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United States Court of Appeals for the Second Circuit

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ROE v. WADE AND THE LESSON OF THE PRE-ROE CASE LAW

Richard Gregory Morgan*†

The standard criticism of *Roe v. Wade*¹ is that the Supreme Court indulged in “Lochnering”: the improper second-guessing of a legislative balance.² Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court’s attempt to justify its conclusions — that abortion implicates women’s “privacy,” that only the most important state interests may supersede that right, and that they may do so only after certain stages of pregnancy — suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function.³ Professor Ely, the first to cry “Lochner,” could only adduce from the opinion that the Court “manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures.”⁴ Even some who approve *Roe*’s form of judicial review concede that the opinion itself is inscrutable.⁵

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† Being an avid reader of authors’ acknowledgments (because it’s fun to see who knows whom), I have often read “I would never have completed this work without the invaluable encouragement of So-and-So.” But being young, energetic, and imbued with a work ethic, I have never understood how anyone could even think of not completing a task once begun — until, for a variety of circumstances they know, I found myself unable to continue this paper without the daily support of Ginny Popper and Carl and Joan Schneider. Thanks guys.

1. 410 U.S. 113 (1973).

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

3. See Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 184-85:

Roe v. Wade is symptomatic of the analytical poverty possible in constitutional litigation Thus in the end we must criticize both Mr. Justice Blackmun in *Roe v. Wade* and the entire method of constitutional interpretation that allows the Supreme Court in the name of Due Process both to “define” and to “balance” interests on the major social and political issues of our time.

4. Ely, *supra* note 2, at 937.

5. See Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) (“One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”).

Critics have cried "Lochner!" before, however, and that worries Professor Ely, who fears that the specter of past mistakes may lose its awe by becoming too familiar.⁶ But more was at stake in the Supreme Court's handling of *Roe* than the wrath of critics: By taking an abortion case when it did, the Court forestalled the development of one of its traditional aids for deciding difficult questions — a thoughtful lower-court case law.

Supreme Court decisions are often thought of as if they have no history, somehow beginning and ending in the Supreme Court. But they are products of a judicial system, one that traditionally adheres to certain axioms that protect and enhance the quality of Supreme Court review. One axiom posits that the Supreme Court should hesitate to decide disputes which the political branch is still actively debating. Beyond observing the well-established "political questions" doctrine, the Court respects the representativeness of government and deepens the thoughtfulness of its own deliberations if it stays out of a dispute until legislatures and executives make an initial decision.⁷ A second axiom cautions that even after a dispute reaches the judicial system, the Supreme Court should still hesitate to hear a specific case until lower courts have "aged" the dispute by articulating the best arguments on both sides and discarding the unpersuasive or irrelevant.⁸

The Supreme Court completely disregarded both those axioms in *Roe*. The politically unsettled and judicially confused law of abortion in 1971 and 1972, when the Court twice heard arguments and deliberated *Roe*, should have warned it not to decide the case. By doing so, the Court thrust itself into a political debate and stunted the development of a thoughtful lower-court case law. If the Court did perceive the warnings but continued toward a decision anyway, perhaps trusting that its own consider-

6. Ely, *supra* note 2, at 943-44.

7. Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 115 (1962) ("standing" and "case and controversy" help make sound judicial decisions by letting courts see legislation's practical consequences before they decide).

8. See *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of certiorari):

The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom which our judicial system makes available. The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities.

able wits would devise an answer the lower courts had not, the result suggests that the judicial system's axioms deserve more respect than they received. This Article, by showing briefly in Section I that the Court should not have decided an abortion case when it did, and by showing at more length in Section II that the Court could find no persuasive rationale in the pre-*Roe* cases for each of the points in its decision, argues that *Roe* was almost destined to be a bad opinion.

I.

In 1973, political forces were still vigorously debating abortion. Most states had prohibited abortions, except to save a woman's life, since the nineteenth century,⁹ but a movement was afoot to relax that restriction. In the five years immediately preceding *Roe*, thirteen states had revised their statutes to resemble the Model Penal Code's provisions,¹⁰ which allowed abortions not only if the pregnancy threatened the woman's life, but also if it would gravely impair her physical or mental health, if it resulted from rape or incest, or if the child would be born with grave physical or mental defects.¹¹ Four states had removed all restrictions on the permissible reasons for seeking an abortion before a pregnancy passed specified lengths.¹² Furthermore, as the Supreme Court noted in *Roe*, both the American Medical Association and the American Bar Association had only recently changed their official views on abortion (and not without opposition).¹³ The abortion debate was not merely one of how far to relax restrictions, however. At least one of the states whose restrictive statutes were judicially invalidated had in 1972 reaffirmed its determination to prohibit abortions unless necessary to save the woman's life.¹⁴ And since several of the pre-*Roe* constitutional challenges were raised by defendants in state abortion prosecutions,¹⁵ it is clear that at least those states had not allowed their

9. See the Supreme Court's survey in *Roe* of the history of abortion and abortion laws, 410 U.S. at 138-39.

10. See Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and Problems*, 1972 U. ILL. L.F. 177, 180.

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

12. See Comment, *supra* note 10, at 181.

13. 410 U.S. at 143, 146.

14. See *Abele v. Markle*, 351 F. Supp. 224, 226 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

15. *YWCA v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972), *cert. denied*, 415 U.S. 989, *affd. without opinion*, 493 F.2d 1402 (3d Cir. 1974); *Rosen v. Louisiana State Bd. of*

abortion statutes to lapse into desuetude.¹⁶ In short, the political process in many states had yet to decide on abortion. But *Roe*'s sweeping rejection of Texas's statute voided almost every other state's as well.¹⁷

Especially given the absence of a firm constitutional footing for deciding the question, the Court could sensibly have refrained from stepping into the debate when it did. Of course, the Court might never decide anything if it always waited for the last political word, and had *Roe* been a soundly reasoned opinion, the Court would surely never have been criticized for being a bit hasty. Indeed, because several states had liberalized their abortion statutes, some might argue that the Court should nudge the rest of the nation toward recognizing the right those states had found. But the second traditional axiom should still have warned the Court not to decide *Roe*: the dispute had not sufficiently steeped in the lower courts. Allegations that abortion statutes violated a constitutional right of privacy were new to the courts. As late as mid-1968, the New Jersey Supreme Court flatly rejected two defendants' claim that the state statute's exception for abortions with "lawful justification" included abortions to end unwanted pregnancies: "It is beyond comprehension that the defendants could have believed that our abortion statute envisioned lawful justification to exist whenever a woman wanted to avoid having a child. The statutes of no jurisdiction in this country permit such an excuse for an abortion."¹⁸ The court's construction of "lawful justification" was undoubtedly correct; the significant point is that the court gave no hint of even considering that a right of privacy might justify such an excuse. The landmark case of *People v. Belous*,¹⁹ apparently the first case to consider a right-

Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (1973); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed per curiam*, 400 U.S. 1 (1970); *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *revd.*, 402 U.S. 62 (1971); *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); *State v. Barquet*, Fla., 262 So. 2d 431 (Fla. 1972); *People v. Nixon*, 42 Mich. App. 332, 201 N.W.2d 635 (1972), *remanded*, 389 Mich. 809, *revd.*, 50 Mich. App. 38, 212 N.W.2d 797 (1973) (*per curiam*).

