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Norman Vieira

Roe and Doe: Substantive Due Process And the Right of Abortion

By NORMAN VIEIRA*

FOR most students of the Supreme Court the primary significance of the decisions invalidating criminal abortion laws[1] lies in their elimination of the risk of prosecution for terminating a pregnancy or, from a different perspective, in their elimination of legal protection for the fetus during a substantial period of its development. This no doubt is a matter of great social importance which deserves close attention; but the decisions appear also to mark a re-emergence of the doctrine of substantive due process and have independent significance for that reason. This doctrine, which had been dormant for the better part of a quarter of a century, carries major implications for judicial review of substantive matters outside the Bill of Rights and hence for the institutional integrity of the Court itself.[2] It is that aspect of the cases which I propose to examine. This article will begin by setting out the Court's position on criminal abortion laws. It will then attempt to scrutinize the specific finding of a right of abortion and to place that finding in perspective in relation to the history of substantive due process. Finally, it will conclude with a brief reflection on the future of substantive due process.

The Facts and the Opinions

In *Roe v. Wade*[3] a pregnant woman sought declaratory and in-

* A.B., 1959, Columbia University; J.D., 1962, University of Chicago.

1. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

2. Some of the most severe challenges to the Court's integrity have arisen as a result of excessive judicial intervention into areas not explicitly protected by the Constitution. *See, e.g.*, R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941) [hereinafter cited as R. JACKSON], which sets forth the events and decisions leading to President Roosevelt's court-packing plan. The Court survived the challenge of the 1930's by beating a hasty retreat on its due process and commerce clause interpretations. See text accompanying notes 35-37 *infra*.

3. 410 U.S. 113 (1973).

junctive relief against the enforcement of a Texas statute which made it a crime to procure an abortion except for the purpose of saving the life of the prospective mother. Related claims were filed by a physician and a married couple, but the Court did not reach the merits of those disputes.[4] *Doe v. Bolton,*[5] a companion case, was an action by a pregnant woman and several other parties for declaratory and injunctive relief against the enforcement of Georgia laws regulating the grounds on which pregnancies could be terminated and limiting lawful abortions to those performed on Georgia residents in accredited hospitals, with the approval of a special committee and two additional physicians.

The Court, after abruptly disposing of a number of difficult preliminary issues,[6] turned in *Roe* to the plaintiff's contention that a right of abortion is conferred in at least one of these constitutional sources: the due process clause, the ninth amendment or the privacy guarantees of the Bill of Rights and its penumbra.[7] Mr. Justice Blackmun, writing for a 7-2 majority, began by exploring the legal history of abortion in the western world. Abortion, he said, had been practiced in the Greek and Roman Empires, and such restrictions as were imposed upon the practice were intended for parental, rather than fetal, protection. At common law "abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero,* appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense."[8] It was not until well into the nineteenth century that the destruction of a prequickened fetus was made criminal in the United States. Justice Blackmun found three objectives which might underlie the enactment of modern abortion laws:[9] (1) deterrence of illicit sexual behavior, (2) avoidance of hazardous medical procedures, and (3) protection of the unborn. The first of those interests was not seriously advanced in *Roe,*[10] and so the Court focused on the two other objectives: "It is with these interests, and the weight attached to them," wrote Justice Blackmun, "that this case is concerned."[11]

4. *Id.* at 125-29.
5. 410 U.S. 179 (1973).
6. In rapid order the Court brushed aside serious problems of federalism, mootness, and standing. I will resist the temptation to examine those problems since they do not bear on the doctrine of substantive due process.
7. 410 U.S. at 129.
8. *Id.* at 132.
9. *Id.* at 147-52.
10. *Id.* at 148.
11. *Id.* at 152.

The Court noted the absence of any mention of a right to privacy in the Constitution, but it took comfort in the fact that some Justices had discovered "at least the roots of that right"[12] in the First, Fourth, Fifth, Ninth and Fourteenth Amendments and in the penumbra of the Bill of Rights. Having paid its respects to the constitutional text, the majority then addressed itself to the relationship between privacy and the specific issue of abortion. A single paragraph announced the Court's disposition of the issue and the reasons found to support it:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, 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. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is 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 may be imminent. Mental and physical health may be taxed by child care. There is also distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[13]

