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Barbara Cox
California Western School of Law, bjc@cwsl.edu

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Refocusing Abortion Jurisprudence to Include the Woman: A Response to Bopp and Coleson and *Webster v. Reproductive Health Services*

Barbara J. Cox*

James Bopp, Jr. and Richard E. Coleson condemn *Roe v. Wade*¹ and its progeny in their article entitled *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*.² They make their case against a woman's constitutional right to choose an abortion by focusing exclusively on the state's and the fetus' interests. Unfortunately, one interest is missing: that of the pregnant woman. In 174 pages, Bopp and Coleson include only a handful of references to the impact that the availability of legalized abortion has on a pregnant woman.

Bopp and Coleson are not alone in excluding women from the abortion debate.³ In the United States Supreme Court's recent decision of *Webster v. Reproductive Health Services*,⁴ the plurality also excludes women from the focus of the case. This exclusion of women from the abortion debate disembodies the right recognized in *Roe* and the original reason for *Roe*'s existence. *Roe* recognized the debilitating impact that state imposed pregnancy has on a woman's constitutional right to liberty and privacy.⁵

This Article seeks to refocus the abortion debate to include the impact of unwanted pregnancy on women. As Rosalind Pollack Petchesky noted:

* Associate Professor, California Western School of Law, B.A., Michigan State University, 1978; J.D., University of Wisconsin, 1982. The author wishes to thank her research assistants, Alicia Baskette, June Stein, and Tracy Macuga for the incredible help they provided on this article: it would not have been possible without them. She would also like to thank Jean Cox for helping to clarify her thoughts on this issue; Michal Belknap for his comments on an earlier draft; Mary Ellen Norvell, Sue Patmor and Frank Daniels for their technical assistance and guidance, and Mollie Martinek for her editing assistance and unwavering support.

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

2. 3 B.Y.U. J. PUB. L. 181 (1989)[hereinafter Bopp & Coleson].

3. See, e.g., Loewy, *Observation: Why Roe v. Wade Should Be Overruled*, 67 N.C.L. REV. 939 (1989) (discussion excludes impact of pregnancy on women and effects of unwanted pregnancy).

4. 109 S. Ct. 3040 (1989).

5. See *Roe*, 410 U.S. at 153.

In this political and cultural context, the immediate priority becomes to restore women to a central place in the pregnancy scene. To do this, we must create new images that recontextualize the fetus: that place it back into the uterus, and the uterus back into the woman's body, and her body back into its social space--differentiated by age, class, race and physical circumstance.⁶

The first two sections of this Article challenge Bopp and Coleson's argument that a woman's right to choose an abortion enjoys no constitutional basis and that *Roe* should be reversed. A woman's constitutionally protected liberty and privacy rights are directly implicated by the state imposed pregnancy that results from restricted access to abortion. The third section disputes Bopp and Coleson's claim that the abortion right has become virtually inviolate, not subject to the state restrictions that the Court has allowed for other aspects of the privacy right.⁷ This Article challenges Bopp and Coleson's reading of the abortion precedents and argues that the right to choose an abortion has been subject to continuous narrowing since the time it was announced in *Roe*. As Justice Blackmun noted in his recent dissent in *Webster*:

Today, *Roe v. Wade* and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure I fear for the future. I fear for the liberty and equality of millions of women who have lived and come of age in the 16 years since *Roe* was decided.⁸

Finally, the fourth section of this Article challenges Bopp and Coleson's argument that both criminal and tort law recognize and protect the fetus and that abortion law diverges from this protection. This Article concludes that the abortion cases have correctly differentiated between fetuses who are dependent on the women

6. Petchesky, Introduction to *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S RTS. L. REP. 3, 6 (1986).

7. See Bopp & Coleson, *supra* note 2, at 222-34.

8. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3067 (1989) (Blackmun, J., dissenting) (citation omitted). Blackmun noted that:

Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality and Justice Scalia would overrule *Roe* (the first silently, the other explicitly) and would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term.

Id. He concluded his dissent with the following statement: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

Id. at 3079.

who bear them and those who are capable of surviving outside the womb. *Roe* is not out-of-step with other areas of the law in this regard. In fact, it is consistent.⁹

When the abortion debate is framed to include the interests of women,¹⁰ it becomes clear that *Roe* correctly recognized a woman's constitutional liberty and privacy rights to make the abortion decision.

I. EXCLUSION OF WOMEN FROM THE ABORTION DISCUSSION

Bopp and Coleson's virtual disregard for the impact of unwanted pregnancy on women who cannot obtain legal abortions is very troublesome. It is a critical omission. Bopp and Coleson are only able to pursue their argument by excluding women's interests from their analysis. Their Article begins with a survey of early critiques of *Roe* that were concerned with the personhood of the fetus.¹¹ The authors of these early critiques feared that, due to *Roe*'s "loose language and lack of constitutional roots," the decision would lead to infanticide and euthanasia.¹² Bopp and Coleson's discussion of future harm, however, excludes any reference to the future harm to women who are prohibited from legal access to abortion.¹³ That exclusion permits them to argue that *Roe* was incorrectly decided because they examine only one aspect of the problem: potential harm to the fetus.

9. Bopp and Coleson also discuss certain aspects of medical regulations. See Bopp & Coleson, *supra* note 2, at 283-98. They also discuss certain procedural and adjudicatory issues. See *id.* at 299-351. I have chosen not to respond to these issues, not because I agree with their views, but due to length limitations.

10. This is not to maintain that the state's interests in protecting maternal health, maintaining medical standards and protecting potential human life are not also important. See *Roe v. Wade*, 410 U.S. 113, 154 (1973). Countless others have fulfilled the need to concentrate on the state's interests. Unlike many articles, this Article does not discuss "fetal rights." Cf. Bopp & Coleson, *supra* note 2, at 246-83 (discussing fetal rights). This is because the Supreme Court has considered, and rejected, the argument that "person" in the fourteenth amendment includes fetuses. See *Roe*, 410 U.S. at 156-62.

11. See Bopp & Coleson, *supra* note 2, at 185.

12. *Id.*

13. Illegal abortions in the 1960's numbered between 200,000 and 1,200,000 per year. Twenty percent of all deaths attributed to pregnancy and childbirth resulted from illegal abortions. See Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S RTS. L. REP. 3, 14 (1986). In Mexico, where abortion is illegal except in rare cases, at least 75,000 women per year die because of illegal or self-induced abortions. These numbers are based on official figures from the Mexican Social Security Institute and other sources. See McDonnell, *Pro-Choice Drive Expands Across the Border*, L.A. Times, Nov. 17, 1989, at B1, col. 6; see also E. MESSER & K. MAY, BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA (1988) (oral histories of women who had abortions when it was illegal).

Bopp and Coleson also argue that "[t]he Court has never demonstrated the connection between the Constitution and the Court-created right to choose abortion."¹⁴ They dismiss the idea that the right to choose is protected by the fourteenth amendment's prohibition against depriving anyone of liberty or privacy without due process.¹⁵

They continue to exclude women from their analysis by focusing on *Roe* as a case protecting the medical profession. "*Roe* . . . appear[s] result-oriented, unjustified by the Constitution, and designed to protect a certain profession, rather than all interested parties."¹⁶ To envision *Roe* merely as a physician's protection package, a claim they make throughout their article,¹⁷ is to show callous disregard of the positive impact that *Roe* has had on the significant number of American women facing unwanted pregnancy every year.¹⁸ Bopp and Coleson fixate on fetal rights and physicians' rights and fail to recognize that *Roe* has significantly impacted women facing unwanted pregnancies.

Bopp and Coleson also criticize the Court's decision in *Thornburgh v. American College of Obstetricians and Gynecologists*¹⁹ for stare decisis abuse.²⁰ They claim *Thornburgh* ignored *Roe*'s recognition of the states' compelling interest in maternal health during the second trimester and in fetal life after viability.²¹ They argue that "[s]tare decisis would require continued recognition of those interests and *sympathetic* treatment of regulations seeking

14. Bopp & Coleson, *supra* note 2, at 200.

15. *See id.*; notes 46-54 *infra* and accompanying text.

16. Bopp & Coleson, *supra* note 2, at 198. It is true that Justice Blackmun's decision in *Roe* substantially protects doctors, as can be seen in his statement that "the attending physician, in consultation with his [or her] patient, is free to determine, without regulation by the State, that, in his [or her] medical judgment, the patient's pregnancy should be terminated." *Roe v. Wade*, 410 U.S. 113, 163 (1973).

17. *See* Bopp & Coleson, *supra* note 2, at 198-200.

18. Paltrow estimated, as of 1986, that approximately 1.5 million American women choose to have abortions each year. *See* Paltrow, *supra* note 13, at 13. That number has remained virtually constant. In 1988, 1,590,750 abortions were performed.

19. 476 U.S. 747 (1986).

20. *See* Bopp & Coleson, *supra* note 2, at 214-18.

21. *See id.* at 214. *Thornburgh* entailed a challenge to the Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3201-20 (Purdon 1983 & Supp. 1989). The Act contained numerous restrictions "seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice." *Thornburgh*, 476 U.S. at 759. The Court found the restrictions to be unconstitutional attempts, "under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Id.* According to the Court, "[c]lose analysis of those provisions . . . shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make." *Id.*

to implement them. The Court has not done this. Rather, the Court has struck down virtually every legislative attempt to assert these 'compelling' interests."²²

When Bopp and Coleson detail the compelling interests that should be recognized, they are concerned only with the "sympathetic" treatment of the states' interests. They are unconcerned with the "sympathetic" treatment of a woman's right to choose to have an abortion, a right that the Supreme Court has recognized repeatedly for over seventeen years.²³ They fail to acknowledge the impact that such sympathetic treatment of states' interests would have on women's interests. Their sympathy extends only to states' attempts to narrow a woman's right to choose to have an abortion.

Relying on *Jacobson v. Massachusetts*,²⁴ a compulsory vaccination case, Bopp and Coleson argue that a state should be able to protect the fetus "even at the risk of some increase in danger to the woman."²⁵ They use the *Jacobson* reasoning to justify Pennsylvania's attempt in *Thornburgh* to enact a requirement that doctors use the abortion technique that most likely will preserve the life of the fetus unless that method causes a "'significantly greater medical risk' to the mother."²⁶

In *Jacobson*, the risk imposed, while partially to protect society at large, was also imposed for the health of the person vaccinated.²⁷ Comparing the risk from receiving a compulsory vaccination that was "too small to be seriously weighed"²⁸ with using the abortion technique that will best protect the fetus even though causing a "significantly greater" risk to the woman's health demonstrates an incredible lack of concern for the life and health of the woman involved.

In *Thornburgh*, an increased risk to the woman's health was mandated even though it would not improve her physical well-being. The State required that a woman protect the fetus, a fetus that she had chosen not to continue to bear, even though that protection increased risks to her health. These cases are inapposite; by their use of this analogy, Bopp and Coleson demonstrate their disregard for the impact that state attempts to restrict abortion have

22. Bopp & Coleson, *supra* note 2, at 214 (emphasis added).

23. See *infra* note 39 and accompanying text.

24. 197 U.S. 11 (1905).

25. Bopp & Coleson, *supra* note 2, at 224.

26. *Id.* (emphasis added)(footnote omitted).

27. See *id.*

28. *Jacobson*, 197 U.S. at 24.

on a woman's health and life. In fact, this argument exposes them to the same claims of *stare decisis* abuse that they raise against the Court.

Midway through their article, Bopp and Coleson briefly recognize the hardship caused to women by state imposed pregnancy.²⁹ "Of course, some women refused abortions experience hardship during pregnancy and childbirth."³⁰ But their recognition is immediately negated when they again turn their attention to the fetus, which they consider to be at the forefront of the abortion controversy: "But abortion certainly involves a serious intrusion on the bodily integrity of the fetus, which is arguably greater than the hardships on its mother."³¹ They conclude, without further reasoning, that the fetus' rights require more concern: "Again, it seems that the presence of the fetus complicates the traditional privacy rights paradigm so as to justify greater state monitoring of the abortion right."³²

The abortion controversy poses extremely difficult questions because of the conflict between the state's interest in protecting potential life and a woman's interest in retaining her constitutional liberty and privacy rights. Reconciliation of these conflicting interests cannot be obtained by excluding women's interests from consideration, and focusing only on the fetus or the state, as do Bopp and Coleson. Reconciliation will only be achieved by recognizing the different, and sometimes conflicting, interests involved. These interests must be balanced to reach a result consistent with the requirements of the Constitution. That is what the Court did in *Roe*.

Bopp and Coleson's continuous silence on the impact of restrictive abortion laws on pregnant women is fundamental to their Article. Bopp and Coleson are not alone in their silence. Unfortunately, the plurality decision in *Webster*, also omitted women's interests from their consideration.³³ This decision is particularly notable for "its intended evisceration of precedents and its deafening silence about the constitutional protections [of a woman to choose

29. See Bopp & Coleson, *supra* note 2, at 234.

30. *Id.*

31. *Id.*

32. *Id.*

33. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3073 (1989) (Blackmun, J., dissenting). Justice Blackmun states: "Of the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous." *Id.*

to have an abortion] that it would jettison."³⁴ In *Webster*, the Court upheld sections of a Missouri statute that stated: "[t]he life of each human being begins at conception;"³⁵ "[u]nborn children have protectable interests in life, health, and well-being;"³⁶ "[i]t shall be unlawful for any public employee within the scope of his [or her] employment to perform or assist an abortion, not necessary to save the life of the mother;"³⁷ it is "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother."³⁸

By upholding each of these provisions as constitutional, the plurality essentially excluded from its analysis the woman and her constitutionally protected right to choose an abortion. The plurality denied the existence of a fundamental constitutional right to choose an abortion, despite seventeen years of precedent explicitly finding such a right.³⁹ Instead, the plurality claimed that a woman's right to an abortion is a "liberty interest protected by the Due Process Clause" and that Missouri's purpose in preventing abortions on viable fetuses was legitimate.⁴⁰ Although Justice Rehnquist did not state this explicitly, his use of "legitimate" as the standard against which Missouri's interest was to be reviewed shows his belief that this liberty interest is not fundamental.⁴¹

34. *Id.* at 3067.

35. MO. REV. STAT. § 1.205.1(1) (Vernon Supp. 1990).

36. *Id.* § 1.205.1(2) (1986 & Vernon Supp. 1990).

37. *Id.* § 188.210 (Vernon Supp. 1990).

38. *Id.* § 188.215.

39. In his dissent in *Webster*, Justice Blackmun refers to the numerous cases in which the Court "repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3078, n.12 (1989) (Blackmun, J., dissenting). These include: *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

40. *Webster*, 109 S. Ct. at 3058. The *Webster* plurality distinguished this "liberty interest" from *Akron*, in which the majority accepted that a woman has a fundamental right to make the choice whether to terminate her pregnancy. See *Akron*, 462 U.S. at 420 n.1. The plurality also distinguished a woman's liberty interest from Justice Blackmun's statement in his *Webster* dissent that *Roe* found a "limited fundamental constitutional right." *Webster*, 109 S. Ct. at 3076 (Blackmun, J., dissenting).