16. See generally A. BICKEL, *supra* note 7, at 148. Indeed, even after *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed per curiam*, 400 U.S. 1 (1970), declared Wisconsin's restrictive abortion statute unconstitutional, the state attorney general continued to threaten prosecution. *Babbitz v. McCann*, 320 F. Supp. 219, 221 (E.D. Wis. 1970), *vacated*, 402 U.S. 903 (1971).

17. See 410 U.S. at 118; Ely, *supra* note 2, at 920.

18. *State v. Moretti*, 52 N.J. 182, 194, 244 A.2d 499, 505-06, *cert. denied*, 393 U.S. 952 (1968).

19. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

of-privacy challenge to an abortion statute and certainly the first reported case to endorse one,²⁰ was decided only in September 1969, less than two years before the Supreme Court decided to hear *Roe*.²¹ Between 1970 and 1972, a flurry of constitutional challenges hit the courts, but of the seventeen courts that decided right-of-privacy claims, twelve were three-judge district courts whose judgments allowed direct appeal to the Supreme Court.²² Thus, when the Court had *Roe* before it and looked, as the axiom has it, to the lower-court deliberations,²³ it found not one federal decision that had received intermediate appellate consideration, and only four decisions of state supreme courts,²⁴ none of which offered particularly illuminating analysis.

In general, three years is hardly time enough for the judicial system to evolve sound analysis for most constitutional issues, and for so emotionally charged an issue as abortion,²⁵ three years

20. See Comment, *supra* note 10, at 184.

21. The Supreme Court decided on May 3, 1971 to hear arguments on jurisdiction and the merits. 402 U.S. 941 (1971).

22. Decisions by three-judge district courts: *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *Crossen v. Attorney Gen.*, 344 F. Supp. 587 (E.D. Ky. 1972), *vacated and remanded*, 410 U.S. 950 (1973); *YWCA v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972), *cert. denied*, 415 U.S. 989, *affd. without opinion*, 493 F.2d 1402 (3d Cir. 1974); *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *Poe v. Menghini*, 339 F. Supp. 986 (D. Kan. 1972); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1972), *vacated and remanded*, 410 U.S. 950 (1973); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *vacated and remanded*, 410 U.S. 950 (1973); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *modified and affd.*, 410 U.S. 179 (1973); *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (1973); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *affd. in part and revd. in part*, 410 U.S. 113 (1973); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed per curiam*, 400 U.S. 1 (1970). Decision by one-judge district court: *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *revd.* 402 U.S. 62 (1971). Decisions by state supreme courts: *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); *Cheaney v. State*, 259 Ind. 138, 285 N.E.2d 265 (1972), *cert. denied*, 410 U.S. 991 (1973); *Rogers v. Danforth*, 486 S.W.2d 258 (Mo. 1972) (en banc); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972), *vacated and remanded*, 410 U.S. 950 (1973).

23. Of course one way in which the Supreme Court "looks" at lower-court decisions is through the parties' and amici briefs. The briefs submitted to the Court for *Roe* are generally susceptible to all the criticisms levelled at the lower courts, leaving the Supreme Court, like T.S. Eliot's self-possessed gallant, "really in the dark."

24. See note 22 *supra*.

25. The emotions surrounding abortion were not lost on the courts. Although the Supreme Court professed "to resolve the issue by constitutional measurement, free of emotion and of predilection," 410 U.S. at 116, not all the lower-court judges could have said the same. See, e.g., *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1229 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (1973) ("This problem involves the condition of pregnancy and its likely consequence, the first entrance of a new

was very little time indeed. The Court could justifiably have let the dispute simmer longer in the lower courts. And technically, the Court could have done so. In *Roe*, both parties appealed the lower-court decision to the Supreme Court: Jane Roe from the denial of an injunction against enforcement of the statute, and District Attorney Wade from the grant of a declaratory judgment that the statute was unconstitutional.²⁶ But as the Court acknowledged, its own cases "are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone."²⁷ Thus, only Roe's complaint from the denial of an injunction was properly before the Court on appeal. Nonetheless, the Court held that "those decisions do not foreclose our review of both the injunctive and declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical."²⁸ Even if the arguments as to both aspects were strictly speaking identical (which they probably were only if the Court wished them to be), the Court still did not have to decide the constitutional question. It could have stayed the direct appeal on the injunction until the appeal on the declaratory judgment had progressed to the Court through the court of appeals, as technically that appeal should have done.²⁹ The reason for doing so would have been clear: a decision on the injunction should logically await a decision on constitutionality (the declaratory judgment issue) and a decision on constitutionality should await a fuller consideration by the courts of appeals. Instead, worried that "[i]t would be destructive of time and energy for all concerned were we to rule other-

player, 'mewling and puking,' onto the world stage. Shakespeare, *As You Like It*, Act ii, sc. 7, 1, 139."); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972) (dissent of Burke, J., who condemned New York's liberal abortion statute by dismissing women's "self-created problem" of injuries from illegal abortions, 31 N.Y.2d at 207, 286 N.E.2d at 893, 335 N.Y.S.2d at 398, by decrying "the massacre of the innocents," 31 N.Y.2d at 209-10, 286 N.E.2d at 894, 335 N.Y.S.2d at 400, and by lamenting, "The deeper disease in this legislation is the widening gap between the American self-image of a country that values *human life* and the reality of a growing preoccupation of the hedonists with a competitive drive for *La Dolce Vita*." 31 N.Y.2d at 211, 286 N.E.2d at 895, 335 N.Y.S.2d at 402 (emphasis original)), *appeal dismissed*, 410 U.S. 949 (1973).

26. 410 U.S. at 122.

27. 410 U.S. at 123.

28. 410 U.S. at 123.

29. Interestingly, the Court dismissed for want of jurisdiction the defendant's appeal from the grant of a declaratory judgment in *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179, 187 (1973).

wise,"³⁰ the Court reached out to grab the abortion question and thereby impaired its ability to construct a sound opinion, something much more valuable than time and energy.³¹

II.