Given the state's interest "in maintaining medical standards, and protecting potential life,"[14] the right to terminate a pregnancy would be subject to some qualifications. But the Court said that "[w]here certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling interest.' "[15] Abortion was evidently one of those "certain" fundamental rights,[16] though Mr. Justice Blackmun did not think it worthwhile to explain why. Instead, he undertook to pinpoint the stage at which the government's interests become sufficiently compelling to justify regulation. His conclusion was that beginning at the end of the first trimester the state could regulate abortions in the interest of maternal health, and that beginning with the viability of the fetus it could prohibit abortions in order to protect potential life, provided the mother's health would not be endangered.[17] Viability was deemed a compelling point "because

12. *Id.*
13. *Id.* at 153.
14. *Id.* at 154.
15. *Id.* at 155.
16. *Id.* at 162-64.
17. *Id.* at 164-65.

the fetus then presumably has the capability of meaningful life outside the mother's womb";[18] the end of the first trimester was critical because until that stage "mortality in abortion is less than mortality in normal childbirth."[19] Finally, in *Doe v. Bolton*,[20] the Court struck down Georgia's requirement that abortions be performed only in accredited hospitals, on approval by committee and two additional physicians, and be available only to Georgia residents. The residence requirement ran afoul of the interstate privileges and immunities clause. The other requirements were unduly restrictive of the right recognized in *Roe* and were lacking in adequate justification.

Substantive Due Process and the Right of Abortion

The central decisions in *Roe* were (1) that the due process clause is a repository of substantive rights not specifically enumerated in the Constitution but deemed worthy of protection by a majority of the Court, and (2) that the freedom to terminate a pregnancy during the first three months is one of those rights. Since the latter ruling can teach a great deal about the soundness of the former, I shall address the abortion question in some detail. However, it seems apparent at the outset that the first of these two propositions is fully capable of resurrecting the discredited regime of *Lochner v. New York*.[21] In order to appreciate the far-reaching implications of such a development, it will be useful to review the earlier cases on substantive due process before examining the abortion decisions.

The dismal history of substantive due process during the first third of this century has been frequently recounted[22] and requires only brief recapitulation. During that period courts freely substituted their judgment for the legislature's on a wide variety of subjects. "Rates set by public-utility commissions were disallowed as confiscatory. Statutes regulating working conditions were held to impair 'liberty of contract.' Taxes were invalidated."[23] The results were not always destructive of regulatory authority, "but this only emphasize[d] the fact that the Court, and not the legislature became the final judge of what might be law . . . ."[24] Women's working hours could be

18. *Id.* at 163.
19. *Id.*
20. 410 U.S. 113 (1973).
21. 198 U.S. 45 (1905).
22. *See generally* R. JACKSON, *supra* note 2.
23. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 5 (1964).
24. R. JACKSON, *supra* note 2, at 70.

regulated,[25] but their rates of pay could not.[26] Men had a constitutional right to work for more than ten hours per day in a bakery,[27] but they could be prohibited from working more than eight in a coal mine.[28] Prices might or might not be regulated, depending on whether courts believed the matter was "affected with a public interest." Fire insurance companies[29] and tobacco warehouses[30] apparently met this "test," but gasoline distributors[31] and employment agencies[32] did not. In the field of labor-management relations the government could not protect employees against being discharged for joining a union[33] and could not refuse to protect employers against picketing or boycotts by employees.[34]

This untenable line of decisions came to a precipitate halt during the New Deal years. In one field after another—labor law, price control, taxation—the law turned 180 degrees.[35] Substantive due process, which had once threatened vast areas of social and economic legislation, became a "last resort of constitutional arguments."[36] By 1963 the Court seemed prepared to bury the doctrine for all time:

> We refuse to sit as a "super-legislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a peculiar school of thought."[37]

However, the temptation for the Court "to weigh the wisdom of legislation" remained great. Sometimes heroic efforts were made to extend the cloak of the Bill of Rights to matters only tangentially related to enumerated liberties in order to avoid reliance on substantive due process.[38] In other instances the Court responded to the problem of

25. Muller v. Oregon, 208 U.S. 412 (1908).
26. Adkins v. Children's Hosp., 261 U.S. 525 (1923).
27. Lochner v. New York, 198 U.S. 45 (1905).
28. Holden v. Hardy, 169 U.S. 366 (1898).
29. German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914).
30. Townsend v. Yeomans, 301 U.S. 441 (1937).
31. Williams v. Standard Oil Co., 278 U.S. 235 (1929).
32. Ribnik v. McBride, 277 U.S. 350 (1928).
33. Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).
34. Truax v. Corrigan, 257 U.S. 312 (1921).
35. *See generally* R. JACKSON, *supra* note 2, at 197-285; W. LOCKHART, Y. KAMISAR & J. CHOPER, CASES ON CONSTITUTIONAL LAW 461-63 (3d ed. 1970).
36. Buck v. Bell, 274 U.S. 200, 208 (1927).
37. Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (footnotes omitted).
38. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Robinson v. California, 370 U.S. 660 (1962). See note 65 *infra*.

finding a constitutional source for unenumerated rights by pretending the problem did not exist.[39] Finally, in *Roe* the Court returned to the doctrine of substantive due process in undisguised form.