41. Justice Blackmun, in his dissent, noted that the plurality's test "appears to be nothing more than a dressed-up version of rational-basis review, this Court's most lenient level of scrutiny." He noted further: "The [Court's] standard completely disregards the irreducible minimum of *Roe*: the Court's recognition that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy." *Id.* at 3076.

Under his analysis, abortion laws such as Missouri's could restrict the pregnant woman's right to choose an abortion so long as the laws were rationally related to a legitimate government goal.⁴² Such minimal scrutiny of restrictive state abortion laws would result in all abortion laws being upheld, thereby effectively overruling *Roe*.

In his concurring opinion, Justice Scalia went even further than Justice Rehnquist. He stated that the question whether a state can enact restrictive abortion statutes is "political and not juridical."⁴³ If adopted, his position would eliminate constitutional protections of a woman's right to choose to have an abortion and would leave the matter to the vicissitudes of the political moment.⁴⁴ Such a move would symbolize a dramatic retreat from the

42. See J. NOWAK, R. ROTUNDA, & N. YOUNG, CONSTITUTIONAL LAW § 10.6, at 323 (3d ed. 1986) (discussing various levels of constitutional scrutiny relating to nonfundamental rights).

43. *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia thus exposes his belief that women have no constitutional right to choose an abortion. In his view, whether a woman can obtain an abortion is a question that should be left to the political process. Justice Scalia's position would remove women's relative security in the knowledge that, at least during the first trimester, their right to choose is protected, placing them in the untenable position of having their liberty and privacy altered with the political winds.

The inherent instability of those winds is evident from the political turmoil surrounding abortion during the fall of 1989. In Pennsylvania, the legislature passed a law prohibiting abortions after 24 weeks, requiring women to be informed about the risk of abortion and imposing a 24-hour waiting period before abortions. See 18 PA. CONS. STATS. § 3205 (Purdon 1989). In Florida, the legislature refused to pass legislation that would have severely restricted abortion. TIME, Nov. 6, 1989 at 30. On September 26th, the United States Senate passed H.R. 2990 which expanded Medicaid funding for abortion. H.R. 2990, 101st Cong., 1st Sess., 135 CONG. REC. 11,848-01 (1989). Medicaid funding had been cut off on a federal level after *Harris v. McRae*, 448 U.S. 297 (1980), which upheld the Hyde Amendment eliminating federal Medicaid funding for abortion. H.R. 2990 covered funding for abortions of women who were the victims of rape, incest, or ectopic pregnancy. A.C.L.U. *Reproductive Rights Update*, Vol I. No. 6 p. 2 (Sept. 29, 1989)[hereinafter A.C.L.U.]. On October 21, 1989, President George Bush vetoed the bill and an attempt to override the veto failed. See Rosenblatt, *Bush Vetoes Aid Bill: Abortion Funding Cited*, L.A. Times, Nov. 20, 1989, at A1, col. 6. President Bush also vetoed an appropriations bill for the District of Columbia because it allowed the district government to use locally raised money to fund abortions. See *id.* President Bush vetoed a \$14.6 billion foreign aid bill because of a \$15 million grant to a United Nations family practice agency that provides money to China's population control agency which supports abortion. See *id.* In July 1989, California Governor George Deukmejian cut \$24.1 million from the state budget for family planning clinics. See *id.* The result of these repeated attempts to restrict the right to choose abortion has also been felt in political races. Abortion was the chief issue in the Virginia and New Jersey election in 1989, and the victor in each race was the Democratic candidate who supported abortion rights. Lauter, *President Seeks to Downplay Abortion Issue*, L.A. Times, Nov. 8, 1989, at A1, col. 3.

44. See *Webster*, 109 S. Ct. at 3077 n.11 (Blackmun, J., dissenting). Justice Blackmun

Court's previous recognition of the impact that unwanted pregnancy has on the liberty and privacy interests of women.

Justice Scalia's brief statement that "[p]erhaps . . . abortions cannot constitutionally be proscribed,"⁴⁶ is the closest he comes to acknowledging that the conflict created by restrictive state statutes might raise a constitutional question. Beyond this, he did not elaborate. Justice Scalia avoided any recognition that the right to choose an abortion has a drastic impact on the woman's interests—interests presumably protected by the Constitution.

To avoid exclusion of constitutionally protected rights from the jurisprudence of abortion, the issue must be reframed to include the woman's interests. The next Section details the constitutional protections that guarantee a woman's right to choose, focusing on the impact that unwanted pregnancy has on a woman's life and identity.

II. PREGNANCY'S IMPACT ON WOMEN'S LIBERTY AND PRIVACY

Bopp and Coleson condemn *Roe* for finding that a woman's constitutional right to privacy includes the right to choose to have an abortion.⁴⁶ They do not believe that the right to privacy, the validity of which they question, supports the right of a woman to choose an abortion.⁴⁷

This section argues that the liberty interest protected by the due process clause of the fourteenth amendment⁴⁸ is one source by which the freedom to make fundamental choices about one's life and identity, including the right to choose an abortion, is protected

stated:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property . . . may not be submitted to vote; they depend on the outcome of no election.' In a Nation that cherishes liberty, the ability of a woman to control the biological operation of her body and to determine with her responsible physician whether or not to carry a fetus to term, must fall within that limited sphere of individual autonomy that lies beyond the will or the power of any transient majority.

Id. (citation omitted).

45. *Id.* at 3066 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia goes on to note "[t]hat [it] is surely an arguable question, the question that reconsideration of *Roe v. Wade* entails." *Id.*

46. See Bopp & Coleson, *supra* note 2, at 221.

47. See *id.*

48. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

under the Constitution. The right to make fundamental choices is implicit in the "concept of ordered liberty"⁴⁹ and thus is protected against intrusion by the state,⁵⁰ except as needed to "promote a compelling secular state interest."⁵¹ This Section also addresses the right of privacy and demonstrates that a woman's right to choose whether to bear a child, including her right to choose an abortion, must be protected as fundamental if the constitutional protection of privacy is to have significant force. This Section concludes that Bopp and Coleson are seriously mistaken in their repeated claims that the right to choose an abortion falls outside the rule of law,⁵² that it amounts to stare decisis abuse,⁵³ and that no source for the right to choose an abortion exists in the Constitution.⁵⁴

49. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

50. *See Roe v. Wade*, 410 U.S. 113, 152 (1973).

51. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, XVII N.Y.L.F. 335, 376 (1971). "The legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine." *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986).

52. *See Bopp & Coleson, supra note 2*, at 192-201.

53. *See id.* at 192-210.

54. *See id.* at 355. Additionally, scholars have raised the question whether the equal protection clause of the fourteenth amendment protects women from restrictive abortion laws that are "part of the systematic oppression and devaluation of women." Olsen, *Unraveling Compromises*, 103 HARV. L. REV. 105, 120 (1989). For a further discussion of this issue, see *id.* at 117-26 and articles cited therein.

Besides the substantive due process analysis that focuses on liberty and privacy rights, and the equal protection analysis that focuses on equality, an additional constitutional source for protecting a woman's right to choose an abortion is found in the ninth amendment to the Constitution. The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The ninth amendment indicates that individual rights not explicitly recognized in the Bill of Rights are constitutionally protected even though they were not enumerated in the previous eight amendments. *See Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring). The list of rights included in the Bill of Rights is not by any means exhaustive. *See id.* Thus, Bopp and Coleson's claim that the right to choose abortion is undeserving of constitutional protection and that in *Roe* Justice Blackmun went beyond the rule of law and stare decisis is directly contradicted by the ninth amendment. In fact, the trial court in *Roe* found that the right to privacy was based on the ninth amendment's reservation of unenumerated rights in the people. *See Roe v. Wade*, 410 U.S. 113, 153 (1973).

David A. J. Richards has painstakingly detailed the constitutional history surrounding the "anti-federalists" opposition to the 1787 Constitution. *See Richards, Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986). The anti-federalists' primary complaint about the document was that it lacked a Bill of Rights. *See id.* at 839. The federalists responded that any powers not expressly granted to the federal government were reserved to the people. The federalists believed that expressly listing individual rights

A. *Liberty Includes the Right to Choose to Have an Abortion*

A woman's right to choose whether to have an abortion is not only included in the right of privacy,⁵⁵ it is also protected by the fourteenth amendment which provides that no person can be deprived of liberty without due process of law. To determine what is a constitutionally protected liberty interest, the Court has looked to " 'principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental' and thus 'implicit in the concept of ordered liberty' or . . . 'basic in our system of jurisprudence.' "⁵⁶

A woman's right to choose to have an abortion is included within these principles of justice that are protected as fundamental. Without the liberty to choose, the state has the power to require that a pregnancy, once begun, must continue. Such a requirement amounts to state-imposed pregnancy, an imposition of such magnitude as to be antithetical to the constitutional protection of individual liberty. As Justice Stevens stated in his dissent in *Meachum v. Fano*:⁵⁷

protected by the Constitution would imply that those rights alone were protected, to the exclusion of others that were unexpressed. *See id.* at 840. Many states refused to ratify the document until convinced that a Bill of Rights, including the ninth amendment, would be added. The ninth amendment explicitly reserved unenumerated rights to the people. *See id.*; *see also Griswold*, 381 U.S. at 487-90 (Goldberg, J., concurring)(documenting purpose of ninth amendment as recognizing unenumerated fundamental rights protected by Constitution).

This history and its focus on the ninth amendment demonstrates that, contrary to Bopp and Coleson's argument, the Bill of Rights recognizes that not all individual rights are enumerated. *See Richards, supra*, at 840. Professor Tribe notes that "[i]t is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is not a source of rights as such; it is simply a rule of how to read the Constitution." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-3, at 776 n.14 (2d ed. 1988)(emphasis in original). Significantly, the ninth amendment's reservation of unenumerated rights retained by the people would include a woman's right to choose an abortion *at any stage of her pregnancy*, not the more restricted right that was recognized in *Roe*. *See Means, supra* note 51, at 374-75. *See also Roe*, 410 U.S. at 135 n.26 (citing Means for proposition that even post-quickening abortion was never a common-law crime). According to Means, the common law in effect when the ninth amendment was ratified in 1791 gave women an unfettered liberty to choose to have an abortion. *See Means, supra* note 51, at 374. In fact, this right had been protected since the fourteenth century. *See id.* at 377. The ninth amendment, by expressly reserving to the people those rights unenumerated in the Constitution, surely included the right of a woman to choose to have an abortion. *See id.*; *see also infra* notes 97-98 and accompanying text (supporting this view of history). This is true even if one interprets the ninth amendment as of the date of ratification of the Bill of Rights, and not "connotatively in light of contemporary circumstances." *Richards, supra* at 826.

55. *See Roe*, 410 U.S. at 155.

56. L. TRIBE, *supra* note 54, § 11-2, at 773 (footnotes omitted).

57. 427 U.S. 215 (1976).

[N]either the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty I had thought it self-evident that all men⁵⁸ were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects.⁵⁹

In *Palko v. Connecticut*,⁶⁰ Justice Cardozo analyzed the meaning of the liberty interest protected by the fourteenth amendment. He examined the particular individual freedoms protected against intrusion by the federal government and considered which interests had been "absorbed" by the fourteenth amendment making them resistant against intrusion by the states.⁶¹ As an organizing

58. Today, these inalienable rights, acknowledged as being self-evidently endowed in men, also have been constitutionally recognized as endowed in women. *See* *Craig v. Boren*, 429 U.S. 190 (1976)(same); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)(same); *Frontiero v. Richardson*, 411 U.S. 677 (1973)(same); *Reed v. Reed*, 404 U.S. 71 (1971)(equality on the basis of sex protected by the Constitution).

Whether liberty is truly granted to women, however, has been questioned:

Inequality because of sex defines and situates women as women. If the sexes were equal, women would not be sexually subjected. Sexual force would be exceptional, consent to sex could be commonly real, and sexually violated women would be believed. If the sexes were equal, women would not be economically subjected, their desperation and marginality cultivated, their enforced dependency exploited sexually or economically. Women would have speech, privacy, authority, respect, and more resources than they have now. Rape and pornography would be recognized as violations, and abortion would be both rare and actually guaranteed.

In the United States, it is acknowledged that the state is capitalist; it is not acknowledged that it is male. The law of sex equality, constitutional by interpretation and statutory by joke, erupts through this fissure, exposing the sex equality that the state purports to guarantee.

C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215 (1989). Given this truth, at least truth as encountered by countless women, it may seem questionable to proceed with an analysis that a woman's right to choose an abortion is protected under the fourteenth amendment's due process clause. But this feeling of unease is overcome when one returns to the purpose of this Article: to expose the invalidity of Bopp and Coleson's views of abortion. Regardless whether sexual equality exists in any form in the United States, it is unquestionable that the basis for pursuing that equality is provided in the Constitution. From such a foundational assumption, this Article argues that women have a liberty interest in being free to choose an abortion.

59. *See Meachum*, 427 U.S. at 230. *Accord* L. TRIBE, *supra* note 54, § 15-3, at 1312.

60. 302 U.S. 319 (1937).

61. *See id.* at 323-28. Justice Cardozo was trying to decide which Bill of Rights provisions to "incorporate" in defining the meaning of the liberty interest protected by the fourteenth amendment. *See* L. TRIBE, *supra* note 54, § 11-2, at 772-73. Justice Black argued that the Bill of Rights set an outer boundary on the substantive reach of the fourteenth amendment. *See* *Adamson v. California*, 332 U.S. 46, 69-72, 77-78, 83-85, 89-90 (1947)(Black, J., dissenting). The ninth amendment, however, "states a rule of construction pointing away from [this] reverse incorporation view that only the interests secured by the Bill of Rights

principle, he found that those freedoms, which are "implicit in the concept of ordered liberty," are protected against state infringement by way of the fourteenth amendment's due process clause.⁶² He excluded the right to trial by jury⁶³ and the immunity from prosecution except by indictment as "not of the very essence" of ordered liberty.⁶⁴ Abolishing those rights would not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁶⁵ Justice Cardozo further noted that the freedoms absorbed by the fourteenth amendment were those that, if sacrificed, would result in the demise of liberty and justice.⁶⁶ He concluded that:

[The] domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action [L]iberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.⁶⁷

Justice Cardozo ended his opinion in *Palko* by asking whether destruction of the interest at stake would violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"⁶⁸ Although the Court answered "no" in *Palko* as to the protection against double jeopardy by the states,⁶⁹

are encompassed within the 14th amendment, and *at most* provides a positive source of law for fundamental but unmentioned rights." L. TRIBE, *supra* note 54, § 11-3, at 774-75.

62. *Palko*, 302 U.S. at 325; *see also* *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965)(Goldberg, J., concurring). Justice Goldberg argued that:

[T]he Ninth amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

Id.

63. *See Palko*, 302 U.S. at 324. However, in *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the right to a jury trial in a criminal case was incorporated into the fourteenth amendment.

64. *Palko*, 302 U.S. at 325.

65. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

66. *See id.* at 326.

67. *Id.* at 327 (footnote omitted).