Even though abortion was a new issue to the courts, and even though no federal court of appeals had considered it, the Supreme Court might still have been justified in hearing *Roe*, for it had been decided by a three-judge district court, and theory has it that "[t]here is little to be gained by delaying important litigation of that sort that initially commands an extraordinary district court of three judges — at least one of them a circuit judge — for review by three other judges on a court of appeals."³² In this instance, however, that theory proved false, and had done so even before the Supreme Court heard rearguments of *Roe*.³³ The district court cases failed to develop any adequate analysis for deciding the constitutionality of abortion statutes; indeed, most of them never honestly acknowledged the competing interests involved. There is some indication that a sounder case law might have evolved if given time.³⁴ But that was prevented by *Roe*, where the Supreme Court, without offering any sound reason of its own, took each step of its decision in the face of the inability of the lower courts that considered those steps to reach a reasoned conclusion. In 1973 the Court could not find a rationale, but decided anyway. That smacks distinctly of a legislative process.

A. "This right of privacy . . . is broad enough"

As do most discussions of the right of privacy, the Supreme Court's began by conceding that "[t]he Constitution does not explicitly mention any [such] right."³⁵ A long line of cases, however, has recognized in several amendments "a guarantee of certain areas or zones of privacy," and "make[s] it clear that the right has some extension to activities relating to" marriage, procreation, contraception, family relations, child rearing, and edu-

30. 410 U.S. at 123.

31. See note 8 *supra*.

32. 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4040, at 78 (1969).

33. The last of the important pre-*Roe* cases, *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973), was announced on September 20, 1972. The Supreme Court heard reargument on October 11, 1972.

34. See text at notes 86-88 and 113-29 *infra*.

35. 410 U.S. at 152.

cation.³⁶ A less informative phrase than "has some extension to" is hard to imagine, but the Court gives no more information than that before declaring, "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."³⁷ The Court then lists several detriments that might befall women if they were altogether denied the choice of abortion.³⁸ The opinion leaves ambiguous whether the Court meant this list somehow to prove that abortion fits within "privacy," or only to suggest the variety of considerations that will surround the exercise of that right,³⁹ but it does make clear that these potential detriments do not imply any "unlimited right to do with one's body as one pleases."⁴⁰

The inadequacy of that explanation is obvious. It does not explain why the right of privacy, just because it extends to some matters of sex and family, extends to abortion; nor what kind of "privacy" abortion involves (especially given that the Court later distinguished this "privacy" from that involved in all the other activities to which the right extends⁴¹); nor why the list of detriments brings abortion within the right, if that is what the list means to do; nor why the right apparently extends to women who incur none of these detriments (especially if it is the detriments that warrant extending the right).⁴² But like the right of privacy itself, *Roe's* inadequacy inheres in a long line of cases. The pre-*Roe*, lower-court decisions that struck down abortion statutes for impairing the right of privacy wholly neglected legal analysis. In virtually all the cases, the proponents of abortion argued the same simplistic theory — that abortion involves both family and

36. 410 U.S. at 152-53.

37. 410 U.S. at 153.

38. 410 U.S. at 153.

39. Professor Ely guesses that the Court's "conclusion is thought to derive from the passage that immediately follows it." Ely, *supra* note 2, at 932. Professor Tribe seems to agree that avoiding these detriments is the gravamen of this right of privacy. Tribe, *supra* note 5, at 10. But neither mentions the paragraph's last sentence, which immediately follows the catalog of detriments: "All these are factors the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153. That sentence suggests that the Court simply meant by the catalog to guide the considerations of the physicians in whom it places so much trust ("The abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." 410 U.S. at 166), not that the catalog somehow proves that abortion implicates privacy. As Professor Ely said, "Confusing signals are emitted . . ." Ely, *supra* note 2, at 922.

40. 410 U.S. at 154.

41. 410 U.S. at 159.

42. See Ely, *supra* note 2, at 923 n.26.

sex, and that *Griswold v. Connecticut*⁴³ and *Eisenstadt v. Baird*⁴⁴ place a zone of privacy around such matters⁴⁵ — and most of the courts agreed without a second thought.

The first case to declare an abortion statute unconstitutional, *People v. Belous*,⁴⁶ exemplifies the lower courts' response to this theory. The opinion's entire explanation for including abortion within the right of privacy runs:

The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right to privacy" or "liberty" in matters related to marriage, family, and sex That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right.⁴⁷

No "impediment," perhaps, but the absence of any explicit right or privacy within the Constitution should have suggested to the court that it do more to support its holding than simply assert that the right exists and that a right of abortion follows from it.⁴⁸ That arguments can be made to defend extending the right of privacy to abortion is beside the point, for arguments can be made against it too. The point is that the *Belous* court, like many of the lower courts and like the Supreme Court itself in *Roe*, never even acknowledged that arguments exist. Once *Belous* was decided, however, precedent existed — albeit of dubious value — and in a follow-the-leader style a second court cited *Belous* to support its decision,⁴⁹ a third court cited *Belous* and the second,⁵⁰ and so on until the Supreme Court cited them all.⁵¹ Yet the most the Supreme Court could say was that those cases generally

43. 381 U.S. 479 (1965).

44. 405 U.S. 438 (1972).

45. See, e.g., *Abele v. Markle*, 351 F. Supp. 224, 227 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970); *Doe v. Bolton*, 319 F. Supp. 1048, 1054 (N.D. Ga. 1970), *modified and affd.*, 410 U.S. 179 (1973).

46. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

47. 71 Cal. 2d at 963, 458 P.2d at 199-200, 80 Cal. Rptr. at 359-60 (citations omitted).

48. Cf. Ely, *supra* note 2, at 928 n.58 (The Supreme Court's "inability to pigeonhole confidently the right involved is not important in and of itself. It might, however, have alerted the Court to what is an important question: whether the Constitution speaks to the matter at all." (emphasis original)).

49. *Babbitz v. McCann*, 310 F. Supp. 293, 300 (E.D. Wis.), *appeal dismissed per curiam*, 400 U.S. 1 (1970).

50. *Roe v. Wade*, 314 F. Supp. 1217, 1222 (N.D. Tex. 1970), *affd. in part and revd. in part*, 410 U.S. 113 (1973).

51. 410 U.S. at 154.

"reached the same conclusion,"⁵² that they "agreed that the right of privacy, however based, is broad enough to cover the abortion decision."⁵³ Just how they reached that conclusion the Court necessarily left unexplained.

Those courts that did attempt an explanation, *Doe v. Scott*⁵⁴ for instance, usually drew the analogy between contraception and abortion:

We do not agree with the defendants that the choice whether to have a child is protected before conception but is not so protected immediately after conception has occurred. A woman's interest in privacy and in control over her body is just as seriously interfered with by a law which prohibits abortions as it is by a law which prohibits the use of contraceptives.⁵⁵

Although less cryptic than *Belous*, this is hardly more persuasive. Certainly abortion statutes interfere with women's interests as seriously as do restrictions on the use of contraceptives. But why does a right to resist interference with the use of contraceptives equal a right to resist interference with abortion? If because women may control their own bodies, as *Scott* suggests, then the analogy reads into *Griswold* a rationale that simply is not there.⁵⁶ If for some other reason, then what? The analogy to contraception is not a complete argument for placing abortion within the right of "privacy."⁵⁷ It is, nonetheless, about the only argument the pre-*Roe* courts made.