The obvious question then is whether *Roe*, unlike its predecessors, can withstand inspection or, stated more generally, whether substantive due process is now a defensible constitutional principle. In dealing with that question it is important to bear in mind the factors which brought the doctrine into disrepute. The problem was not merely the inconsistency of result in the Court's actions; this indeed seems only symptomatic of the real difficulty. The root problem with substantive due process was the absence of adequate standards for determining which of the values not explicitly safeguarded by the constitutional text are nevertheless entitled to special protection under the Fourteenth Amendment. It is difficult enough to fix the proper scope of the Bill of Rights.[40] But if certain unenumerated liberties are to be given special constitutional protection while others are not, some basis must be found for determining which freedoms are entitled to such protection and which are entrusted to the fortunes of the political processes.[41] It was this challenge which the old Court never met, and I feel it necessary to say that the modern Court was equally unsuccessful in *Roe v. Wade.*

The dominant issue in *Roe* was whether there is a constitutional right to terminate a pregnancy. The Court's affirmative response rested essentially on this line of reasoning: The constitutional right

39. "We have no occasion to ascribe the source of [the] right to travel interstate to a particular constitutional provision." Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

40. The language and history of the first eight amendments give some guidance to the courts which is lacking in the substantive due process cases. At the same time the express mandate of the amendments makes close judicial scrutiny relatively easy to justify in these areas.

41. A large part of the problem is precisely the *special* protection which due process cases have afforded to unenumerated rights that the Court deems "fundamental." A due process requirement of rationality might well produce no greater intrusion into the legislative domain than that requirement has generated in equal protection cases. *See* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974); *see also* B. SCHWARTZ, CONSTITUTIONAL LAW—A TEXTBOOK 168 (1970). But the Court has decided—explicitly in *Roe* and implicitly in *Lochner*—that rational government actions are sometimes invalid, absent compelling justification. This approach necessarily requires the formulation of suitable standards for determining which of our important liberties merit special solicitude and which do not. Compare the Court's close scrutiny of racial classifications, which avoids this problem by drawing no distinction between "fundamental" and non-fundamental rights. *See generally* Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969).

of privacy "has some extension"[42] to activities relating to marriage, procreation, contraception, family relationships and child rearing; anti-abortion laws impose a detriment on pregnant women; therefore, the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[43] No elaborate discussion is required to expose the glaring non sequitur in the Court's argument. Plainly the fact that *some* family matters are constitutionally protected does not demonstrate that abortion is constitutionally proected. Nor does the added fact that abortion laws disadvantage pregnant women establish their invalidity. Legal restrictions are placed on family autonomy in fields ranging from divorce to euthanasia despite the heavy costs thereby exacted from the individuals concerned. Perhaps because the Court recognized this, it put great emphasis on historical evidence suggesting that restrictive abortion laws "are of relatively recent vintage."[44]

But the history of abortion control cannot serve to distinguish other areas of private life which the states have continued to regulate. First, the historical record on abortion is more ambivalent than the Court acknowledged. In some jurisdictions the destruction of even a prequickened fetus was an offense at common law.[45] Furthermore, as *Roe* concedes, the significance attached to quickening in other states "appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins."[46] Such an unsupported concept—that life begins when movement of the fetus is felt by a pregnant woman—is surely not entitled in the twentieth century to constitutionally mandated deference from the legislative branches.[47]

Second, the common law of crimes, even when uninfluenced by outdated assumptions, would hardly be a suitable measure of constitutional power. Many private activities which were tolerated at common law have been brought under government regulation by statutes which, until now, have not been deemed unconstitutional. Some homosexual acts, for example, were unregulated at common law.[48] The same

42. 410 U.S. at 152.

43. *Id.* at 153.

44. *Id.* at 129.

45. *E.g.* Mills v. Commonwealth, 13 Pa. 631 (1850).

46. 410 U.S. at 133.