68. *Id.* at 328 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

69. *See id.* *But see* *Benton v. Maryland*, 395 U.S. 784 (1969)(incorporating double jeopardy provision of fifth amendment into fourteenth amendment's restrictions on state intrusion).

a resounding "yes" must follow this question when applied to the liberty interest at stake in a woman's right to choose whether to have an abortion.

Bopp and Coleson, while discussing whether the right to an abortion is inherent in the right to privacy,⁷⁰ assert that the right to abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁷¹ They reach this conclusion by referring to the history of nineteenth- and twentieth-century abortion law,⁷² and they repeat Justice White's claim from *Thornburgh* that "a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion."⁷³ Thus, they conclude that the right to have an abortion is not fundamental and can be restricted by the states merely upon showing a rational relationship between a legitimate state interest and the abortion statute in question.⁷⁴

Bopp and Coleson also challenge the validity of the *Palko* formulation of when state statutes impinge on the liberty interest protected by the fourteenth amendment's due process clause.⁷⁵ Rather than using a formulation as "abstract" as the one in *Palko*,⁷⁶ they claim that the *Roe* court should have used the formulation from *Duncan v. Louisiana*.⁷⁷ In *Duncan*, the Court stated that whether the due process clause protects a particular liberty interest is determined by "whether given this kind of [common-law] system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."⁷⁸ Although they concede that *Duncan* was not expressly extended to due process analysis until *Moore v. East Cleveland*,⁷⁹ they refer to *Palko*'s "questionable contemporary vitality"

70. Bopp and Coleson do not discuss whether the liberty interest protected by the due process clause of the fourteenth amendment, aside from its privacy component, protects a woman's right to choose to have an abortion. The analysis of the privacy right is the same analysis used when discussing any substantive challenge under the due process clause. Therefore, I refer to Bopp and Coleson's analysis of the right to privacy in this section.

71. Bopp & Coleson, *supra* note 2, at 236 n.410 (quoting *Palko*, 302 U.S. at 325).

72. *See id.* at 238-40.

73. *Id.* at 236 n.410 (quoting *Thornburgh v. American College of Obstetrics & Gynecology*, 476 U.S. 747, 793 (1986)(White, J., dissenting)).

74. *See supra* note 42 and accompanying text.

75. *See* Bopp & Coleson, *supra* note 2, at 237.

76. *Id.* at 237 n.413 (citing *Moore v. East Cleveland*, 431 U.S. 494, 503-04 n.12 (1977), which noted the "abstract formula" of *Palko* and the more restrictive, historically based test of *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

77. *See id.*

78. *Duncan*, 391 U.S. at 149-50 n.14.

79. 431 U.S. 494 (1977).

when *Roe* was decided."⁸⁰

Regardless whether one uses the *Palko* test or the *Duncan* test, it is evident that Bopp and Coleson entirely miss the point in analyzing the liberty interest protected by the fourteenth amendment's due process clause. Whether the *right to have an abortion* is rooted in the traditions and conscience of our people may be open to question. The *right to choose to have an abortion*, however, is fundamentally rooted in the traditions and conscience of our people. When the focus is placed on the choice whether to have an abortion, due process protection for the liberty to make that choice is found easily.

In this way, *Carey v. Population Services International*⁸¹ focused on the choice involved, not the particular practice. The *Carey* Court declared a New York statute⁸² unconstitutional for criminalizing the sale of contraceptives by anyone but licensed pharmacists.⁸³ The appellants argued that the Court had not accorded fundamental status to the right of access to contraceptives, and thus the state had the power to limit or prohibit the distribution of contraceptives.⁸⁴ The Court noted that this argument was fatally flawed because it "overlooks the underlying premise . . . that the Constitution protects 'the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.'"⁸⁵

The Court stated that the same test must be applied when considering state regulations burdening the individual's "right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely."⁸⁶ Such regulations must serve compelling state interests and must be drawn narrowly to effect only those legitimate state interests.⁸⁷ The Court explained:

80. Bopp & Coleson, *supra* note 2, at 237 (citing Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 931 n.79 (1973)).

81. 431 U.S. 678 (1977).

82. N.Y. EDUC. LAW § 6811(8) (McKinney 1985).

83. See *Carey*, 431 U.S. at 681-82. The Court concentrated on the privacy aspect of the liberty protected by the due process clause of the fourteenth amendment as the basis for this determination. See *id.* at 684. The analysis used by the Court is the same when considering the liberty interest per se.

84. See *id.* at 686-87.

85. *Id.* at 687 (emphasis added)(citation omitted).

86. *Id.* at 688.

87. See *id.*

This is so not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the *constitutionally protected right of decision* in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*.⁸⁸

Thus, Justice White, and Bopp and Coleson are incorrect in focusing on whether under the Anglo-American regime a particular rule or set of rules had been established regarding abortion. The correct focus is on the decision to be made. That decision is protected from state regulation by the due process clause because it is fundamental to preserving liberty for pregnant women.

Furthermore, even if we apply the *Duncan* formula of concentrating on an Anglo-American regime of ordered liberty, the right to choose whether to have an abortion is protected as fundamental by the due process clause. The fundamental nature of this right can be established in two ways. First, one need only look at the history of abortion laws in the United States and the purpose behind those laws to discover that states did not significantly restrict abortion until the late nineteenth century and then only at the insistence of the medical profession.⁸⁹ Protection of a woman's right to choose an abortion is more consistent with Anglo-American history than were the restrictive laws passed in the late 1800s.

Second, previous Supreme Court precedents explaining the breadth of the liberty interest protected by the due process clause demonstrate that the right to choose is included within this definition of liberty.⁹⁰ Under the American regime, the liberty interest has been held to include the freedom to choose one's actions in areas significantly less intrusive on individual liberty than remaining pregnant and bearing a child. Because those choices are protected by the due process clause, so too is the choice whether to have an abortion.

In their review of American history, Bopp and Coleson argue that, from the mid-nineteenth century, states enacted "stringent prohibitions on abortion" that were "much stricter than what the Court imposed in *Roe*."⁹¹ They argue on the basis of *Duncan*, therefore, that American abortion rights were not "fundamental in the context of the criminal processes."⁹² They further claim that

88. *Id.* at 688-89 (emphasis added).

89. See *infra* notes 95-120 and accompanying text.

90. See *infra* notes 121-143 and accompanying text.

91. Bopp & Coleson, *supra* note 2, at 239.

92. *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968)).

“[v]irtually every aspect of the [*Roe*] Court’s recitation of history has been challenged” and “thoroughly refuted.”⁹³ Because the right to choose to have an abortion was restricted at one point in history, they claim that the right is not fundamental and thereby is subject to extensive state restriction.

Bopp and Coleson refer to articles challenging as inaccurate the Court’s view of the “quickenings” distinction, the Hippocratic oath, Plato’s Republic, and historical Christian views.⁹⁴ This history, however, falls outside the American statutory scheme. When one examines the common and statutory law of the United States, a different picture emerges. Even a quick review indicates that women historically have had the right to choose abortion. When that right has been restricted, the restriction was a result of an attempt by American doctors to gain control over medicine.

The origins and evolution of American abortion policy from 1800-1900 are illuminating.⁹⁵ No legislation addressed the subject of abortion in the United States in 1800, and abortion was governed by traditional British common law.⁹⁶ That law did not recog-

93. *Id.*

94. *See id.* at 239 n.430. One commentator rejects the idea that the *Roe* Court erred by noting historical support for abortion.

Surprising as it may seem, the view that abortion is murder is a relatively recent belief in American history. To be sure, there has always been a school of thought, extending back at least to the Pythagoreans of ancient Greece, that holds that abortion is wrong because the embryo is the moral equivalent of the child it will become. Equally ancient however is the belief articulated by the Stoics: that although embryos have some of the rights of already-born children (and these rights may increase over the course of the pregnancy), embryos are of a different moral order, and thus to end their existence by an abortion is not tantamount to murder.

Perhaps the most interesting thing about these two perspectives (which have co-existed over the last two thousand years) is the fact that modern-day subscribers to the first point of view—that abortion is always murder—have been remarkably successful in America at persuading even opponents that their view is the more ancient and the more prevalent one.

K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 11 (1984). Another commentator adds that virtually all preindustrial societies accepted abortion, considering the fetus as a part of the mother “as the fruit is a part of the tree till it ripens and falls down.” L. GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 35-36 (1976).

95. *See* J. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978). Bopp and Coleson cite Mohr for the proposition that the period of 1860-1880 resulted in a “burst of anti-abortion legislation.” Bopp & Coleson, *supra* note 2, at 238 n.425 (citing J. MOHR, *supra*, at 200). As the next few pages of this article indicate, although this “burst” of anti-abortion legislation did occur, a thorough look at American history shows that this legislation is, in fact, aberrational. Luker also documents this period of history and reaches most of Mohr’s conclusions as well. *See* K. LUKER, *supra* note 94, at 11-39.

96. *See* J. MOHR, *supra* note 95, at 3.

nize abortion as criminal until after quickening, which generally occurred late in the fourth or early in the fifth month.⁹⁷ "American women in 1800 were legally free to attempt to terminate . . . a pregnancy until . . . that pregnancy was incontrovertibly confirmed by the perception of fetal movement."⁹⁸

The earliest American abortion laws were passed between 1821 and 1841 in ten states.⁹⁹ These first abortion statutes resulted from a desire to control medical practice and the dangerous medical treatments for abortion, rather than from public pressures to deal with abortion as morally problematic.¹⁰⁰ Many doctors believed that abortion was unjustifiable at quickening. Quickening was simply one step in the process toward gestation, and thus, according to these doctors, it was wrong to terminate pregnancy before quickening as well.¹⁰¹ The states did not accept this argument. Sixteen of twenty-six states had no abortion laws as of 1841, and five of those restricted it only after quickening.¹⁰²

By the early 1840s, abortion had become an openly practiced service.¹⁰³ From 1840 to the 1870s, the American public "did not consider the termination of pregnancy prior to quickening an especially serious matter."¹⁰⁴ The chief concern of American women during this time was their own health and safety.¹⁰⁵ The women who obtained abortions were not desperate, single women concerned about scandal; they were married, middle- or upper-class women.¹⁰⁶

"[T]he evolution of abortion policy in the United States was inextricably bound up with the history of medicine and medical practice in America, and would remain so through the rest of the nineteenth century."¹⁰⁷ Only after the founding of the American Medical Association (AMA) and its drive toward professionalizing the practice of medicine did the movement to pass restrictive abortion laws take effect.¹⁰⁸ The growing AMA was officially committed

97. *See id.*

98. *Id.* at 4.

99. *See id.* at 20.

100. *See id.* at 20-45.

101. *See id.* at 36.

102. *See id.* at 43.

103. *See id.* at 47.

104. *Id.* at 73.

105. *See id.* at 74.

106. *See id.* at 86.

107. *Id.* at 31.

108. *See id.* at 147-48.

to outlawing abortion in the United States and its efforts were "the single most important factor in altering the legal policies toward abortion in this country."¹⁰⁹ One commentator contends, however, that these doctors were frustrated by the lack of public support for their position¹¹⁰ and by the "unwillingness of American wives to remain in their places bearing and raising children."¹¹¹

To many doctors the chief purpose of women was to produce children; anything that interfered with that purpose, or allowed women to 'indulge' themselves in less important activities, threatened marriage, the family, and the future of society itself. Abortion was a supreme example of such an interference for these physicians.¹¹²

These doctors were determined to prevent women from risking American society's future by denying their biologically determined social imperative of bearing children.¹¹³ Doctors spent the period from 1860 to 1880 "educating" the American public to adopt their view of abortion.¹¹⁴ This educational effort succeeded in changing

109. *Id.* at 157; see also K. LUKER, *supra* note 94, at 29 (drive for professionalizing medicine is the context in which doctors' political activity against abortion must be viewed). Some doctors wanted to upgrade their profession by obtaining licensing laws to purge their ranks of the incompetent. *See id.* at 28. Although they could not show direct proof of their own medical superiority over folk practitioners, the "regular" doctors chose to claim moral stature by opposing abortion along with touting their technical expertise and superior training. *See id.* at 31. Their choice of abortion as the focus of their moral crusade, rather than other issues such as alcoholism, slavery, venereal disease, or prostitution, was calculated to provide them with the opportunity for claiming that they were saving lives. *See id.* In order to maintain control of abortion practice, however, "what the physicians did, in effect, was to simultaneously claim both an *absolute* right to life for the embryo (by claiming that abortion is always murder) and a *conditional* one (by claiming that doctors have a right to declare some abortions 'necessary')." *Id.* at 32. Luker claims that the core of their movement, therefore, "was a *reallocation* of social responsibility" for determining the rights of the embryo against the rights of the woman. *Id.* at 35. "From the late nineteenth century until the late 1960s, it was doctors, not women, who held the right to make that assessment." *Id.*

110. *See* J. MOHR, *supra* note 95, at 166.

111. *Id.* at 168.

112. *Id.* at 169.

113. *See id.* at 170.

114. *See id.* at 171. It is important to remember, however, the "public" that doctors educated during their crusade was the male population. Women were not granted the right to vote until the nineteenth amendment was passed in 1920 and were unable to influence directly the laws passed by legislators. *See* U.S. CONST. amend. XIX § 1. Thus, the political discussion excluded women's concerns with changes in abortion policy. This essentially male political discussion led to drastic statutory changes on women's right to choose to have an abortion—a choice that had been available since the beginning of the American regime.

At the time of these changes in abortion laws, married women, at least, were completely excluded from legal recognition. Traditional legal concepts treated the husband and wife as having only one identity: the husband's. These legal concepts prohibited the wife from: contracting without his consent; entering into various professions including law; controlling her own property or earnings; maintaining legal custody and control of her children; suing; or

American abortion policy. Most legislation passed during this time criminalized abortion, accepting the doctors' claims that abortion at any time during pregnancy should be restricted.¹¹⁵

Twentieth-century laws restricting abortion resulted from a number of crusades by doctors and the public.¹¹⁶ Prior to *Roe*, "a great deal of pressure had built . . . in favor of altering the anti-abortion policies that twentieth-century Americans inherited from their nineteenth-century predecessors."¹¹⁷ A new constituency entering the political field was the source of much of this pressure. This constituency was made up of a new generation of women.

A group of women who valued motherhood, but *valued it on their own timetable*, began to make a new claim, one that had never surfaced in the abortion debate before this, that abortion was a woman's *right*. Most significantly, they argued that this right to abortion was essential to their right to equality—the right to be treated as individuals rather than as potential mothers.¹¹⁸

The late nineteenth-century's restrictions on abortion were

making a will. Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 Wis. L. Rev. 819, 828-29. Given her lack of legal existence, it is not surprising that laws were passed completely negating a woman's choice to have an abortion.