One case, *Abele v. Markle*,⁵⁸ did try something slightly different. The court still relied on the questionable reading that *Griswold* and *Eisenstadt* apply to abortion, but in describing women's interests it said:

52. 410 U.S. at 154.

53. 410 U.S. at 155.

54. 321 F. Supp. 1385 (N.D. Ill. 1971), *vacated and remanded*, 410 U.S. 951 (1973).

55. 321 F. Supp. at 1390 (footnote omitted).

56. See Ely, *supra* note 2, at 929-30, 929 n.68. The Supreme Court expressly rejected in *Roe* the theory of unimpairable bodily control, 410 U.S. at 154, and characterized *Griswold* as a case about "marital intimacy," 410 U.S. at 159; but even before *Doe v. Scott*, at least one court had already refused (although without explanation) to read into *Griswold* a theory of bodily control. *Doe v. Bolton*, 319 F. Supp. 1048, 1055 n.2 (N.D. Ga. 1970), *modified and affd.*, 410 U.S. 179 (1973).

57. See Epstein, *supra* note 3, at 170.

58. 342 F. Supp. 800 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

There are two cases entitled *Abele v. Markle*. The first, 342 F. Supp. 800 (D. Conn. 1972), struck down the restrictive abortion statute Connecticut had originally passed in 1860. The second, 351 F. Supp. 224 (D. Conn. 1972), struck down the substantially identical statute Connecticut passed in response to the first *Abele* decision. See text at note 113 *infra*.

The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman.⁵⁹

The similarity between this list and the Supreme Court's in *Roe* is obvious.⁶⁰ Unfortunately, even assuming that the Court consciously adopted this particular argument (and without a word-by-word borrowing, an assumption is all that is warranted), what the Court meant by "privacy" remains a mystery, for this argument leaves unanswered why the state may regulate any number of decisions with equally "extraordinary ramifications."⁶¹

Finally, another of the pre-*Roe* cases, *Doe v. Bolton*,⁶² not only failed to offer any rationale, but tossed off its conclusion so cavalierly that one wonders whether the court really knew what it meant: "For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." And in footnote 2: "We see no connection between this theory and the claimed right of a woman 'to use her body in any way she wishes' read into *Griswold* by some."⁶³ That is no way for a court to expound a Constitution.

Given this complete failure of the lower courts to argue persuasively for extending the right of privacy to abortion, it is hardly surprising that the Supreme Court had nothing to justify its decision. The lower courts offered it no guidance, nor did the proponents in *Roe*, whose briefs argued more expansively but relied largely on the inconclusive arguments that had proved successful thus far.⁶⁴ In short, the pre-*Roe* cases forged a trail that the Supreme Court followed as if dutifully. That is surprising. Lower courts help to prepare disputes for Supreme Court review, but the Court obviously need not follow lower courts that cannot

59. 342 F. Supp. at 801-02 (footnote omitted).

60. Compare 342 F. Supp. at 801-02 with 410 U.S. at 153.

61. See Ely, *supra* note 2, at 932 n.81.

62. 319 F. Supp. 1048 (N.D. Ga. 1970), *modified and affd.*, 410 U.S. 179 (1973).

63. 319 F. Supp. at 1055 n.2.

64. Brief for Appellants at 91-124, *Roe v. Wade*, 410 U.S. 113 (1973).

articulate persuasive reasons for doing so. And yet the Court did just that.

B. "Where certain 'fundamental' rights are involved"

In the course of its curiously dim elucidation of privacy, the Supreme Court said, "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."⁶⁵ With just that label — "fundamental" — the Court ordained the demands of its review: only "compelling state interests" would justify abridging the right.⁶⁶ Irritated by the Court's reliance on equal protection precedent in this due process case, and presumably by the offhanded manner in which the Court found so disputed a right as abortion "implicit in . . . ordered liberty," Justice Rehnquist dissented, "Unless I misapprehend the consequences of this transplanting of the 'compelling state interest test,' the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it."⁶⁷ But in fact, *Roe* left this area only *as* confused as it found it. The pre-*Roe* cases that found the right of privacy broad enough to include abortion had already distorted the concept of fundamental rights.

Identifying those rights that are "fundamental," in that they are "implicit in the concept of ordered liberty," is a difficult task in itself, but it rightly demands of courts especial clarity and persuasiveness, because of the extraordinary protection a right once deemed fundamental acquires against legislative encroachment. Thus Justice Harlan wrote:

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."⁶⁸

And thus it is incredible that without a hint of explanation the court in *People v. Belous* announced "[t]he *fundamental* right

65. 410 U.S. at 152 (citation omitted).

66. 410 U.S. at 155.

67. 410 U.S. at 173.

68. *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (citation omitted).

of the woman to choose whether to bear children."⁶⁹ If the court had convincingly shown that a right of abortion follows from the Supreme Court's privacy cases, it would have taken the first step toward showing that right fundamental. It was content instead to apply the label, and the courts that followed it were content to march in lockstep behind. *Babbitz v. McCann*, for example, credited *Belous* with showing that a right of abortion "is a fundamental liberty that is implicit in the penumbrae of the Bill of Rights, and is supported, by analogy, in many past decisions."⁷⁰ Then the lower-court *Roe v. Wade* relied on *Belous* and *Babbitz*,⁷¹ and *Doe v. Scott* relied on all three,⁷² plus the lower-court *United States v. Vuitch*, which never said a word about fundamental rights.⁷³ The misuse of the fundamental rights concept became unmistakable in the lower-court *Roe*, which said, "Freedom to choose in the matter of abortions has been accorded the status of a 'fundamental' right in every case coming to the attention of this Court"⁷⁴ Merely counting judicial votes for bestowing super-protection is exactly what courts are not supposed to do. But that is what the lower courts and the Supreme Court did.

C. "The appellee . . . argue[s] that the fetus is a 'person'"

To respond to Texas's argument that "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment,"⁷⁵ the Supreme Court listed each use of "person" in the Constitution, adroitly adduced that "in nearly all these instances, the use of the word is such that it has application only post-natally,"⁷⁶ and concluded, "All this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."⁷⁷ Professor

69. 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969) (emphasis added), cert. denied, 397 U.S. 915 (1970).

70. 310 F. Supp. 293, 300 (E.D. Wis.), appeal dismissed per curiam, 400 U.S. 1 (1970).

71. 314 F. Supp. 1217, 1222 (N.D. Tex. 1970), affd. in part and revd. in part, 410 U.S. 113 (1973).

72. 321 F. Supp. 1385, 1390 (N.D. Ill. 1971), vacated and remanded, 410 U.S. 950 (1973).