47. The detection of fetal movement depends to a considerable degree on the sensitivity of the pregnant woman. "Mothers with experience from previous pregnancies may . . . be able to recognize the fetus kicking" four or six weeks earlier than other women. R. COOKE, THE TERRIBLE CHOICE: THE ABORTION DILEMMA 37 (1968).

48. *See* R. PERKINS, CRIMINAL LAW 390 (2d ed. 1969).

holds true for gambling[49] as well as for adultery and fornication.[50] But perhaps the best example of government regulation of "recent vintage" in an area of private conduct is provided by state and federal drug laws. Until about 1870 there were virtually no legal restrictions on narcotics traffic.[51] Even when such restrictions became widespread early in the twentieth century, they were usually directed at distribution or sale and did not prohibit mere possession.[52] Marijuana controls came still later, appearing for the most part between 1914 and 1937.[53] Yet cannabis, opium, cocaine and morphine had been in use in the United States many years earlier.[54] In short, there was for a substantial period of time a "right" to use drugs, just as there may have been a right to destroy a prequickened fetus. Moreover, the denial of access to some drugs is arguably detrimental to persons already addicted to them. The stigma, the possible harm, and the "distressful life and future" which *Roe* attempted to forestall will await many addicts who are deprived of their supply of narcotics. This of course is not to suggest that abortion and drug abuse are indistinguishable. My point is simply that the logic of *Roe*, which relied on common law history and on the detrimental effects of antiabortion laws, is applicable to many other areas of private life, some of which have never been suspected of entitlement to constitutional status. No doubt the Court could try to distinguish abortion from drug abuse by weighing the interests which the respective statutes promote. But it is far from certain that a careful analysis of these interests would reveal differences of constitutional dimension. Indeed, many people would contend that the protection of potential life is more important than the interests served by many of our drug laws.[55]

Finally, the Court's identification of the "compelling" point for asserting state interests is no less difficult to justify than the general

49. J. BISHOP, STATUTORY CRIMES § 843, at 558-59 (3d ed. 1901).

50. "Adultery and fornication were punished by the Church as ecclesiastical offenses, but were not recognized as common-law crimes . . . ." R. PERKINS, CRIMINAL LAW 377 (2d ed. 1969) (italics omitted).

51. U.S. DEPT OF TREASURY, STATE LAWS RELATING TO THE CONTROL OF NARCOTIC DRUGS AND THE TREATMENT OF DRUG ADDICTION 1-2 (1931).

52. Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 986 (1970).

53. *Id.* at 1010.

54. *See generally* R. BLUM, SOCIETY AND DRUGS (1969).

55. Restrictions on the use of marijuana have been subjected to especially sharp attack, but even the criminalization of "hard" drugs like heroin has been criticized as being counter-productive. *See generally* J. KAPLAN, MARIJUANA—THE NEW PROHIBITION (1970); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 332-42 (1968).

finding of a right of abortion. The selection of the end of the first trimester as the point for safeguarding health interests is plausible enough insofar as physical risks are involved. But it ignores the state's concern for the pyschological health of women contemplating abortion, a concern which does not necessarily vary in intensity with the stage of pregnancy at which abortion is performed.[56] And the choice of viability as the constitutionally permissible point for protecting the unborn seems utterly arbitrary. It is difficult to see how either the woman's interests or those of the fetus would significantly change at viability. The fact that the fetus could survive outside the womb is quite irrelevant, since that will not be the alternative to abortion. Rather, the alternative will be to compel the woman to carry the fetus for several months. If this compulsion is justified in the interest of permitting a viable fetus to develop into an infant, it is unclear why a similar compulsion could not be justified to permit an embryo to develop into a viable fetus. The Court apparently values potential life less than it does the freedom of women in early stages of pregnancy and more than it does the freedom of women in late stages of pregnancy. But nowhere in its lengthy opinion did the Court adequately explain why state legislatures which happen not to share these values should be constitutionally required to conform to them.[57]

Nor was the Court persuasive in its astonishing venture into the field of public health. In *Doe v. Bolton* the requirements of hospital accreditation by JCAH[58] and of committee supervision in abortion cases were struck down because no other medical or surgical procedure was similarly burdened:

56. There is a strong current of professional opinion emphasizing the likelihood of adverse psychological consequences [of abortion]. One psychiatrist has gone so far as to insist that . . . any abortion (except perhaps those performed to terminate pregnancies resulting from rape or incest) is likely to produce serious and adverse psychic aftereffects." E. SCHUR, CRIMES WITHOUT VICTIMS 41 (1965).