Given their total exclusion of women's lives and reality from their argument, it is also not surprising that Bopp and Coleson use the passage of such laws to support their claim that the "American regime of ordered liberty" did not permit abortion. Bopp and Coleson support the Court's overturning the "separate but equal" doctrine from *Plessy v. Ferguson*, 163 U.S. 537 (1896). Likewise, they agree with the Court's substitution of the "no-state-enforced-discrimination" rule of *Brown v. Board of Education*, 347 U.S. 483 (1954), and find such a substitution to be constitutionally valid. See Bopp & Coleson, *supra* note 2, at 196 n.92. But they criticize the Court's overturning the nineteenth-century statutes prohibiting abortion, even though those abortion statutes were passed at about the same time as the *Plessy* statute. Their willingness to recognize the need "for some modification of the rules in light of changing circumstances" as applied to "separate-but-equal", but not as applied to prohibitive abortion laws again underscores the incoherence of their argument. *Id.* at 196.

115. See J. MOHR, *supra* note 95, at 200. Gordon notes that this legislation "was a severe blow to women" because, "next to the long tradition that abortion was a crime only after quickening, these laws appear as a repeal of a time-honored *right* of women." L. GORDON, *supra* note 94, at 57.

116. See J. MOHR, *supra* note 95, at 200. It is ironic that Bopp and Coleson argue that American history excludes the right to choose to have an abortion from the concept of ordered liberty because of the restrictive abortion laws passed in the second half of the nineteenth century. See Bopp & Coleson, *supra* note 2, at 238-39. Those laws were the result of the physicians' crusade discussed above. Thus, it would seem that physicians are natural allies of Bopp and Coleson. Physicians in the twentieth century, however, played a central role in overturning those early restrictions. See K. LUKER, *supra* note 94, at 16. Thus, modern physicians are the focus of Bopp and Coleson's disdain. See Bopp & Coleson, *supra* note 2, at 191, 198-199, 283-291.

117. J. MOHR, *supra* note 95, at 250.

118. K. LUKER, *supra* note 94, at 92 (emphasis in original).

not examples of “‘normal’ or ‘usual’ abortion policies, but rather [were] deviations from the norm.”¹¹⁹

Though Mr. Justice Blackmun’s majority opinion did not push this line of argument any further, the point was evident: *Americans would come to recognize the anti-abortion laws of the late nineteenth century as the real aberrations in the history of their nation’s abortion policies* and realize that the *Roe* guidelines represented an attempt by the Court to formulate a modern version of the older, though ultimately more appropriate, abortion policies of the past, in the wake of a concerted, though ultimately inappropriate, attempt to impose criminal proscription as the national norm.¹²⁰

The history of abortion in America does not support Bopp and Coleson’s claim that the right to choose to have an abortion is not fundamental under the American regime of ordered liberty. A more accurate reading of history shows that the right to choose is fundamental and was widely recognized until the late nineteenth-century.

Court precedents also establish that the right to choose an abortion is within the liberty interest protected by the due process clause.¹²¹ In *Meyer v. Nebraska*,¹²² the Court broadly defined the liberty interest protected by the due process clause. At issue was the constitutionality of a Nebraska statute that prohibited the teaching of any language other than English prior to the eighth grade.¹²³ The Court considered whether the statute unreasonably infringed on the liberty guaranteed by the fourteenth amendment.¹²⁴ The Court stated that liberty

denotes not merely freedom from bodily restraint but also the right of [individuals] to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of

119. J. MOHR, *supra* note 95, at 259.

120. *Id.* at 258 (emphasis added).

121. *See, e.g.*, *People v. Belous*, 71 Cal. 2d. 954, 963, 80 Cal. Rptr. 354, 359, 458 P.2d 194, 199 (1969) (“The fundamental right of the woman to choose whether to bear children follows from the . . . repeated acknowledgement of a ‘right of privacy’ or ‘liberty’ in matters related to marriage, family, and sex.”); *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969) (“As a secular matter, a woman’s liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy.”).

122. 262 U.S. 390 (1923).

123. *See id.* at 400-01. The Court did note that “the so-called ancient or dead languages” such as Latin, Greek, and Hebrew were not proscribed by the statute. *Id.*

124. *See id.* at 399.

[their] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free [people].¹²⁵

The Court held that the liberty interest included the freedom to teach languages other than English to students before the eighth grade.¹²⁶ The Court reasoned that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."¹²⁷ Individuals have certain fundamental rights that the state must respect¹²⁸ and absent compelling circumstances, the state was not free to infringe on these deeply rooted rights.¹²⁹ Thus, the Court's focus in *Meyer* was on access and choice in education, rather than on the narrow issue of teaching foreign languages.

The Court protected the freedom of choice again in *Pierce v. Society of Sisters*.¹³⁰ In *Pierce*, the Court considered an Oregon statute that required parents and guardians to send their children to public school. The Society of Sisters argued that the statute conflicted with "the right of parents to choose schools where their children will receive appropriate mental and religious training [and] the right of the child to influence the parents' choice of a school."¹³¹ The Court held that the statute violated the fourteenth amendment's due process clause because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."¹³²

Similarly, in *Loving v. Virginia*,¹³³ the Court found that the due process clause protects the right to choose marriage partners.¹³⁴ *Loving* involved a Virginia statute that prohibited whites from marrying non-whites.¹³⁵ The Court rejected the statute as unconstitutional, stating:

[M]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom . . . is surely to deprive all the State's citizens of liberty without due

125. *Id.*

126. *See id.* at 400.

127. *Id.*

128. *See id.* at 401.

129. *See id.* at 403.

130. 268 U.S. 510 (1925).

131. *Id.* at 532 (emphasis added).

132. *Id.* at 534-55.

133. 388 U.S. 1 (1967).

134. *See id.* at 12.

135. *See id.* at 4-5.

process of law. The Fourteenth Amendment requires that the *freedom of choice* to marry not be restricted by invidious racial discriminations.¹³⁶

Finally, in *Moore v. East Cleveland*,¹³⁷ the Court focused on the liberty interest at stake when a city attempted to prohibit extended family members from choosing to live in a single-family home. *Moore* involved an East Cleveland zoning ordinance that defined family to exclude a grandmother, her son, and her two grandsons, who were cousins, from living together in a single-family neighborhood.¹³⁸ The Court held that the zoning ordinance violated the due process clause.¹³⁹ The Court noted that it "has long recognized that *freedom of personal choice* in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."¹⁴⁰ The Court stated that numerous cases had relied on *Meyer* and *Pierce* to protect liberties, including freedom of choice regarding family life and childbearing,¹⁴¹ parental rights to custody and companionship,¹⁴² and traditional parental authority in childrearing and education.¹⁴³

The liberty interest protected by the fourteenth amendment's due process clause is broad enough to protect a woman from state restrictions on abortion. The freedom to choose whether to have an abortion is protected, just as the freedom to choose whether to teach a foreign language, whether to have one's child attend public school, whether to marry interracial, and whether to live with one's extended family are also protected. The common thread in all these decisions is the Court's understanding that, without pro-

136. *Id.* at 12 (emphasis added). The Court, however, has not protected the right of gay men and lesbians to choose their marriage partners. See Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1, 6 n.19 (1986); Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George or Mary and Alice at the Same Time?*, 10 J. CONST. L. 33 (1984); Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part II*, 11 U. DAYTON L. REV. 275, 324-25 (1986).

137. 431 U.S. 494 (1977).

138. See *id.* at 496.

139. See *id.* at 505-06.

140. *Id.* at 499 (citation omitted)(emphasis added).

141. See *id.* at 500. The Court also listed the following cases as related to freedom of choice with respect to marriage and family life: *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974)(mandatory leave requirement for pregnancy); *Roe v. Wade*, 410 U.S. 113 (1973)(abortion); and *Griswold v. Connecticut*, 381 U.S. 479 (1965)(contraceptives).

142. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

143. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1923); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

tection of these choices, the liberty interest recognized in the fourteenth amendment would have little meaning.

This liberty to make fundamental choices must include a woman's right to choose whether to have an abortion. Otherwise, she cannot retain power over her body or her life. Without such a liberty interest, the state can force her to bear a child she does not want. The impact on a woman's life and health for the nine months that she carries the child¹⁴⁴ and the risk to her life inherent in childbirth are substantial.¹⁴⁵ Moreover, she will continue to have a connection with that child for the rest of her life, even if she allows her child to be adopted.¹⁴⁶ If the Constitution's protection of liberty does not include the liberty to choose whether to bear a child, when that choice is so fundamental to a woman's life, then the constitution has *no* protections for women. Fortunately, the Court has found the right to choose an abortion to be protected.¹⁴⁷

A woman must have the right to make choices about her own life. If abortion laws are restrictive, and thus force a woman to bear a child and become a mother despite her personal choice not to do so, her constitutional liberty is violated. Restrictive abortion laws often produce enslaving impacts. These impacts can be under-

144. See Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 REV. L. SOC. CHANGE 277, 294 (1987-88).

145. See Paltrow, *supra* note 13, at 14.

146. A woman in the book *BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* spoke about giving her child up for adoption in 1952, a child who had been conceived as a result of rape:

I had a [later] miscarriage . . . I was almost nine months pregnant. I felt like that was punishment. You see, having had that child and giving it up for adoption had a tremendous effect on my life. Because of the guilt about that, I'd bring waifs home, homeless children. We've had a series of kids that would come and stay four or five months at a time.

E. MESSER & K. MAY, *supra* note 13, at 36.

This woman's daughter also spoke of the impact she observed on her mother of giving up her child for adoption:

[My father] wants to act in some way as if having a child, bringing a child into the world that was an unwanted child, is something that a woman can just forget. That it's something very clinical . . . that the baby was born, and the connection was severed. I don't think he quite understands that giving birth to a child is an emotional experience. Even in the circumstances of the child conceived in rape, I think women are able to still forge a connection with that child, separate from the act of violence that caused the conception. I think that my father is unwilling to take a look at the lifelong effect on my mother: that she still does this sort of thing, constantly bringing in waifs . . . homeless children, children in trouble.

Id. at 42.

147. See *supra* note 39 and cases cited therein.

stood by reading letters from women who avoided this enslavement because abortion laws protected their liberty interests. For example, one individual wrote:

My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chance to get a better job. I just couldn't have another baby—5 kids were enough for me to support. I didn't like the idea of going thru [sic]¹⁴⁸ with it. I felt badly for a day or two after the abortion. But it was the right thing to do. If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids through school.¹⁴⁹

Another woman stated, "On the ride home from the clinic, the relief was enormous. I felt happy for the first time in weeks. I had a future again. I had my body back."¹⁵⁰ A third woman reflected, "Personally legal abortion allowed me the choice as a teenager living on a very poor Indian Reservation to finish growing up and make something of my life."¹⁵¹ Another noted, "I cannot stress strongly enough how that one personal decision allowed me to control my life."¹⁵²

Another significant aspect of liberty is the freedom to determine how to present oneself to others and how to define one's own self-identity. Pregnancy and motherhood significantly impact a woman's self-identity. Women today may spend less time pregnant and breast-feeding than in the past, but child care is now more demanding.¹⁵³ Additionally, there is a powerful ideology associated with motherhood. This ideology is reflected in "the belief that motherhood is the natural, desired and ultimate goal of all 'normal' women, and that women who deny their 'maternal instincts' are

148. The letters incorporated into NARAL's brief were reproduced without corrections in punctuation, grammar or spelling. See Paltrow, *supra* note 13, at 12 n.1. They are reproduced verbatim here.

149. *Id.* at 20.

150. *Id.* at 23.

151. *Id.*

152. *Id.* For African American women, the enslaving impact of forced pregnancy is especially acute, given the history of African-Americans and African-American women in particular. See A.C.L.U., *supra* note 43, at 3-4.

153. See M. STANWORTH, *Reproductive Technologies and the Deconstruction of Motherhood* in REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 14 (M. Stanworth ed. 1987). "[M]othering involves responsibility not only for the physical and emotional care of children, but for detailed attention to their psychological, social and intellectual development. Motherhood is seen, more than in the past, as a full-time occupation." *Id.*

selfish, peculiar or disturbed.”¹⁵⁴ Once a woman makes the choice to become a mother, she takes upon herself the responsibility of child care, which becomes “a regular and substantial part of one’s working life.”¹⁵⁵ In fact, one commentator describes the pervasive nature that assuming motherhood can entail, arguing that motherhood can cause a woman to develop “maternal” responses, thinking, and practice.¹⁵⁶ The very development of such “maternal” aspects alters a woman’s self-identity. Moreover, the primary social groups with which a woman identifies pressure her to raise her children in a way that is acceptable to them.¹⁵⁷ Not only does she change her own identity by becoming a mother, but she also changes the way in which others view her.

Considering the impact that restrictive abortion laws have on a woman’s liberty interest, her right to choose her own self-identity and actions must be protected by the due process clause. Closely associated with this impact is the constitutionally-protected freedom of intimate association.¹⁵⁸

One commentator, Kenneth Karst, has argued that the freedom of intimate association is inherent in the Constitution.¹⁵⁹

154. *Id.* at 15. Stanworth notes that, at a conference in Oxford in 1987, Patrick Steptoe, the doctor responsible for the first test-tube baby, stated: “It is a fact that there is a biological drive to reproduce. Women who deny this drive, or in whom it is frustrated, show disturbances in other ways.” *Id.* (citation omitted). Many other doctors also share this belief. *See id.*

155. S. RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* 17 (1989).

156. *See id.* at 17-27. Ruddick differentiates between birthing labor, pregnancy and birth or “everything a woman does to protect and sustain her fetus,” and mothering. *Id.* at 50.

Mothering is an ongoing, organized set of activities that require discipline and active attention. It is best divided among several people who, in an egalitarian society, would be as likely to be male as female. Birthing labor, by contrast, is essentially female, performed by one woman (aided in many ways by others.) Pregnant women—especially if they look forward to mothering—often take a maternal attitude toward the fetus, becoming deeply attached to an infant they have yet to meet. *Id.* (emphasis added). Thus, Ruddick argues that to mother is not essentially related to women, while to birth is essentially related to women.

157. *See id.* at 17.

158. The freedom of association is a fundamental right implied in the text of the first amendment. *See* J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 42, § 11.7, at 370 (citing *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)).

159. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 637 (1980). *Accord* *Bowers v. Hardwick*, 478 U.S. 199, 205 (1986) (Blackmun, J., dissenting); *see also* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In *Roberts*, the Court recognized that one line of its decisions secures the right to enter into and maintain intimate human relationships against undue intrusion by the state. *See Roberts*, 468 U.S. at 617-18. The Court also noted that protecting this freedom of association is necessary to safeguard individual free-

Karst asserts that the freedom of intimate association¹⁶⁰ heralded by *Griswold v. Connecticut*¹⁶¹ resulted from using substantive due process to guarantee personal freedoms.¹⁶² The freedom of intimate association constitutionally protects the development of individuality.¹⁶³

The right to choose an abortion is inherent in the freedom of intimate association because of the impact such a decision has on a woman's life. Intimate associations impact the formation and shape of not only one's self-identity,¹⁶⁴ but also how that identity is perceived by others.¹⁶⁵ As Karst notes, "[t]o become a father or mother is to assume a new status, a new identity in the eyes of oneself and others . . . [which] profoundly affect[s] our personalities and our senses of self."¹⁶⁶

The freedom of intimate association includes the freedom of nonassociation.¹⁶⁷ Karst uses rape and unwanted pregnancy as two examples of what he calls "coerced intimate association [which is] the most repugnant of all forms of compulsory association."¹⁶⁸ Karst explains that the freedom of intimate association is implicated in a woman's decision whether to bear her child or to have an abortion:

The decision to have a child, whether within or outside marriage, strongly implicates the values of intimate association, particularly the values of caring and commitment, intimacy, and self-identification. The decision ranks in importance with any other a person may make in a lifetime; an attempt to imagine state interests that would justify governmental intrusions amounting to a practical prohibition on procreation and childbearing takes us out of our own experience and into an imaginary world of Malthusian nightmare.¹⁶⁹

Karst then draws a corollary between the decision to procreate, and the decision not to procreate and insists that state interference

dom that is central to the constitutional scheme. *See id.* at 618.