73. 305 F. Supp. 1032, 1035 (D.D.C. 1969), revd., 402 U.S. 62 (1971).

74. 314 F. Supp. at 1222.

75. 410 U.S. at 156.

76. 410 U.S. at 157.

77. 410 U.S. at 158.

Ely, evidently touched by the irony of the Court's sudden allegiance to the letter of the Constitution, found "[t]he canons of construction employed here . . . most intriguing when they are contrasted with those invoked to derive the constitutional right to an abortion."⁷⁸

The irony appeared in pre-*Roe* case law as well. Although most of the lower courts, including those that upheld abortion statutes, never addressed this issue, two courts faced it squarely when purported guardians ad litem alleged that abortions unconstitutionally deprive fetuses of life. In both *McGarvey v. Magee-Womens Hospital*, where the guardian claimed that even Pennsylvania's traditional restrictive statute was unconstitutional for allowing abortions without "some form of judicial process,"⁷⁹ and *Byrn v. New York City Health & Hospitals Corp.*, where the guardian argued that New York's liberal statute was unconstitutional for ever allowing abortions except to save the woman's life,⁸⁰ the courts found that the fourteenth amendment does not include fetuses, and they therefore emphatically disclaimed any authority to disturb the legislative balances.⁸¹ Both courts are to be praised for their restraint, but it is ironic that in the midst of judicial legislation to expand abortion, the two courts asked to restrict it invoked judicial restraint. That is especially ironic because had the courts wished to expand fetal protection, they could arguably have relied, given the generally low level of analysis in the pre-*Roe* cases, on the earlier anti-abortion decision in *Steinberg v. Brown*.⁸² Casually relying on the defendant's biology and Webster's dictionary, the court in *Steinberg* had decided that life begins at conception and that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it."⁸³ Of course, *Steinberg's* effort to draw fetuses within the fourteenth amendment by deciding from scanty evidence when life begins had itself been judicial legislation (although paradoxically it supported the balance it second-guessed). As a whole, the pre-*Roe* courts, like the Supreme Court, seem to

78. Ely, *supra* note 2, at 926.

79. 340 F. Supp. 751, 752 (W.D. Pa. 1972), *affd.*, 474 F.2d 1339 (3d Cir. 1973).

80. 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973).

81. *McGarvey*: 340 F. Supp. at 754; *Byrn*: 31 N.Y.2d at 203, 286 N.E.2d at 890, 335 N.Y.S.2d at 395.

82. 321 F. Supp. 741 (N.D. Ohio 1970).

83. 321 F. Supp. at 746-47.

have found second-guessing a handy resort when needed, but not the kind of girl one wants to marry.

To bolster its decision that a fetus is not a "person," the Supreme Court said, "Indeed, our decision in *United States v. Vuitch* . . . inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection."⁸⁴ That statement is a bit disingenuous, for the Court in *Vuitch* expressly — which is more than "inferentially" — declined to discuss any aspect of the privacy arguments made by the appellee.⁸⁵ That notwithstanding, the Court can surely apply interpretative glosses to its own opinions, and this gloss had the advantage of being ready-made. In strikingly similar language, *Abele v. Markle* had previously said, "Surely the Court would have withheld even tacit approval of abortions in such circumstances if the consequence was the termination of a life entitled to fourteenth amendment protection."⁸⁶ In this instance, then, the traditional axiom was at work: the lower court identified and articulated an argument that aided Supreme Court review. Unfortunately, *Abele's* gloss on *Vuitch* was a rather minor point; but still more unfortunately, the Court settled for plucking it out of a much larger argument. *Abele* held that "person" does not include a fetus and specifically referred to *Vuitch* in the course of arguing that a state cannot almost totally abridge women's constitutional rights by asserting an interest in fetuses which have no constitutional rights.⁸⁷ That theory is debatable, and even *Abele* stated it tentatively,⁸⁸ but it was one step toward a more

84. 410 U.S. at 159.

85. Interestingly, the Supreme Court not only avoided discussing the arguments, it conspicuously avoided even using the word "privacy":

Appellee has suggested that there are other reasons why the dismissal of the indictments should be affirmed. Essentially, these arguments are based on this Court's decision in *Griswold v. Connecticut* Although there was some reference to these arguments in the opinion of the court below, we read it as holding simply that the statute was void for vagueness Since that question of vagueness was the only issue passed upon by the District Court it is the only issue we reach here.

402 U.S. 62, 72-73 (1971) (citation omitted). Neither the district court nor the appellee, however, had been reluctant to invoke the right of privacy. See *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969), *revd.*, 402 U.S. 62 (1971); Brief for Milan M. Vuitch, M.D., at 40-44, *United States v. Vuitch*, 402 U.S. 62 (1971).

86. 351 F. Supp. 224, 228 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

87. 351 F. Supp. at 228-30.

88. 351 F. Supp. at 230.

precise definition of the state interest necessary to abridge constitutional rights than the conclusory tags "rational" and "compelling." By deciding *Roe* too soon, the Supreme Court afforded itself only the minor point, precluded any judicial debate of *Abele's* theory, and pinned itself to an obfuscating method with " 'compelling' points."⁸⁹

D. "We need not resolve the difficult question of when life begins"

Having decided that the Constitution does not protect fetuses, the Supreme Court turned to Texas's statutory claim: "Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception."⁹⁰ In response, the Court quickly abjured any attempt to decide when life begins,⁹¹ noting instead that this question yields a "wide divergence of thinking,"⁹² and that "[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth."⁹³ How those observations lead to the conclusion that states may protect fetuses only after viability is a mystery. The critics have particularly dismissed this portion of *Roe* as the merest dissemblance of a rationale.⁹⁴ And the Court's dissembling at this point undercut the purported purpose of its opinion: to discern the relative weights of the interests involved.⁹⁵ By busying itself with the question of what a fetus *is* — "life," "potential life," a "person," a person "in the whole sense" — the Court avoided admitting that *something* hangs in the balance against women's rights and thus avoided the real question of whether states may protect fetuses, as nothing more than fetuses, and at what cost to women.⁹⁶

This avoidance was the legacy of the pre-*Roe* cases. The courts that struck down abortion statutes for abridging women's right of privacy essentially denied that a fetus is anything at all.

89. 410 U.S. at 163.

90. 410 U.S. at 159.

91. 410 U.S. at 159.

92. 410 U.S. at 160.

93. 410 U.S. at 161.

94. See, e.g., Ely, *supra* note 2, at 924-26; Epstein, *supra* note 3, at 180-85; Tribe, *supra* note 5, at 3-5.

95. 410 U.S. at 162, 165.