57. A commentator has attempted to distinguish embryonic life this way: "[M]uch that we associate with the value of human life is not present at the earliest stages. There is no feeling nor thought *of which we know*. There is no reciprocal relationship to others that is reflected in need or love. There is no memory or fear." Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 776 (1973) (emphasis added). But such conjecture over pre-natal feeling is scarcely an appropriate basis for overturning the legislative judgments of more than forty states. In the terminal stages of some illnesses there may also be a lack of feeling and thought. Yet the prohibition against taking life in these circumstances, while often criticized as unwise, has never been thought to be unconstitutional.

58. JCAH, the Joint Commission on Accrediation of Hospitals, is a private organization operated for the purpose of establishing standards that will afford quality medical care. JCAH, ACCREDITATION MANUAL FOR HOSPITALS 1-2 (1970).

> [T]here is no restriction of the performance of nonabortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon are met.[59]

Yet the Court went on to announce that a wholly nondiscriminatory requirement of hospitalization alone, as distinguished from hospitalization in a JCAH accredited institution, would also be invalid.[60] The latter ruling was not based on any finding that abortion would otherwise be singled out for disadvantageous treatment; many states might choose to require hospitalization for abortions in common with other medical or surgical activities. What the Court was saying instead was that the government is constitutionally required to exempt abortions from general measures which are validly applied to other medical procedures. It was thus the Court, and not the state, which in this regard was demanding differential treatment for abortion. In so doing the majority was simply imposing upon the states its own medical opinions concerning the "adequacy" of various facilities to the purpose at hand. Discussion of the Court's qualifications to pass on medical questions or of its fact-finding abilities as compared to those of the legislature was conspicuously, though not surprisingly, absent. The Court was similarly silent as to why the interests of a viable fetus must in every case be subordinated to a pregnant woman's interest in "life *or health*."[61] A decision to protect a woman's life, or even to prevent major risks to her health, would command wide support, at least if the decision were made through the political processes and hence remained subject to majoritarian control. But does it follow that *all* health interests of the woman, no matter how insignificant they might be, must as a matter of constitutional law override the interest of fetal life? This judicial broadside, like so many others in the abortion cases, was totally devoid of reasoned exposition.

The deficiencies in these opinions would be less disturbing if they were peculiar to the disposition of the abortion problem. Unfortunately, however, the loose reasoning in *Doe* and *Roe* is not merely an aberrational by-product which can be charged to the pressures of time or to the limitations of the opinion writer. The cases were under advisement in the Supreme Court for six months during the 1971 Term and then were reargued during the 1972 Term. The weaknesses of the opinions are weaknesses which have inhered from the

59. 410 U.S. at 193.
60. *Id.* at 195.
61. Roe v. Wade, 410 U.S. 113, 164-65 (1973) (emphasis added).

beginning in the philosophy of *Lochner v. New York*. The values of the judges have changed; the old struggle to measure the scope of the liberty of contract has given way to a search for the compelling point in the life of a fetus. But *Roe*, like *Lochner*, provides no real basis for containing the doctrine of substantive due process. The crucial problem of devising standards for determining which unenumerated freedoms are entitled to special protection remains as intractable as ever. There is no way of knowing why abortion is entitled to such protection but consensual homosexuality, let us say, is not. And there is no reason to believe that the problem of inadequate standards, which continues to resist solution after seventy-five years of judicial effort, will be overcome in the foreseeable future. Yet we are admonished by experience that without such standards decision-making in this field will be a product of judicial intuition and nothing more. Thus, the careless reasoning in *Doe* and *Roe* is distressing, not because of what it did to antiabortion laws, but because it shows that substantive due process decisions are as unprincipled today as they were during the unhappy season of *Lochner v. New York*.[62]

The Future of Substantive Due Process

The history of substantive due process—running from judicial abstention[63] to heavy-handed intervention and back again—cautions against the issuance of extravagant predictions in this area. It is possible at most to speculate on the prospects for renewed use of the doctrine in the immediate future. Any analysis of the longer term must await the disposition of claims which will be brought to test the elasticity of *Roe* and *Doe*.

Even short-term prospects are difficult to gauge. I have suggested above that *Roe* is susceptible to an expansive interpretation reminiscent of the worst excesses of the *Lochner* era. But inadequately reasoned opinions are characteristically as vulnerable as they

62. Attempts are sometimes made to distinguish between the economic freedoms protected during the *Lochner* era and the personal freedoms now thought to be entitled to special judicial favor. But the Court itself seems to have despaired of this distinction, finding that "the dichotomy between personal liberties and property rights is a false one" and that such a distinction would be almost impossible to apply. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). There may be a stylistic difference between *Roe* and *Lochner* in that the latter case *purported* to apply a rationality test, while the former candidly asserted a power to invalidate reasonable regulations. But the extent of actual interference with the legislative process is substantially the same in each case.