160. Karst argues that it is this freedom of intimate association that ties together the Court's cases dealing with "marriage and divorce, family relationships, the choice whether to procreate and various forms of intimate association outside the traditional family structure." *Karst, supra* note 159, at 625.

161. 381 U.S. 479 (1965).

162. *See Karst, supra* note 159, at 626.

163. *See id.*

164. *See id.* at 635.

165. *See id.* at 636.

166. *Id.* at 637.

167. *See id.* at 638; L. TRIBE, *supra* note 54, at 312-22, 974.

168. *Karst, supra* note 159, at 638.

169. *Id.* at 640.

with that decision can only be justified by "state interests of the highest order."¹⁷⁰ The freedom of intimate association or, more correctly the freedom of intimate nonassociation, protects women

against the enforced intimate society of unwanted children, against an unchosen commitment and a caring stained by reluctance, against a compelled identification with the social role of parent. Coerced intimate association in the shape of forced child-bearing or parenthood is no less serious an invasion of the sense of self than is forced marriage or forced sexual intimacy.¹⁷¹

The statements of women who were impacted by the decision to choose abortion support Karst's assessments. One woman stated:

When I was only 16 years old, in 1968, I found myself faced with an unplanned and an untimely pregnancy. Abortions were illegal at that time and I did not have the money or resources to know how to go about getting one way or any other way *During my pregnancy I was treated like a baby machine—an incubator without feelings—who was to produce this child for adoption for another couple who could not have children, for whatever reasons.*¹⁷²

Similarly, one couple wrote: "It is difficult to adequately describe the difference between a wanted and an unwanted pregnancy. It is something like the difference between darkness and despair, and light and joy."¹⁷³

Freedom of intimate association protects the right to choose an abortion. This right is also protected by the fourteenth amendment's due process clause. The freedom to choose whether to identify oneself as a mother and the freedom to choose whether to have a life-long parental connection with another human being is so fundamental that it must fall within the "Anglo-American regime of ordered liberty."¹⁷⁴ Thus, contrary to Bopp and Coleson's arguments, the right to choose whether to have an abortion is a fundamental interest protected by the Constitution.

B. *The Right of Privacy Protects A Woman's Right to Choose*

Bopp and Coleson's main argument with *Roe* seems to be that

170. *Id.*

171. *Id.* at 641 (footnotes omitted).

172. Paltrow, *supra* note 13, at 16 (emphasis added).

173. *Id.* at 19.

174. *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968).

they do not like the framework the Court used in announcing the right to choose an abortion. The Court held that the privacy right, which "was broad enough to encompass" the woman's right to choose to have an abortion, was located in the fourteenth amendment's concept of personal liberty and protected by the due process clause.¹⁷⁵ Bopp and Coleson belittle this protection and argue that the use of substantive due process analysis fatally flaws the Court's reasoning.¹⁷⁶ Apparently, they agree with Justice White's assertion in *Bowers v. Hardwick*¹⁷⁷ that the Court is "most vulnerable and comes nearest to illegitimacy" when it hands down decisions "having little or no cognizable roots in the language or design of the Constitution."¹⁷⁸

Bopp and Coleson also claim that the *Roe* decision broke with *stare decisis* because the privacy cases the Court relied on to support its decision were not related to abortion.¹⁷⁹ Bopp and Coleson

175. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

176. Bopp & Coleson, *supra* note 2, at 221.

177. 478 U.S. 186 (1986).

178. *Id.* at 194. David A. J. Richards argues, however, that the founders intended the constitution to be read "connotatively in light of contemporary circumstances, not denotatively as of 1787." Richards, *supra* note 54, at 826 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). Denotative reading limits constitutional interpretation to how the founders would have applied the language and, thus, is insensitive to changing conditions. *See id.* A connotative reading allows constitutional interpretation to remain true to the text, but "advances the Founders' unambiguous aspiration for long-term durability of the written Constitution." *Id.* Besides reading the commerce clause connotatively, Richards argues that the preference for connotative language over denotative language also applies to protecting individuals' rights. *See id.* at 826-27. Connotative interpretation, combined with the ninth amendment's protection of rights not enumerated in the Constitution, results in a strong argument for protecting a woman's right to choose whether to have an abortion.

Richards chastises Justice White for his claim in *Bowers* that the privacy cases from *Griswold* to *Carey* have "little or no textual support in the constitutional language." *Id.* at 848 (quoting *Bowers*, 478 U.S. at 191). Similarly, I chastise Bopp and Coleson for their claim that

[t]he Court has never demonstrated the connection between the Constitution and the Court-created right to choose abortion . . . [thereby] transgress[ing] a fundamental principle of the rule of law—that all are bound by the law, even justices. They may not lawfully exercise power where it is unauthorized by the Constitution.

Bopp & Coleson, *supra* note 2, at 200.

While it may be true that Blackmun did not do as much as he could have to clarify the links between the right to choose an abortion, the right to privacy, and the protections granted by the Constitution, he did establish that such a link exists. Further decisions by the Court have developed and cemented the link between a woman's right to choose and the constitution's role in protecting women from overly restrictive state statutes. *See supra* note 39 and accompanying text.

179. Bopp & Coleson, *supra* note 2, at 220. The decisions on which the Court relied are: *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Loving v. Virginia*,

applaud Richard Epstein's condemnation of *Roe* and his claim that it was difficult to see how the privacy precedents cited by the Court were linked to *Roe* or explained its result.¹⁸⁰ They also agree with John Hart Ely that the Court did not offer much assistance in showing how the privacy cases can be combined with *Roe* to make a coherent doctrinal unit.¹⁸¹

Perhaps Bopp, Coleson, Epstein, and Ely cannot see an internal coherence linking the privacy cases to the right to choose an abortion enunciated in *Roe* because they have failed to consider women's interests and thus have viewed the constitutional doctrine out of context. When seen from the point of view of a woman facing a state-imposed unwanted pregnancy, it becomes clear that the right to privacy protects a woman's right to determine whether to remain pregnant. The essence of this right to choose is "the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals."¹⁸² For the woman involved, nothing less than her individual privacy—both bodily and emotionally—are at risk by any threatened loss of her right to decide whether to bear a child or to have an abortion.

In a trilogy of cases, *Griswold v. Connecticut*,¹⁸³ *Eisenstadt v. Baird*¹⁸⁴ and *Roe v. Wade*,¹⁸⁵ the Court recognized its responsibility to prevent the states from enacting prohibitive contraception and abortion laws that virtually could eliminate an individual's right to privacy. *Griswold*, for example, gave constitutional recognition, if not substance, to the idea of a right to privacy inherent in the first ten amendments to the Constitution.¹⁸⁶ The decision also

388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Olmstead v. United States*, 277 U.S. 438 (1928); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Union Pac. Ry. v. Botsford*, 141 U.S. 250 (1891); and *Boyd v. United States*, 116 U.S. 616 (1886). *See id.*

180. *See* Bopp & Coleson, *supra* note 2, at 220 (citing Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 170).

181. *See id.* (citing Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978)).

182. *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970), *aff'd*, 410 U.S. 113 (1973).

183. 381 U.S. 479 (1965)(right to privacy protected married couple's use of contraceptives).

184. 405 U.S. 438 (1972)(right to privacy protected individuals' use of contraceptives).

185. 410 U.S. 113 (1973)(right to privacy protected women's right to choose an abortion).

186. Justice Douglas specifically referred to the first, third, fourth, fifth and ninth amendments and the penumbras surrounding the specific guarantees included in those

grounded part of its protection of the married couple's use of contraceptives in the traditional sanctity accorded marital relationships and in the privacy that surrounds such relationships.¹⁸⁷ Similarly, the *Eisenstadt* Court, using an equal protection analysis, found constitutional protection for unmarried individuals to use contraceptives.¹⁸⁸ The Court noted that the right of privacy was implicated by a statute that prohibited the use of contraceptives by unmarried individuals.¹⁸⁹ Justice Brennan, writing for the Court in an oft-quoted passage, stated:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹⁹⁰

Brennan also referred to *Stanley v. Georgia*¹⁹¹ for the proposition that fundamental rights include "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."¹⁹²

Bopp and Coleson claim that these privacy cases are unrelated to the right to choose recognized in *Roe*.¹⁹³ In particular, they criticize the Court for failing to show how a right to privacy, assuming such a right exists, includes a right to choose to have an abortion and how substantive due process provides the doctrinal analysis for such a right.¹⁹⁴ Bopp and Coleson seem to be arguing that because the Court's previous privacy decisions did not include a case on abortion, *Roe* could not be decided on privacy grounds.

amendments. See *Griswold*, 381 U.S. at 484.

187. See *id.* at 486.

188. See *Eisenstadt*, 405 U.S. at 454-55.

189. See *id.* at 453.

190. *Id.* (emphasis in original).

191. 394 U.S. 557 (1965).

192. *Eisenstadt*, 405 U.S. at 453 n.10 (quoting *Stanley*, 394 U.S. at 564). Brennan went on to quote from Justice Brandeis' dissenting opinion in *Olmstead v. United States* that "[t]he makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized [people]." *Id.* at 453-454 n.10 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1968)(Brandeis, J., dissenting)).

193. See Bopp & Coleson, *supra* note 2, at 220.

194. See *id.* at 221.

The error in Bopp and Coleson's reading of *Roe* again comes from their conspicuous and seemingly conscious¹⁹⁵ exclusion of women from the abortion discussion. Women denied abortions due to restrictive state abortion laws have no trouble finding an inexorable link between a constitutionally-protected right to privacy and the right to choose. If the privacy right enunciated by the Court in *Griswold* and *Eisenstadt* is to mean anything for women, it is incumbent that it include the right to choose. When abortion rights are restricted, the fear of unwanted pregnancy subverts a woman's sexuality:

My husband and I take our responsibility to our children and any potential children seriously. I take no chance with my contraception except its own failure rate. And any of them can fail. I hunger for a time when this will stop, when we can know and not simply assume that our plans to prevent conception will work. But until that time we must have the right to choose, either to abort or to give birth. Without that choice we love in the shadow of fear.¹⁹⁶

Griswold and *Eisenstadt* make it clear that the right of individuals, married or unmarried, to engage in nonprocreative sexual intimacy is protected by the Constitution.¹⁹⁷ If this freedom is to mean anything for women, then women must have the right to engage in sexual intimacy without the fear of unwanted pregnancy.¹⁹⁸ Mitigating this fear requires protecting the woman's right to choose an abortion when contraceptive failure occurs.¹⁹⁹

195. It would seem deliberate that, in an article spanning 174 pages, the authors only raised the impact of unwanted pregnancy on women forced to bear children by restrictive abortion laws a handful of times.

196. Paltrow, *supra* note 13, at 19.

197. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). The right to engage in nonprocreative sexual freedom, however, has not been extended to gays and lesbians. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

198. See Karst, *supra* note 159, at 654. In fact, birth control was designed specifically to permit sexual intercourse whenever desired without the risk of pregnancy. See L. GORDON, *supra* note 94, at 100. No method of birth control, however, currently exists that is completely effective at preventing pregnancy. See THE BOSTON WOMEN'S HEALTH COLLECTIVE, *THE NEW OUR BODIES, OUR SELVES: A BOOK BY AND FOR WOMEN* 224 (1984).

199. In fact, Catherine MacKinnon argues that abortion laws exist as they are, not to protect women from unwanted pregnancy, but to protect men in their desire for heterosexual sex.

[U]nder conditions of gender inequality, sexual liberation in this sense does not so much free women sexually as it frees male sexual aggression. The availability of abortion removes the one real consequence men could not easily ignore, the one remaining legitimated reason that women have had for refusing sex besides the headaches. As Andrea Dworkin puts it, analyzing male ideology on abortion: "Getting laid was at stake."

Even though most women will not use abortion as a post-conception form of birth control, the right to privacy includes the right to engage in sexual activity without the fear that the state will force a woman to continue an unwanted pregnancy. When an unwanted pregnancy occurs, a woman must be given the option, on her own initiative, to terminate her pregnancy. Without such an option, when a state-sanctioned pregnancy forces a woman into the role of mother and childbearer, privacy has little meaning for her. A state cannot be permitted to impose unwanted pregnancy on women in contravention of their own desires. To require women to carry unwanted pregnancies to term would contradict the constitutional protections women have gained in the last two decades. It would force them back into the domestic sphere where they were simply "breeders" for their husbands and families.

Bopp and Coleson's argument against constitutional protection for the right to choose is based on their assertion that the right to abortion is not fundamental in the American concept of ordered liberty. As noted above,²⁰⁰ this assertion incorrectly states the nature of the rights protected by the Constitution. Rather than being a right to have an abortion, there is a right to make fundamental decisions that affect an individual, which includes the right to choose to have an abortion. The Constitution protects a woman's choice and it is the protection of that choice that gains constitutional significance.

Bopp and Coleson also miss the constitutional significance of the Court's much maligned decision in *Bowers v. Hardwick*.²⁰¹ They claim that *Bowers* was decided correctly, while *Roe* was decided incorrectly, because *Bowers* accurately noted the historical prohibition of gay²⁰² sodomy in American history.²⁰³ They also ar-

C. MACKINNON, *supra* note 58, at 190 (footnote omitted).

200. See *supra* notes 75-88 and accompanying text.

201. 478 U.S. 186 (1986). A few of the numerous articles that condemn the Court's decision in *Bowers* are: Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988); Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); Note, *Bowers v. Hardwick: Is There a Right to Privacy?*, 37 AM. U.L. REV. 487 (1988); Note, *Bowers v. Hardwick: The Supreme Court Closes the Door on the Right to Privacy and Opens the Door to the Bedroom*, 64 DEN. U. L. REV. 599 (1988); Note, *The Constitutional Privacy Doctrine After Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process*, 62 SO. CAL. L. REV. 1297 (1989); Note, *The Supreme Court as Super Legislature Emasculates the Right to Privacy: Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), 21 SUFFOLK U.L. REV. 853 (1987).

202. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 802 (1979). Rivera explains that "gay" is

gue that the historical treatment in *Bowers* was accurate, if not complete, and that *Bowers* correctly noted that the practice of gay sodomy "was not rooted in the traditions of this nation nor essential to a scheme of ordered liberty."²⁰⁴ Therefore, according to Bopp and Coleson, the right to engage in homosexual sodomy is not fundamental and is subject to restriction, and even prohibition, by the states.²⁰⁵ Justice White, writing for the Court in *Bowers*, similarly noted that the earlier privacy cases were related to family, marriage or procreation, and he argued that no connection has been made between those familial activities and gay sodomy.²⁰⁶ Thus, Justice White concluded that no fundamental right to engage in gay sodomy exists because of the historical proscriptions against those activities.²⁰⁷

But the question in *Bowers* should not have been whether the practice of gay sodomy was legal or illegal historically. Rather, the question should have been whether the Constitution protects an individual's decision to practice gay sodomy. That fundamental choice is protected by the right to privacy, just as the choice whether to possess obscene materials in one's home,²⁰⁸ the choice whether to use contraceptives,²⁰⁹ the choice to marry interracially,²¹⁰ and the choice to have an abortion,²¹¹ among others, are protected by the privacy right. Both Justice Blackmun and Justice Stevens in their *Bowers* dissents note this misconstruction of the constitutional question. Justice Blackmun emphasizes that previous privacy cases have protected the decision whether to marry and the decision whether to have a child.²¹² As Justice Blackmun

synonymous with the term "homosexual." See *id.* This Article uses the term "gay" in place of "homosexual."

203. See Bopp & Coleson, *supra* note 2, at 240-41.

204. *Id.* at 241.

205. See *id.*

206. See *Bowers v. Hardwick*, 478 U.S. 186, 186-91 (1986).

207. See *id.* at 192-93.

208. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

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

210. See *Loving v. Virginia*, 388 U.S. 1 (1967).

211. See *Roe v. Wade*, 410 U.S. 113 (1973).

212. See *Bowers v. Hardwick*, 478 U.S. 186, 204-05 (1986)(Blackmun, J., dissenting).

Justice Blackmun notes:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

concludes, "we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."²¹³ Justice Stevens also emphasized that fundamental decisions are protected by the privacy right.

[H]e wrote broadly of the 'individual's right to make certain unusually important decisions' and 'respect for the dignity of individual choice,' rejecting the notion that such liberty belongs to heterosexuals alone. 'From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions.'²¹⁴

The *Bowers* Court erred because it focused too narrowly on the "practice" regulated by the Georgia statute, and it did not recognize the significance of an individual's decision to the concepts of privacy and personhood. If the Court had focused on constitutional protection for the choice involved in the practice of gay sodomy, then *Bowers* would have resulted in the same protection for the choice that was reached in *Roe* and the other privacy precedents. Rather than supporting Bopp and Coleson's claim that *Roe* was decided wrongly, *Bowers* indicates the type of error that the Supreme Court avoided by its decision in *Roe*. Rather than demonstrating that *Roe* merits reversal, Bopp and Coleson have underscored the fact that *Bowers* merits reversal.

C. Conclusion

Bopp and Coleson join others in the antichoice movement who make much of what they view as the seemingly insignificant sacrifice women should be required, by the state, to make in bearing a child they do not want. "Married women, also, from the fear of labor, from indisposition to have the care, the expense, or the trouble of children, or some other motive *equally trifling and degrading*, have solicited that the embryo should be destroyed by their medical attendant."²¹⁵ They seem to agree with other anti-choice supporters who "speak so contemptuously of women's real-

Id. at 205 (emphasis in original).

213. *Id.* at 205-06.

214. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 535 (1989)(quoting *Bowers*, 478 U.S. at 217-19 (Stevens, J., dissenting)).

215. K. LUKER, *supra* note 94, at 22 (emphasis added).

life circumstances, or call an unwanted child an 'inconvenience.'"²¹⁶

Bopp and Coleson miss the point: "Forgetting your umbrella is an inconvenience. Having a baby—even if she gives it up for adoption—is a major event in a woman's life, and deserves, one would think, some respect."²¹⁷ The woman facing an abortion realizes the significance of the choice she is making. She realizes that a state that is so concerned about her fetus that it requires state-imposed pregnancy and makes "a value judgment favoring childbirth over abortion"²¹⁸ seems forever to lose its interest once childbirth is complete. But the woman is not free similarly to lose her interest. A woman forced to carry an unwanted pregnancy to term will find that Aid to Families for Dependent Children only will provide \$560 per month to support this "favored" child and her mother.²¹⁹ She will also find that by the year 2000 the United States poverty population will be solely composed of women and children,²²⁰ that a woman will earn approximately two-thirds of the full-time wage that a male earns,²²¹ and that she will receive little assistance from the authorities if she decides to defend herself or her children from a spouse or partner who abuses them.²²²

Women realize the commitment they are making by deciding to bring a child into the world. They understand that the conflict is not what the legal system and Bopp and Coleson like to characterize as an adversary conflict between the mother and the fetus.²²³ "[Women] asked, in effect, whether it is responsible or irresponsible, moral or immoral, to sustain and deepen an attachment under circumstances in which you cannot be, for whatever reason, responsible, and in which you cannot exercise care?"²²⁴ Given the

216. Pollitt, *Men and Abortion*, 20 UTNE READER 116 (March/April 1987).

217. *Id.*

218. *Harris v. McRae*, 448 U.S. 297, 314 (1980)(quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

219. Aid to Families for Dependent Children also provides up to \$694 per month for two children and their mother. Interview with Inquiry Unit of California Department of Social Services (Nov. 28, 1989).

220. See L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 350 (1985).

221. See Blumrosen, *Wage Discrimination, Job Segregation and Women Workers*, 6 WOMEN'S RTS. L. REP. 19, 25 (1980).

222. See Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 151 (1978).

223. See Gilligan, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 38 (1985).

224. *Id.*

impact that bearing a child has on a woman's life, she must be left to make her own choice. While the state and Bopp and Coleson are willing to be involved and sanctimonious before the fetus is born, that involvement and concern dissipates immediately after birth. The state denies a woman's liberty and privacy just long enough to force her to make a life-long connection to a child she does not choose to bear, and after that she is left on her own.

Once Bopp and Coleson's argument is understood for what it does—completely exclude the woman from the abortion debate—it becomes clear that the argument cannot stand. Once the woman is included back into the debate, it becomes clear that there can be no debate. The choice belongs to the woman.

III. THE RIGHT TO CHOOSE AN ABORTION IS LIMITED, NOT INVIOULATE

The first two sections of this Article have established that the Constitution protects a woman's right to choose an abortion. This section now addresses Bopp and Coleson's claim that this right has become inviolate.

Bopp and Coleson claim that the Court has altered its usual treatment of protecting privacy rights by making the right to choose an abortion virtually inviolate.²²⁵ They claim that, although the Court in *Roe* stated that it was not announcing an unlimited right to choose an abortion, in fact, it has treated the right as being virtually unrestricted.²²⁶

Referring to the Court's decision in *Thornburgh v. American College of Obstetricians and Gynecologists*,²²⁷ Bopp and Coleson claim that "the Court has struck down virtually every legislative attempt to assert [the state's] compelling interests" in protecting maternal health and potential life.²²⁸ They argue that in trying to make the right to choose an abortion virtually inviolate, "*Thornburgh* indicates the extremes to which the Court will go in avoiding its own precedent in *Roe*."²²⁹ Bopp and Coleson cite Justice White's *Thornburgh* dissent for the proposition that "the majority

225. See Bopp & Coleson, *supra* note 2, at 222-34. Bopp and Coleson note that most aspects of the privacy right are subject to limitations justifying state regulation. See *id.* at 225. As this section of the Article argues, the abortion aspect of the privacy right is also subject to state regulation.

226. See *id.* at 218-19 (abortion right is subject to minor health regulations).

227. 476 U.S. 747 (1986).

228. Bopp & Coleson, *supra* note 2, at 214.

229. *Id.*

viewed Pennsylvania's efforts to codify what the Court previously said was allowable regulation as 'some sinister conspiracy' and 'change[d] the rules to invalidate what before would have seemed permissible.'²³⁰ They further assert that the Court was "creating a climate of instability, unpredictability, inconsistency, unworkability, and unfairness."²³¹

Upon closer examination, however, it is evident that in interpreting *Thornburgh* as well as other abortion precedents, Bopp and Coleson draw an inaccurate picture of abortion jurisprudence. When states have enacted statutes that actually relate to their recognized interests in protecting maternal health and protecting potential life, the Court has upheld those statutes. Only when the states have surpassed their authority and have enacted statutes impinging on a woman's protected right to choose an abortion, especially during the first trimester when the state's interests are minimal, has the Court rejected abortion statutes.²³² After carefully reviewing the cases according to the type of restriction created by the state, it is evident that Bopp and Coleson incorrectly characterize the right to choose to have an abortion as inviolate. In fact, it becomes easy to question whether the Court has neglected its responsibility to protect women's interests as recognized in *Roe*.

This section begins with an analysis of *Roe's* recognition of both a woman's right to choose an abortion²³³ and the state's interests in protecting maternal health, medical standards and potential life.²³⁴ The section challenges the assertions that the state's interests are compelling throughout pregnancy and that a nonarbitrary line does not exist for determining when abortion should be permitted. A review of the various state restrictions on abortion challenged in the Court follows. The section then demonstrates that the Court consistently upholds state statutes if they advance com-

230. *Id.* at 215 (quoting *Thornburgh*, 476 U.S. at 799 (White, J., dissenting)). Justice White further argued that the majority's opinion "finds no justification in the Court's previous holdings, departs from sound principles of constitutional and statutory interpretation, and unduly limits the State's power to implement the legitimate (and in some circumstances compelling) policy of encouraging normal childbirth in preference to abortion." *Thornburgh*, 476 U.S. at 798 (White, J., dissenting).

231. Bopp & Coleson, *supra* note 2, at 215 (citing *Thornburgh*, 476 U.S. at 821, 826-27 (O'Connor, J., dissenting)).

232. The Court in *Roe* recognized that, during the first trimester when the state's other interests in protecting maternal health and potential life are not compelling, the state has an interest in establishing medical standards for abortions. *See Roe v. Wade*, 410 U.S. 113, 154-55 (1973).

233. *See id.* at 153.

234. *See id.* at 154-55.

elling interests and do not interfere with a woman's fundamental right to choose an abortion. This section concludes with the finding that Bopp and Coleson are incorrect in asserting that the right to choose an abortion has become inviolate.

A. *The Fundamental Right to Choose an Abortion and the State's Compelling Interests*

Throughout history, a woman's right to abortion has not been inviolate. Both English and American common law and American statutory law for much of the nineteenth century restricted abortion after quickening.²³⁵ The *Roe* Court also acknowledged that a woman's right to an abortion was not absolute.²³⁶ The Court recognized that the state has important interests in protecting health, preserving medical standards and safeguarding prenatal life. Therefore, the state could regulate in those areas.²³⁷ The *Roe* Court concluded that even though the privacy right includes the right to choose an abortion, that right is not unconditional and must be considered in light of state interests.²³⁸

To accommodate both the woman's right to choose and the state's interests, the *Roe* Court established the trimester framework for evaluating state abortion regulation.²³⁹ During the first trimester, the woman and her doctor are free to make the abortion decision except for minimal state regulation of abortion providers.²⁴⁰ During the second trimester, the state may regulate abortions "in ways that are reasonably related to maternal health."²⁴¹ During the third trimester, the state may regulate and prohibit abortions, except when an abortion is required to save the life of the mother.²⁴² In creating this framework, the *Roe* Court essentially balanced the sensitive interests involved in abortions and allowed for increasing state regulations as the pregnancy lengthened.²⁴³ Thus, *Roe* established that a woman's right to an abortion is not inviolate because the state can regulate abortion when state

235. See *supra* notes 95-115 and accompanying text; Note, *Constitutional Line Drawing: Abortion Versus Homosexuality—Why the Difference?*, 12 OKLA. CITY U.L. REV. 865, 868-69 (1987).

236. See *Roe*, 410 U.S. at 153-54.

237. See *id.*

238. See *id.*

239. See *id.* at 164-65.

240. See *id.*

241. *Id.* at 164.

242. See *id.* at 164-65.

243. See *id.*

interests in maternal health and protecting potential life are compelling.

Even Justice O'Connor has acknowledged that the right to choose an abortion is a limited fundamental right.²⁴⁴ She has claimed, however, that states' compelling interests in ensuring maternal health and protecting potential human life exist throughout pregnancy.²⁴⁵ Justice O'Connor believes that the *Roe* framework is on a "collision course" with itself because changes in medical technology will alter the points at which the state's and a woman's interests are compelling.²⁴⁶ Justice O'Connor argued that "[i]t is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future."²⁴⁷ Thus, she claimed the *Roe* trimester framework is "inherently tied to the state of medical technology that exists whenever particular litigation ensues."²⁴⁸

Justice O'Connor would limit judicial scrutiny of state restrictions on abortion to whether the law bears a rational relationship to legitimate purposes in advancing the state's compelling interests.²⁴⁹ Only when the restriction imposes an "undue burden" on the abortion decision would Justice O'Connor apply heightened scrutiny.²⁵⁰ Justice O'Connor has read the Court's abortion cases as finding an undue burden "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree."²⁵¹

Justice O'Connor has asserted that the Court's decisions in *Maher v. Roe*²⁵² and *Harris v. McRae*²⁵³ establish this standard.²⁵⁴ In *Maher* and *Harris*, the Court determined that states were not required to pay for abortions for poor women choosing them—even though those states would pay for childbirth costs for the same women.²⁵⁵ Justice O'Connor seems to believe that constitutional

244. See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 465-66 n.10 (1983)(O'Connor, J., dissenting).

245. See *id.* at 461.

246. *Id.* at 458.

247. *Id.* at 457.

248. *Id.* at 458.

249. See *id.* at 453.

250. See *id.*; see also *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)(restriction not unconstitutional unless it unduly burdens right to seek abortion).

251. *Akron*, 462 U.S. at 464.

252. 432 U.S. 464 (1977).

253. 448 U.S. 297 (1980).

254. See *Akron*, 462 U.S. at 464.

255. See *Maher*, 432 U.S. at 480 (Court refused to proscribe state government funding

protection of a woman's right to choose abortion arises only in the face of absolute prohibition. As Justice Powell noted in *Akron*, Justice O'Connor would "uphold virtually any abortion regulation under a rational-basis test."²⁵⁶ Justice Powell argued, however,

of non-therapeutic abortions); *Harris*, 448 U.S. at 326 (states not obligated to fund necessary abortions under Title XIX of Medicare). That states are not required to fund abortions for women on Medicaid results from the Court's decision to place the constitutional protection for the right to choose an abortion within the right to privacy. "Asserting that decisional privacy was nevertheless constitutionally intact, the Court stated that 'although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.'" C. MacKINNON, *supra* note 58, at 187 (citations omitted).

The point is that *Roe v. Wade* presumes that government nonintervention in the private sphere promotes a woman's freedom of choice. When the alternative is jail, there is much to be said for this presumption. But the *McRae* result sustains the meaning of privacy in *Roe*: women are guaranteed by the public no more than what they can get in private—what they can extract through their intimate associations with men. Women with privileges, including class privileges, get rights.