96. See Ely, *supra* note 2, at 933.

As Professor Ely said, "a fetus may not be a 'person in the whole sense,' but it is certainly not nothing."⁹⁷ The lower courts pretended otherwise. In *People v. Belous*, the court said:

It is next urged that the state has a compelling interest in the protection of the embryo and fetus and that such interest warrants the limitation on the woman's constitutional rights. Reliance is placed upon several statutes and court rules which assertedly show that the embryo or fetus is equivalent to a born child. However, all of the statutes and rules relied upon require a live birth or reflect the interest of the parents.

In any event, there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child.⁹⁸

Satisfied that a fetus is not equivalent to a born child, the *Belous* court thought its task complete. But why must a fetus be "equivalent to a born child" before the state may protect it? A fetus is a fetus. The court never considered the straightforward question "Can the state protect a fetus?" without regard to whether a fetus is like something else the state protects elsewhere.⁹⁹ And because it failed to do so, the court never honestly faced the question abortion raises.

The other courts were no more honest. The lower court in *Roe v. Wade* said, "To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions Concern over abortion of the 'quickened' fetus may well rank as . . . such [an] interest."¹⁰⁰ The court did not say, however, what distinguishes a quickened from an unquickened fetus that the state may protect one but not the other. If the court thought an unquickened fetus is nothing, then it was blinking at facts. If the court thought the fetus is something, but is too insubstantial to count, then it needed to explain why. In *Doe v. Scott*¹⁰¹ and *Abele v. Markle*,¹⁰² the courts insinuated that all of what hangs in the balance is something grotesque, by lamenting fetuses that would be born gravely defective or that resulted from rape. Those situations are undeniably tragic, but

97. Ely, *supra* note 2, at 931.

98. 71 Cal. 2d 954, 967-68, 458 P.2d 194, 202-03, 80 Cal. Rptr. 354, 362-63 (1969) (footnotes omitted), *cert. denied*, 397 U.S. 915 (1970).

99. See Epstein, *supra* note 3, at 175.

100. 314 F. Supp. 1217, 1223 (N.D. Tex. 1970), *affd. in part and revd. in part*, 410 U.S. 113 (1973).

101. 321 F. Supp. 1385, 1391 (N.D. Ill. 1971), *vacated and remanded*, 410 U.S. 950 (1973).

102. 342 F. Supp. 800, 804 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

invoking them does not honestly characterize all fetuses. Yet the *Scott* and *Abele* courts, rapt in their discomfort, allowed themselves to avoid admitting that anything not grotesque was at stake. In *Doe v. Bolton*, the court acknowledged that "[o]nce conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence."¹⁰³ That potentiality, the court said, grants to the state "a legitimate area of control,"¹⁰⁴ so long as the controls "do not restrict the reasons for the initial decisions" to abort.¹⁰⁵ That assessment of the fetus differs only superficially from *Belous's* or the lower-court *Roe's*. By leaving unexplained the limit on the state's interest, the court denied that anything counterbalances the woman's right just as effectively as *Belous* and *Roe* did when they diverted themselves with questions about what a fetus is or resembles. One court, *Babbitz v. McCann*, at least tried to be honest: "For the purposes of this decision, we think it is sufficient to conclude that the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares."¹⁰⁶ Why the woman's interests prevail, however, is unexplained.

In sum, the resort to questions like "Is a fetus a person?" "To what extent do other statutes protect fetuses?" and "Is a fetus alive?" did more to divert the courts from their analytic duties than to answer the question before them. One of the last pre-*Roe* cases, *Abele v. Markle*, realized that fact, and dismissed in a footnote the comparisons to other statutes.¹⁰⁷ Perhaps if the Supreme Court had allowed the abortion dispute to brew longer, more courts would have faced the question and offered guidance when the Court finally decided a case. That it rushed into this darkness to decide *Roe*, only to fail to add new illumination, simply adds to the impression that the Court should have heeded the traditional axioms.

The Court concluded its discussion of Texas's statutory claim by remarking, "In short, the unborn have never been recog-

103. 319 F. Supp. 1048, 1055 (N.D. Ga. 1970) (emphasis original), *modified and affd.*, 410 U.S. 179 (1973).

104. 319 F. Supp. at 1055.

105. 319 F. Supp. at 1056.

106. *Babbitz v. McCann*, 310 F. Supp. 293, 301 (E.D. Wis.), *appeal dismissed per curiam*, 400 U.S. 1 (1970).

107. *Abele v. Markle*, 351 F. Supp. 224, 226 n.5 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

nized in the law as persons in the whole sense."¹⁰⁸ This regrettable sentence first appeared in *Byrn v. New York City Health & Hospitals Corp.*¹⁰⁹ After noting that fetuses may acquire some rights even before birth, the *Byrn* court said, "But unborn children have never been recognized as persons in the law in the whole sense."¹¹⁰ In context, the import of this sentence is quite clear. The *Byrn* court meant that even if fetuses receive some protection, they have never received all the protection people receive after birth. The Supreme Court, by using the sentence to end the entire section on Texas's interests, and by prefixing to it "In short," which clearly signals that a summary definitive statement should follow, managed to obscure what little meaning the sentence has. The traditional axiom recommends that the Court use lower-court arguments to its benefit; in this instance the Court adopted the argument so cryptically that it lost any potential benefits.

E. "[W]e do not agree that, by adopting one theory of life"

Having decided in section IX that a fetus is neither a fourteenth amendment "person," nor a "person in the whole sense," the Supreme Court opened section X with, "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."¹¹¹ This is a curious statement. If read out of context, it would seem to suggest that *Roe* is a case about the limits of state authority to regulate activity by deciding metaphysical questions. For according to this statement, the Court did not object to Texas's end — prohibiting abortions — but to its means — "adopting one theory of life." But that suggestion seems untenable if the statement is read in context, for nothing preceding it in the opinion discussed what theories a state may or may not endorse in the course of regulation, nor did the opinion say anything about states adopting theories when it subsequently announced its schema of permissible regulation. What, then, is the phrase, "by adopting one theory of life" doing there? One fairly plausible answer is that the phrase was meant to conceal some doctrinal sleight of hand. The Court surely wanted to avoid explicitly inval-

108. 410 U.S. at 162.

109. 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973).

110. 31 N.Y.2d at 200, 286 N.E.2d at 888, 335 N.Y.S.2d at 392.

111. 410 U.S. at 162.

identifying Texas's legislative goal, even if that is what the Court was doing. Conveniently for the Court, Texas's brief justified protecting fetuses from the moment of conception by arguing that that is when life begins and that the state has a duty to protect life.¹¹² Thus, although objecting to the goal, the Court could attack the means — verbally if not analytically. Obviously, the sleight of hand was not very deft.