63. See note 74 *infra*.

are threatening. Precisely because such opinions have not been properly explained, they can either be greatly expanded or severely restricted in future cases. So it is with *Roe* and *Doe*. Those cases, though explicitly invoking substantive due process, also relied on the right of privacy which the Court had previously held to be protected by the Bill of Rights.[64] It is conceivable, therefore, that the abortion decisions may be viewed in the future as being controlled by the provisions of the Bill of Rights. Under this interpretation the decisions would add relatively little, other than the specific right of abortion, to what had been decided in *Griswold v. Connecticut*.[65] Alternatively, it is possible that the Court will merely choose to limit unprincipled decisions in an unprincipled way.[66] The uniqueness of pregnancy would facilitate this action by lending an air of authenticity to a decision limiting *Roe* to its facts.

Strong support for restricting judicial intervention can be found in *San Antonio Independent School District v. Rodriguez*.[67] The question in that case was whether an educational financing system in which the amount of spending in each school district depended largely on local property tax revenues, and consequently varied throughout the state, was unconstitutional. The issue was cast in terms of equal protection, but the claim presented was basically one of substantive due process.[68] The Court held that, despite the inequalities in this financing scheme, the system is rationally based and the Constitution requires no more.[69] In turning back this challenge, the Court resisted a carefully orchestrated effort to repackage substantive due process in a more attractive mold. The majority, while not disclaiming Four-

64. Roe v. Wade, 410 U.S. 113, 152 (1973).

65. 381 U.S. 479 (1965). *Griswold* had established the technique of protecting unenumerated freedoms by first giving an extravagant construction to the Bill of Rights and then making that construction applicable to the states through the Fourteenth Amendment. This might seem a circuitous route to the same result which substantive due process achieves; but in fact there may be a significant, if subtle, difference between (1) extrapolating unenumerated freedoms from the Bill of Rights—a process in which history and the constitutional text can exert a restraining influence—and (2) giving special protection to judicially selected freedoms which have no constitutional roots.

66. The Court's familiarity with this stratagem has been well documented. *See* Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181 (1973); Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265 (1971).

67. 411 U.S. 1 (1973).

68. *See* Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17 n.25 (1969).

69. 411 U.S. at 54-55.

teenth Amendment protection for unenumerated freedoms, limited strict judicial scrutiny to rights which are safeguarded by the Constitution explicitly or implicitly, and it held that the right to an education is not constitutionally protected.[70] Other cases have indicated that housing[71] and welfare benefits[72] are similarly unprotected. The upshot of this line of decisions may be that, at least where substantial government appropriations would be required, judicial intrusions to safeguard unenumerated liberties will be fairly limited. The decisions may thus suggest that the Court, as presently constituted, intends no radical expansion of substantive due process.[73]

Perhaps the most likely course for the immediate future would involve a sporadic use of the due process clause in "hard" cases which do not admit of the Court's desired result through the enforcement of enumerated constitutional rights.[74] The problem, of course, is that once unleashed the doctrine of substantive due process cannot be easily controlled. The *Lochner* phase of due process also had a modest beginning,[75] but in time it assumed catastrophic proportions. We are, one would suppose, less likely to travel that road after our experience with it the first time around. But there are those who believe that there was nothing wrong with *Lochner* except that it protected someone else's values instead of their own. That unfortunate attitude can be detected in *Roe v. Wade*. It is not negated, though its consequences will be diminished, by *Rodriguez* and similar decisions. In any case one must surely question the soundness of a doctrine calling for judicial restraint except where five Justices feel strongly about the matter. Such a doctrine has meant, and probably must continue to mean, essentially unprincipled decision-making.

70. *Id.* at 35-40.

71. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).

72. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

73. *Cf.* Cleveland Bd. of Educ. v. LaFleur, 94 S.Ct. 791 (1974), invoking a rationality test, rather than "strict scrutiny," against mandatory maternity leaves for public school teachers. See note 41 *supra*.

74. *Cf.* Poe v. Ullman, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting).

75. *See* W. LOCKHART, Y. KAMISAR, & J. CHOPER, CASES ON CONSTITUTIONAL LAW, 454-56 (3d ed. 1970).