Id. at 191. Locating the right to choose an abortion within the right to privacy, rather than providing women with an affirmative right, means that women are simply guaranteed of government not intervening into the choice. What of the woman who chooses to have an abortion but is too poor to pay for one? Government's refusal to assist her financially translates into a denial of any meaningful choice. According to Professor Tribe:

[T]he unavailability of abortion to such a woman follows from her lack of funds only by virtue of government's quite conscious decision to treat the needed medical procedure as a purely private commodity available only to those who can pay the market price

[That decision is] especially dubious by the government's simultaneous decision—at considerable net public cost—to take *childbirth* for the same poor women off the private market by funding the necessary medical care within a comprehensive medical benefits program

Such governmental choices, in fact, require women to sacrifice their liberty, and quite literally their labor, in order to enable others to survive and grow in circumstances likely to create lifelong attachments and burdens.

Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 336-37 (1985)(footnotes omitted)(emphasis in original); see also Olsen, *supra* note 54, at 109-17 (discussing abortion funding cases as limiting privacy analysis); Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, 11 WOMEN'S RTS. L. REP. 15, 16-20 (1989)(discussing difficulties poor women and women of color have in obtaining early abortions).

256. *Akron*, 462 U.S. at 420 n.1. (Powell, J.). Justice O'Connor did just that by voting with the plurality to uphold the abortion statute in *Webster*. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3064 (1989)(O'Connor, J., concurring). However, she seems to have modified her view that the *Roe* framework is unworkable. Despite the desires of the plurality and Justice Scalia to overrule *Roe*, she refused to do so in this case. She noted that none of Missouri's viability testing requirements "conflict with any of the Court's past decisions concerning state regulation of abortion." *Id.* at 3060. Thus, Justice O'Connor found no occasion to even consider whether *Roe* should be overruled. See *id.* at 3060-61. It is commendable that Justice O'Connor refused the opportunity to overrule *Roe* considering her vociferous condemnation of it in *Akron* and *Thornburgh*. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 714, 814-15, 828 (1986); *Akron*, 462 U.S. at 458-59.

that such limited review of state restrictions on abortion "is wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*."²⁵⁷

Justice O'Connor's concern that the *Roe* trimester system will collapse on itself is unfounded. As Justice Blackmun noted in his *Webster* dissent, some of the medical literature has established that there is an "anatomic threshold" for fetal viability of 23-24 weeks gestation.²⁵⁸ Because the states' interest in protecting potential life is limited to the time after viability, and because viability is set at 23-24 weeks at the earliest, the *Roe* trimester framework continues to adequately delineate the competing interests.²⁵⁹

Despite Justice O'Connor's and Justice White's claims to the contrary,²⁶⁰ nonarbitrary lines can be drawn to differentiate the status of the unborn. Clifford Grobstein articulated the issue of the status of the unborn as follows:

When we view the public world of real people dealing with each other in the complex and subtle interactions of social life, it seems ludicrous to suggest that concepts appropriate to that realm should be extended to an individual cell at the bare limit of ordinary visi-

257. *Akron*, 462 U.S. at 421 n.1.

258. *Webster*, 109 S. Ct. at 3075-76 n.9 (Blackmun, J., dissenting)(quoting Brief for American Medical Association, *et al*, as *Amici Curiae* at 7, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989)).

259. The *Webster* Court, however, upheld a Missouri statute that presumed viability at 20 weeks due to a four week margin of error in estimating gestational age. *See id.* at 3055. If any aspect of the *Roe* framework is unsound, it is the portion that recognizes the state interest in protecting maternal health throughout the second trimester. In *Roe*, the Court recognized the state's interest as becoming compelling during the second trimester because, until the end of the first trimester, the risk from abortion is less than the risk from childbirth. *See Roe v. Wade*, 410 U.S. 113, 163 (1973). Today, however, the risk from abortion remains less than the risk from childbirth well into the second trimester. *See Akron*, 462 U.S. at 429 n.11. If anything, a state's compelling interest in protecting maternal health should be limited to when the risk from abortion is greater than the risk from childbirth. The Court in *Akron*, however, declined to make such a change in the *Roe* framework despite "substantial evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions . . . have extended the period in which abortions are safer than childbirth." *Id.* (citation omitted). The Court determined that when the state adopts a regulation governing abortions during the second trimester, "the determinative question should be whether there is a reasonable medical basis for the regulation. The comparison between abortion and childbirth mortality rates may be relevant only where the State employs a health rationale as a justification for a complete prohibition on abortions in certain circumstances." *Id.* (citation omitted).

260. Justice O'Connor has claimed that *Roe's* trimester framework is outmoded. *See Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). Justice White has stated that the fetus "bears in its cells all the genetic information that characterizes a member of the species [and] there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being." *Id.* at 792 (White, J., dissenting).

bility. It makes as much sense as declaring acorns to be oak trees and selling them at oak tree prices. Less ludicrous, but much more difficult to answer, are questions about what should, in fact, be the status of the zygote and—most difficult of all to answer—*exactly when in the course of development full human status should be assigned.*²⁶¹

Grobstein argues that fetal development is a process and that providing the fetus with a legal status could occur at any point in the six separable stages of individuality that occur while the fetus is in womb.²⁶² Those six stages are genetic, developmental, functional, behavioral, psychic, and social.²⁶³ He argues that it makes just as much sense to accord status to the unborn at some point during this development as to accord it immediately upon fertilization. Grobstein posits that if all six aspects are essential to full human status, “it would be reasonable to withhold such status until all six were clearly present to some defined level.”²⁶⁴

Certain nonarbitrary lines during fetal development could justify differing levels of status for the unborn. For example, if one equates human status with the fetus’ ability to experience pain, human status should not be afforded until at least twenty weeks when the fetus’ nervous system is established.²⁶⁵ To the extent that inner experience and pain depend on brain function, they cannot be present at any time during the first thirteen weeks.²⁶⁶ In fact, some researchers believe that “an adequate neural substrate for experienced pain does not exist” until about thirty weeks.²⁶⁷ Thus, any of these points could establish a nonarbitrary point for affording status to the fetus.

261. C. GROBSTEIN, *SCIENCE AND THE UNBORN: CHOOSING HUMAN FUTURES* 5-6 (1988)(emphasis added). Grobstein has been an embryologist for forty years and is a professor emeritus of biological science and public policy at the University of California, San Diego. See Hall, *When Does Life Begin?, A Conversation with Clifford Grobstein: Does Life Begin?* *PSYCHOLOGY TODAY*, Sept. 1989, at 43.

262. C. GROBSTEIN, *supra* note 261, at 22. Grobstein notes that the right-to-life movement’s characterization of life beginning at conception is scientifically an egregious oversimplification. See *id.* at 23-24. He states that “[e]ven while recognizing the profound importance of this first step, it is essential to keep in mind how much is yet missing at this early stage from what will be present when full human individuality is achieved. Uniqueness in the genetic sense has been realized but, for example, unity or singleness has not . . . [S]ingleness arises independently and at a significantly later time.” *Id.* at 25-26.

263. See *id.*

264. *Id.* at 37.

265. See *id.* at 40-41. Twenty weeks was the point of viability assumed in the Missouri statute at issue in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3055 (1989).

266. See C. GROBSTEIN, *supra* note 261, at 54.

267. *Id.* at 55.

At a minimum, the preceding discussion establishes that according human status involves complex medical, legal, and philosophical considerations. The theological perspective alone makes the discussion seem simple. The Vatican claims that "[t]he human being must be respected—as a person—from the very first instant of his [or her] existence Human life must be absolutely respected and protected from the moment of conception."²⁶⁸ Similarly simplistic is Missouri's claim that "[t]he life of each human being begins at conception."²⁶⁹

Although the Missouri statute makes such a claim, it certainly is not a secular claim. As Justice Stevens noted in his *Webster* dissent, however, "[o]ur jurisprudence . . . has consistently required a secular basis for valid legislation."²⁷⁰ He observed that the Missouri legislature constitutionally may not endorse a particular religious tradition within its statutory scheme.²⁷¹ Not all Christian faiths agree with the claim that "life begins at conception."²⁷² According to the Jewish faith, only when a child is born does it become a person.²⁷³ Thus, after discounting any of Missouri's legislative purposes for its statutory scheme, Justice Stevens concluded that the statute violates the Constitution.²⁷⁴

This section has argued that the *Roe* framework of balancing a woman's fundamental right to choose an abortion against the state's compelling interests in protecting maternal health and potential life is the most appropriate way to address the difficult issues raised by abortion. Among the several points during fetal development that could be used for attaching legal status or personhood, viability is the most coherent. It is logical to locate that status at the time that the fetus is capable of surviving with-

268. *Id.* at 14 (citation omitted).

269. MO. ANN. STAT. § 1.205.1(1)(Vernon Supp. 1990). Grobstein would take issue with the Vatican's position and Missouri's statutory declaration. He points out that "there is no instant of conception; the process of fertilization (or syngamy) extends over many hours." C. GROBSTEIN, *supra* note 261, at 14.

270. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3082 (1989)(Stevens, J., concurring in part and dissenting in part).

271. *See id.* at 3085.

272. *Id.* at 3082.

273. *See Roe v. Wade*, 410 U.S. 113, 160 (1973)(Blackmun, J., dissenting); *see also* Paltrow, *supra* note 13, at 22 ("Being Jewish, our teaching is that the child becomes a full-fledged person only when it takes the first breath. Until then it does not have 'human' standing.")

274. *See Webster*, 109 S. Ct. at 3084-85 (Stevens, J., concurring in part and dissenting in part). Justice Stevens found the statute to be unconstitutional because it had "substantive impact on the freedom to use contraception" as determined in *Griswold*. *Id.* at 3085. He also found that the statute violated the establishment clause of the first amendment. *Id.*

out the woman. Given the appropriateness of the *Roe* framework, it becomes incumbent to challenge Bopp and Coleson's claims that the Court has negated the states' interests in its attempt to make the abortion right inviolate. Careful analysis of the Court's decisions with regard to state restrictions on record keeping and informed consent, maternal health, and potential life verifies that the Court has been faithful to the *Roe* framework.

B. Restrictions During the First Trimester

The *Roe* Court held that during the first trimester a woman is free, in consultation with her doctor, to choose to have an abortion without state interference.²⁷⁵ During that time, the state has no compelling interest that would allow it to interfere with the woman's fundamental right. The Court recognized, however, that the state may regulate abortions in the first trimester consistent with its regulation of other medical procedures.²⁷⁶ In response, some states have passed statutes requiring record keeping and informed consent. In cases where such statutes were concerned with record keeping or informed consent, the Court has found them constitutional. When the statutes were in reality designed to restrict a woman's right to procure an abortion, the Court has found them unconstitutional.

1. Record Keeping by Abortion Facilities

The Missouri abortion statute reviewed in *Planned Parenthood v. Danforth*²⁷⁷ required, in part, that healthcare facilities and physicians maintain records of abortions performed at all stages.²⁷⁸ Under the statute each abortion facility and physician had to maintain records of abortions including relevant maternal health and life data.²⁷⁹ Planned Parenthood challenged this statute as interfering with the woman's right to choose an abortion during

275. See *Roe*, 410 U.S. at 164.

276. See *id.* at 149-50. States have passed statutes adding restrictions on the woman's right to choose an abortion. These restrictions included approval of abortion by hospital committees; a requirement that three physicians approve the abortion decision; residency requirements; abortion counseling; and a twenty-four hour waiting period before the abortion. The Court struck down these restrictions in *Doe v. Bolton*, 410 U.S. 179 (1973) and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), as unconstitutional.

277. 428 U.S. 52 (1976).

278. See *id.* at 79 (citing MISSOURI HOUSE REPORT No. 1211, 77th Gen. Assb., 2d Sess., §§ 10-11 (1974)).

279. See *id.*

the first trimester.²⁸⁰ The Court held that record keeping requirements were constitutionally permissible so long as they are reasonably related to the goal of preserving maternal health and respect the need for confidentiality.²⁸¹ The Court found the Missouri record keeping requirement to be reasonably related to promoting the State's interest in safeguarding the health of its female residents.²⁸² The Court noted that in Missouri physicians must report births, deaths, and communicable diseases, and that their prescription of controlled substances is strictly regulated by the state.²⁸³ The Court found the State's abortion record-keeping requirements to be similar, and to impose no significant impact on the abortion decision because the records were to be kept confidential.²⁸⁴ It also found that the record keeping requirement advanced the State's interest in safeguarding the health of its female residents and that it would likely be a valuable resource for medical findings.²⁸⁵

The statute in *Thornburgh v. American College of Obstetricians & Gynecologists*²⁸⁶ contained a record keeping requirement pertaining to second and third trimester abortions.²⁸⁷ The provision required the physician to compile a substantial amount of information, including some nonmedical data,²⁸⁸ in a report that would be accessible to the public.²⁸⁹ Even though the report was not considered to be a public record, each report was "available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report."²⁹⁰ The *Thornburgh* Court held that these

280. *See id.* at 79-80.

281. *See id.* at 80.

282. *See id.* at 81.

283. *See id.* at 81 n.13 (citations omitted).

284. *See id.* at 81.

285. *See id.*

286. 476 U.S. 747 (1986).

287. *See id.* at 765.

288. *See id.* The information required included:

identification of the performing and referring physicians and of the facility or agency; information as to the woman's political subdivision and State of residence, age, race, marital status, and number of prior pregnancies; the date of her last menstrual period and the probable gestational age; the basis for any judgment that a medical emergency existed; the basis for any determination of nonviability; and the method of payment for the abortion. The report is to be signed by the attending physician.

Id. (citing 18 PA. CONS. STAT. § 3214(b) (1982)).

289. *See id.*

290. *Id.* (quoting PA. STAT. ANN. tit. 65, § 66 *et seq.* (Purdon 1959 & Supp. 1985)). Correspondingly, the report of complications was to be "open to public inspection and copying." *Id.*

requirements went beyond the state's limited health related interests and were unconstitutional.²⁹¹

Bopp and Coleson condemn the Court's decision in *Thornburgh*, claiming that the record failed to show that identification was the purpose of the reporting requirements.²⁹² For support, they refer to the trial court's finding that the requirements of confidentiality prevented any invasion on the patient's privacy that would significantly burden the abortion decision.²⁹³ They also claim that the purpose of the reports was to ensure that doctors did not perform postviability abortions and to further the state's medical interests through accurate record keeping.²⁹⁴ The reports were available to the public, however, and the statute imposed no limitation on the use of the reports.²⁹⁵ The Court concluded that there was no legitimate state interest involved in Pennsylvania's record keeping requirement due to the extent of information required and the report's accessibility to the public.²⁹⁶ The Court contrasted the record keeping requirement in *Danforth*, which was held valid because it required less information and provided that the reports were to be used for statistical purposes only.²⁹⁷ Bopp and Coleson's claim that the reports required in *Thornburgh* furthered the state's interests is belied by the public nature of the reports. If they were to be used only for such limited purposes, they would not need to be available to the public.

The *Thornburgh* Court concluded that the availability of the report to the public might chill the right to choose an abortion and thus was unconstitutional.²⁹⁸ The Court recognized that the decision to abort a pregnancy is an extremely private one that must be safeguarded in a way that guarantees anonymity.²⁹⁹ The Court observed: " 'It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.' "³⁰⁰ Thus, when a record keeping requirement was imposed

291. *See id.* at 766-67.