There may be a second, less cynical explanation for the phrase. By looking to the nature of Texas's interest — one that adopted a theory of life — the Supreme Court might have been suggesting a rationale similar to the unique theory developed in *Abele v. Markle*.¹¹³ That theory grew from a legislative-judicial dialogue that may well have continued had the Supreme Court not decided *Roe*. In April 1972, a three-judge district court struck down Connecticut's restrictive abortion statute,¹¹⁴ with one of the two majority judges expressly declining to decide how he would have voted had the state persuasively shown that an interest in protecting fetuses originally motivated the statute's enactment.¹¹⁵ One month later, the Connecticut General Assembly enacted a substantially identical statute with a new first section declaring, "The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception"¹¹⁶ When this new statute was challenged, the *Abele* court responded by considering "whether the state has power to advance such a purpose" by abridging a constitutional right.¹¹⁷ In the course of its consideration, the court, rather than attaching or withholding the label "compelling," attempted the difficult task of articulating the nature of a compelling state interest:

A compelling state interest has generally been one where the nature of the interest was broadly accepted, with dispute remaining only as to whether the state could constitutionally advance that interest by the specific means being challenged.

. . . No decision of the Supreme Court has ever permitted anyone's constitutional right to be directly abridged to protect a state interest which is subject to such a variety of personal judgments [as is Connecticut's interest in protecting life from concep-

112. Brief for Appellee at 31, *Roe v. Wade*, 410 U.S. 113 (1973).

113. 351 F. Supp. 224 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

114. *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

115. 342 F. Supp. at 810 (Newman, J., concurring).

116. 351 F. Supp. at 226.

117. 351 F. Supp. at 227.

tion on] . . . Such an interest cannot acquire the force of a governmental decree to abridge an individual's constitutional right. To uphold such a statute would permit the state to impose its view of the nature of a fetus upon those who have the constitutional right to base an important decision in their personal lives upon a different view.

. . . Of course, legislation is not rendered unconstitutional simply because it advances a social policy about which people differ. Normally it is the legislative function to resolve such differences. But where a state interest subject to such variety of viewpoints is asserted on behalf of a fetus which lacks constitutional rights, and where the assertion of such an interest would accomplish the virtually total abridgment of a constitutional right of special significance, in these circumstances such a state interest cannot prevail.¹¹⁸

Pursuant to this test, the *Abele* court again struck down Connecticut's statute, but also suggested the type of abortion statute this test would allow:

If a statute sought to protect the lives of all fetuses which could survive outside the uterus, such a statute would be a legislative acceptance of the concept of viability . . . [T]he state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable.¹¹⁹

The Supreme Court's otherwise inexplicable discussion of state interests in *Roe* can be read, with some imagination, to suggest a similar argument.¹²⁰ Texas claimed just what Connecti-

118. 351 F. Supp. at 230-31 (citations omitted).

119. 351 F. Supp. at 232 (footnote omitted).

120. Of course, the Court cited in *Roe* all the lower court decisions, 410 U.S. at 154-55, but it seems clear that the Court was particularly familiar with *Abele*, for part "A" of *Roe*'s § IX contains striking verbal and organizational parallels to *Abele*'s part "A." Organizationally, both opinions marshalled the same evidence to argue that a fetus is not a fourteenth amendment "person": that other constitutional uses of "person" do not apply to fetuses, compare 410 U.S. at 157 with 351 F. Supp. at 229 n.8; that courts which had addressed the issue had held that fetuses are not "persons," compare 410 U.S. at 158 with 351 F. Supp. at 228; and that *United States v. Vuitch* had implied that fetuses are not "persons," compare 410 U.S. at 159 with 351 F. Supp. at 228. No other lower-court opinion adduces the same three points. Verbally, *Roe* echoed *Abele*'s language three times: (1) it described *Vuitch*'s implication with similar words, see text at notes 84-86 *supra*; (2) its statement of the first claim it considered — "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment," 410 U.S. at 156 — resembled *Abele*'s "The initial inquiry is whether the fetus is a person, within the meaning of the fourteenth amendment . . .," 351 F. Supp. at 228; and (3) its reference to "those few cases where the issue was squarely presented," 410 U.S. at 158, resembled *Abele*'s reference to the two courts in which "[t]he issue has been squarely faced." 351 F. Supp. at

cut had: that "life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception."¹²¹ The Court said two things in response. First: "It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question."¹²² Unfortunately, the Court left ambiguous exactly what the wide divergence of thinking suffices to show. Perhaps this survey of opinion suffices to show that "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate" about when life begins.¹²³ The survey also suffices to show, however, that Texas's state interest rests on a theory that many people, including no doubt many pregnant women, sincerely reject. Second: "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"¹²⁴ Professor Ely is surely right that if the Court was trying to show why Texas may not protect fetuses before viability, then "the bodies of doctrine to which the Court adverts . . . tend to undercut rather than support its conclusion."¹²⁵ If, on the other hand, the Court was trying to suggest that a compelling state interest may not depend on a premise so widely disputed as that life begins at conception, then revealing that no other doctrines or statutes endorse that premise does support its conclusion. Finally, like the *Abele* court, the Supreme Court designated viability as "the 'compelling' point."¹²⁶ It explained: "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."¹²⁷ While the Court does not appear to suggest that it selected viability because Texas's interest would then be "more generally accepted,"¹²⁸ which is how *Abele* decided on viability, it does seem

228. Of course the verbal and organizational parallels do not prove much, especially the verbal ones, for judges borrow language from each other like brothers borrow socks: constantly, if not openly. But they do suggest that the Supreme Court knew more about *Abele* than its holding.

121. 410 U.S. at 159; Brief for Appellee, *supra* note 112.

122. 410 U.S. at 160.

123. 410 U.S. at 159.

124. 410 U.S. at 161.

125. Ely, *supra* note 2, at 925.

126. 410 U.S. at 163.

127. 410 U.S. at 163.

128. *Abele v. Markle*, 351 F. Supp. 244, 232 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973).

to find significant that by viability Texas may justify its interest in fetal life with more than just one debatable theory chosen from among many. By the time a fetus is viable, logic and biology dictate that the fetus, if not alive, is at least almost alive. Therefore, to read a bit into the opinion, Texas's interest would no longer depend on a widely disputed premise, and by the *Abele* test could be "compelling."

This reading of *Roe* is purely speculative. Indeed, seeing *Abele*'s theory in *Roe* is like finding the hidden object drawn into a puzzle-picture: one must know to look for it.¹²⁹ Even if *Roe* does contain fine shadings of *Abele*, the opinion still leaves many questions unanswered. The best that can be said is equivocal: It is heartening to think that some rationale lurks behind *Roe*, but equally disheartening that after taking *Roe* too soon for that rationale to develop further, the Court would not say whether it used the rationale or not, and if not, then what rationale it did use.

F. *"Each grows in substantiality as the woman approaches term"*

Immediately after rejecting Texas's claim to protect fetuses from the moment of conception, the Court granted that the state yet had "important and legitimate" interests in protecting women's health and fetuses' potential life.¹³⁰ "Each [interest] grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"¹³¹ For the interest in protecting women's health, "the 'compelling' point" was approximately the end of the first trimester, "because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."¹³² Thus, abortions within the first trimester are "free of interference by the State."¹³³ For the interest in protecting potential life, "the 'compelling' point" was viability, be-

129. Once one begins looking, however, one finds in *Roe* a great many more references to beliefs, theories, and the divergence of thinking than one might have suspected were there. The opinion's first page-and-a-half, for instance, mentions attitudes, views, and thinking six times. 410 U.S. at 116-17. And, of course, the Court included its much-maligned survey of "medical and medical-legal history" to show "what that history reveals about man's attitudes" toward abortion. 410 U.S. at 117.

130. 410 U.S. at 162.

131. 410 U.S. at 162-63.

132. 410 U.S. at 163.

133. 410 U.S. at 163.

cause as already mentioned, "the fetus then presumably has the capability of meaningful life outside the mother's womb."¹³⁴

The Supreme Court must have been well acquainted with differentiating compellingness of state interests according to length of pregnancy, for most of the pre-*Roe* courts had done it. With the exception of *Abele*, however, none of the lower courts had protected the right to abortion so zealously as did the Supreme Court. In assessing states' interests in women's health, for example, the lower courts had often relied solely on statistics about the relative risks in abortion and childbirth to justify their decisions that those interests no longer warranted prohibiting abortions in the first trimester.¹³⁵ But all the lower courts had expressly conceded that even in the first trimester the state could regulate who may perform abortions and where.¹³⁶ As to interests in protecting fetuses, the courts had generally found those uncompelling during "early" pregnancy,¹³⁷ or before quickening.¹³⁸ While the courts had rarely specified when "early" pregnancy

134. 410 U.S. at 163.

135. See, e.g., *YWCA v. Kugler*, 342 F. Supp. 1048, 1074 (D.N.J. 1972), *cert. denied*, 415 U.S. 989, *affd. without opinion*, 493 F.2d 1402 (3d Cir. 1974); *Babbitz v. McCann*, 310 F. Supp. 293, 301 (E.D. Wis.), *appeal dismissed per curiam*, 400 U.S. 1 (1970); *People v. Belous*, 71 Cal. 2d 954, 965, 458 P.2d 194, 200-01, 80 Cal. Rptr. 354, 360-61 (1969), *cert. denied*, 397 U.S. 915 (1970). The statistical studies most frequently cited were by Christopher Tietze. That name became so familiar in the pre-*Roe* cases and in the *Roe* briefs, that when the Supreme Court cited three Tietze studies among the five named sources that wholly supported the decision not to allow any state regulation during the first trimester, 410 U.S. at 149 n.44, 163, one begins to think that the due process clause of the fourteenth amendment enacts Dr. Christopher Tietze's Abortion Statistics.

136. *Abele v. Markle*, 342 F. Supp. 800, 804 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *YWCA v. Kugler*, 342 F. Supp. 1048, 1075-76 (D.N.J. 1972), *cert. denied*, 415 U.S. 989, *affd. without opinion*, 493 F.2d 1402 (3d Cir. 1974); *Doe v. Scott*, 321 F. Supp. 1385, 1391 (N.D. Ill. 1971) (decision that a state interest in women's health is uncompelling limited to abortions "by licensed physicians in a licensed hospital"), *vacated and remanded*, 410 U.S. 950 (1973); *Doe v. Bolton*, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970), *modified and affd.*, 410 U.S. 179 (1973); *Roe v. Wade*, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970), *affd. in part and revd. in part*, 410 U.S. 113 (1973); *Babbitz v. McCann*, 310 F. Supp. 293, 302 (E.D. Wis.), *appeal dismissed per curiam*, 400 U.S. 1 (1970); *People v. Belous*, 71 Cal. 2d 954, 965, 458 P.2d 194, 201, 80 Cal. Rptr. 354, 360-61 (1969) (decision that state interest in women's health is uncompelling limited to "a hospital therapeutic abortion"), *cert. denied*, 397 U.S. 915 (1970).

137. *Abele v. Markle*, 342 F. Supp. at 804 ("within an appropriate period after conception"); *Doe v. Scott*, 321 F. Supp. at 1391 ("the early stages"); *Doe v. Bolton*, 319 F. Supp. at 1055 (exactly what *Bolton* held is difficult to discern — indeed, after two months the court issued an explanatory supplemental opinion — but the plaintiffs alleged a right to terminate "an unwanted pregnancy in its early stages," and the court apparently accepted that); *United States v. Vuitch*, 305 F. Supp. at 1035 ("early stages").

138. *YWCA v. Kugler*, 342 F. Supp. at 1075; *Roe v. Wade*, 314 F. Supp. at 1223, *Babbitz v. McCann*, 310 F. Supp. at 299.

ends, none of them except *Abele*¹³⁹ had indicated in any way that it stretches to viability.

More important than the timing of when interests become compelling, however, is the fact that none of the courts — lower or Supreme — adequately justified differentiating by length of pregnancy at all. None of them explained why relative risks “should provide the only constitutionally relevant measure of permissible state regulation”¹⁴⁰ to protect the mother’s health. And, as seen before, most of them never honestly faced the task of balancing states’ interests in fetuses against women’s interests in abortion,¹⁴¹ much less articulated why the state interest was “compelling” in late pregnancy but not in early. Thus, when the Supreme Court drafted what Professor Ely called its “commissioner’s regulations,”¹⁴² it went beyond any balance of interests it or the lower court had explained, and beyond what any lower court (except *Abele*) had thought necessary. To be sure, the Court was not wholly without models for its selection of viability as “the ‘compelling’ point”: the statutes of Alaska, Hawaii, and New York allowed abortions for any reason before viability.¹⁴³ But the Court could not really have patterned its decision after them — that would have been judicial legislation.

CONCLUSION

Roe and the pre-*Roe* cases share many of the same faults, and not coincidentally. In the face of the lower courts’ confusion, and the inadequacy of most of their attempts to evolve a constitutional analysis for the abortion cases, the Supreme Court was doubtless tempted to ignore the traditional axioms of Supreme Court review, to seize the problem and resolve it itself. *Roe* should serve as a reminder that quick resolution is not always the wisest choice, for *Roe* is an opinion uninformed by any thoughtful lower-court analysis. The *Abele* court’s attempt to grapple with the difficult issues suggests that more thoughtful analysis was in the offing. Unfortunately, the Supreme Court did not wait to enjoy those benefits.

139. 351 F. Supp. at 232.

140. Tribe, *supra* note 5, at 4.

141. See text at note 106 *supra*.

142. Ely, *supra* note 2, at 922.

143. See Comment, *supra* note 10, at 181.

PART II

THE POLITICS OF ABORTION