292. *See* Bopp & Coleson, *supra* note 2, at 298.

293. *See id.*

294. *See id.*

295. *See Thornburgh*, 476 U.S. at 766.

296. *See id.* at 765-66.

297. *See id.* at 766-67.

298. *See id.* at 767-68.

299. *See id.* at 766.

300. *Id.* at 766 (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979)(Stevens, J., concurring)).

for the purpose of furthering the state's medical interests, the Court has been willing to uphold its constitutionality. When the requirement allowed public access to the records and potentially chilled a woman's decision to have an abortion, however, the Court overturned the statute. This simply amounts to a balancing of the states' interests against the woman's interests.

2. *Informed Written Consent to an Abortion During the First Trimester*³⁰¹

The Court in *Planned Parenthood v. Danforth*³⁰² also considered whether a state could constitutionally require a woman to give informed written consent to an abortion during the first trimester.³⁰³ The Missouri statute at issue in the case defined informed written consent as the woman's attestation in writing of her freely given and informed consent to having the abortion.³⁰⁴ The Court agreed with the district court's decision that this provision merely included abortion with those other medical operations for which consent was required and was therefore constitutional.³⁰⁵

In *City of Akron v. Akron Center for Reproductive Health*,³⁰⁶

301. In addition to restrictions based on a woman's informed consent, other attempts have been made to use consent requirements by third parties to veto a woman's choice to have an abortion. In *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976), the Court rejected a requirement for spousal consent during the first 12 weeks of pregnancy. Because a state cannot proscribe first trimester abortions, it cannot delegate that power to a spouse. *See id.*

Additionally, the *Danforth* Court held that a state cannot require parental consent to a minor's abortion in the first trimester. *See id.* at 74. The state, however, can impose a parental consent requirement if an alternative procedure is available to obtain judicial permission for the abortion. *See Bellotti v. Baird*, 443 U.S. 622, 643-48 (1979). The minor must be given the opportunity to demonstrate, independently of her parents' wishes, either 1) that she is mature enough to make the abortion decision herself, or 2) that, even if she is not mature enough to make the decision, the abortion is in her best interest. *See id.* at 643-44.

Thus, the Court will not permit the states to enact statutes allowing third-parties to veto a woman's decision to have an abortion. The parental consent issue, however, is still being litigated with the Supreme Court having issued decisions in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), upholding statutes that require parental notification unless a judicial bypass procedure is used.

302. 428 U.S. 52 (1976).

303. *See id.* at 65.

304. *See id.* (citing M.O.H.R. 1211, 77th Gen. Assb., 2d Sess. § 3(2) (1974)).

305. *See id.* at 66-67. The Court noted, however, that "apparently . . . the only other Missouri statutes concerned with consent for general medical or surgical care related to persons committed to the Missouri State chest hospital, or to mental or correctional institutions." *Id.* at 66 n.6 (citations omitted).

306. 462 U.S. 416 (1983).

the Court stated that the legality of provisions requiring informed written consent for an abortion depend upon whether they are legitimately related to the state's interest in protecting maternal health.³⁰⁷ The Court held that the *Danforth* decision, which acknowledged the state's interest in guaranteeing informed consent, would not support abortion restrictions created to sway the woman's informed choice between abortion or childbirth.³⁰⁸ Many of the Ohio statute's information requirements being challenged in *Akron* were designed not to advise, but to influence the woman to withhold consent and to interfere with the judgment of the pregnant woman's physician.³⁰⁹ The Court found the requirement of informed written consent and the other restrictions in *Akron* unconstitutionally expanded the State's interest in securing informed consent beyond acceptable limits.³¹⁰

In *Thornburgh v. College of Obstetricians & Gynecologists*,³¹¹ the Court considered, in part, the constitutional validity of a Pennsylvania statute that required the "voluntary and informed consent" of a woman to have an abortion.³¹² Under the statute, physicians who did not provide information relating to informed consent would be subject to penalties.³¹³ Other persons who failed to provide information connected to informed consent would be subject to criminal sanctions.³¹⁴ In striking down the provision, the Court relied on language in its *Akron* decision stating "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" ³¹⁵ In *Akron*, the Court had found the ordinance defective for two reasons. First, the information was not required to apprise, but to influence the woman to withhold her agreement to the abortion.³¹⁶ Second, the fixed body of material to be disseminated, irrespective of the situation of the patient, interfered with the judgment of the woman's physician and inflicted a straitjacket upon the physician.³¹⁷

307. See *id.* at 443.

308. See *id.* at 443-44.

309. See *id.* at 444-45.

310. See *id.* at 444.

311. 476 U.S. 747 (1986).

312. *Id.* at 759 (quoting 18 PA. CONS. STAT. § 3205(a) (1982)).

313. See *id.*

314. See *id.* at 759-60 (citing 18 PA. CONS. STAT. § 3205(c) (1982)).

315. *Id.* at 760 (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 443-44 (1983)).

316. See *id.* at 762.

317. See *id.*

The *Thornburgh* Court determined that these reasons also applied to the Pennsylvania statute.³¹⁸ The Court declared that the provision failed to meet the standard announced in *Akron* because a variety of information had to be given to the woman twenty-four hours before her consent was given, some of which had to be given by the physician.³¹⁹ The Court found that this provision made the physician an agent of the State because it required the physician to disseminate information provided by the State.³²⁰ The Pennsylvania provision also failed the *Akron* test because the information concerning informed consent contained nonmedical information irrelevant to the abortion procedure. Thus, the Court concluded that the provision advanced no legitimate state goal and was therefore unconstitutional.³²¹

Bopp and Coleson assert that the statute in *Thornburgh* simply required that objective information relevant to informed consent be disseminated to women pursuing abortions.³²² They refer, for example, to the requirement that the woman was merely to be advised of the probable gestational age of her fetus.³²³ They claim that this was "non-judgmental, relevant information which is certainly not objectionable under the *Akron* test."³²⁴

Upon closer examination of *Thornburgh*, however, one sees that the Pennsylvania statute required more than informing the woman of the fetus' gestational age. Rather, it mandated detailed descriptions of the actual characteristics of the fetus at two-week intervals.³²⁵ *Thornburgh*'s majority referred to this information as "a parade of horrors."³²⁶ The Court also found that the information, no matter how impartial, was overinclusive because it was nonmedical and not always pertinent to the woman's decision.³²⁷ The Court found that explaining the characteristics of the fetus may serve only to puzzle and castigate the woman, and elevate her anxiety—functions counter to approved medical procedure.³²⁸

318. *See id.*

319. *See id.* at 764.

320. *See id.* at 763.

321. *See id.*

322. *See Bopp & Coleson, supra* note 2, at 211.

323. *See id.* at 294.

324. *Id.*

325. *See Thornburgh*, 476 U.S. at 761 (citing 18 PA. CONS. STAT. § 3208(a)(2) (1982)).

326. *Id.* at 760 (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 445 (1983)).

327. *See id.* at 762.

328. *See id.*

The Court also found that requiring that the woman be informed of the availability of medical assistance and the father's responsibility for some child support was simply a thinly veiled attempt to deter the abortion decision.³²⁹ The Court determined that these requirements were nonmedical and inappropriate because, for a patient with a life-endangering pregnancy, the "'information' in its very rendition may be cruel as well as destructive of the physician-patient relationship."³³⁰ The *Thornburgh* Court found that the requirements that the physician advise the woman of "'detrimental physical and psychological effects' and of all 'particular medical risks'" complicated medical care, raised the patient's anxiety, and encroached upon the physician's discretion.³³¹ The Court characterized this category of forced information as the "antithesis of informed consent."³³² The Court concluded that this provision exposed the actual anti-abortion nature of the statute because Pennsylvania did not, and certainly would not, require comparable disclosure of every conceivable danger of necessary surgery or of simple vaccination.³³³

In contrast, the *Danforth* Court allowed the imposition of an informed consent requirement that brought abortion in line with other medical procedures in the state that also require informed consent.³³⁴ The State's interest in medical procedures and maternal health justified this imposition, even during the first trimester.³³⁵ The informed consent statutes in *Akron* and *Thornburgh*, however, were struck down because they did not simply elicit the woman's consent; they were also intended to affect her decision. Under *Akron* and *Thornburgh*, therefore, the state could not, under the guise of obtaining informed consent, require information actually intended to affect the woman's constitutionally-protected right to choose to have an abortion.

C. Restrictions Concerning Maternal Health

The *Roe* Court determined that the states have a compelling

329. *See id.* at 763.

330. *Id.* The Court also stated that a rape victim should not have to listen to gratuitous counsel that an unknown perpetrator is responsible for support if she carries the pregnancy to term. *See id.*

331. *Id.* at 764 (quoting PA. CONST. STAT. § 3205(a)(1)(ii)-(iii) (1982)).

332. *Id.*

333. *See id.*

334. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 66-67 (1976).

335. *See id.*

interest in protecting maternal health following the first trimester.³³⁶ That interest permits states to regulate abortions "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."³³⁷ Many states, however, have imposed restrictions on abortions under the guise of protecting maternal health during the second trimester when those restrictions actually did not further maternal health and, in some cases, actually jeopardized it. Although the Court has been willing to uphold restrictions that further maternal health, it has been quick to reject those that do not.

1. *Use of Saline Amniocentesis as an Abortion Method after the First Trimester*

The Missouri statute reviewed in *Planned Parenthood v. Danforth* proscribed the use of saline amniocentesis as an abortion method after the first trimester.³³⁸ The Court determined that this restriction was not related reasonably to safeguarding maternal health in the second trimester. Saline amniocentesis was a widely used method, alternative methods were not widely available, and the statute did not prohibit more dangerous methods of abortion.³³⁹ In sum, the Court found the restriction on saline amniocentesis an "unreasonable and arbitrary regulation designed . . . to inhibit abortion."³⁴⁰ The restriction was, therefore, unconstitutional because it was not reasonably related to safeguarding maternal health.³⁴¹

336. See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

337. *Id.*

338. See *Danforth*, 428 U.S. at 75-76 (citing MISSOURI H.R. REP. No. 1211, 77th Gen. Ass., 2d Sess., § 9 (1974)).

339. See *id.* at 77-79.

340. *Id.* at 79.

341. See *id.* Bopp and Coleson condemn the *Thornburgh* majority's recital of Pennsylvania history on abortion statutes "as if it were evidence of some sinister conspiracy." Bopp & Coleson, *supra* note 2, at 209 (quoting *Thornburgh v. College of Obstetricians & Gynecologists*, 476 U.S. 747, 798 (1986) (White, J., dissenting)). This is not surprising given the attempts by states, as seen in *Danforth* and *Thornburgh*, to protect potential life by risking maternal health and survival. Given the states' interests in protecting the woman's health, which the *Roe* Court found to be compelling, it is incongruous that states would turn around and impose statutes that actually place the woman at increased risk. It is difficult to be sympathetic to a state's attempts to protect a fetus when it expresses its "concern" by placing a living, fully developed woman at risk to do so. It was this incongruity that led the Court in *Danforth* to strike down the restriction on saline amniocentesis.

2. *The Hospital Accreditation Requirement for Abortions Performed After the First Trimester*

The Georgia abortion statute in *Doe v. Bolton*³⁴² specified that abortions were to be performed in hospitals approved by the Joint Commission on Accreditation of Hospitals (JCAH).³⁴³ JCAH did not have governmental sponsorship.³⁴⁴ It was concerned with quality medical care, but did not have a specific concern with abortion as a medical or surgical procedure.³⁴⁵ The Court noted that “[s]ome courts have held that a JCAH-accreditation requirement is an overbroad infringement on fundamental rights” because it did not concern the specific medical difficulties and perils of the abortion operation.³⁴⁶ The Court found that Georgia’s JCAH-accreditation requirement was unconstitutional because it was not reasonably related to a state objective.³⁴⁷

The *Doe* Court observed that facilities other than hospitals were able to perform abortions. The Georgia hospitalization requirement therefore was invalid because it did not exclude first trimester abortions from its scope.³⁴⁸ The Court asserted that Georgia could ratify principles for licensing all facilities where abortions may be performed, so long as those standards were reasonably related to legitimate state objectives.³⁴⁹ Georgia had not, however, offered convincing evidence to demonstrate that only JCAH-accredited hospitals satisfied its legitimate interest in guaranteeing maternal health.³⁵⁰

The ordinance³⁵¹ examined in *Akron v. Akron Center for Reproductive Health* also required that abortions performed after the first trimester be performed in a hospital.³⁵² The *Akron* Court found this restriction unconstitutional because it did not advance an important state health objective³⁵³ and placed serious restraints

342. 410 U.S. 179 (1973).

343. *See id.* at 193. The statute referred to is GA. CODE ANN. § 26-1202(b)(4) (1968). *See id.* at 202.

344. *See id.* at 193.

345. *See id.* at 193 n.12.

346. *Id.* at 194.

347. *See id.*

348. *See id.* at 195.

349. *See id.* at 194-95.

350. *See id.* at 195.

351. AKRON, OHIO CODIFIED ORDINANCES ch. 1870.03 (1978).

352. 462 U.S. 416, 431-32 (1983).

353. *See id.* at 433-38 (citing AKRON, OHIO CODIFIED ORDINANCES ch. 1870.03 (1978)).

on the abortion decision, such as unnecessary added cost.³⁵⁴ The Court stated that this hospitalization requirement may force women to travel great distances to locate available facilities, which would result in monetary expense and additional health risks.³⁵⁵ The Court noted that certain abortion procedures that were commonly used for second trimester abortions could be accomplished just as safely and less expensively at outpatient facilities than at full service hospitals.³⁵⁶ According to the Court, "present medical knowledge' . . . convincingly undercuts Akron's justification for requiring that all second-trimester abortions be performed in a hospital."³⁵⁷ Because the statute imposed requirements unrelated to maternal health with additional expense and risk, it was an unconstitutional imposition on the woman's right to choose to have an abortion.

In *Planned Parenthood Association v. Ashcroft*,³⁵⁸ an abortion statute also required that all second-trimester abortions be performed in a hospital.³⁵⁹ The *Ashcroft* Court again found the provision unconstitutional based on the *Akron* decision because it "unreasonably infringe[d] upon a woman's constitutional right to

354. See *id.* at 434-35. The Court noted that an "[i]n-hospital abortion costs \$850-\$900, whereas a dilation-and-evacuation (D&E) abortion performed in a clinic costs \$350-\$400." *Id.* at 435 (citation omitted).

355. See *id.*

356. See *id.* at 435-37.

357. *Id.* at 437 (citations and footnote omitted). Bopp and Coleson state that the Court's decision in *Akron* constituted stare decisis abuse because the Court did not follow its summary affirmance of a second-trimester hospitalization requirement in *Gary-Northwest Indiana Women's Services, Inc. v. Orr*, 451 U.S. 934 (1981). See Bopp & Coleson, *supra* note 2, at 207. They note that the Court acknowledged its summary affirmance, but dismissed the case as not binding. See *id.* at 207 (citing *Akron*, 462 U.S. at 433 n.18). They claim that the Court was incorrect in doing so because its asserted reason for rejecting *Orr*, that the plaintiff had not proven the safety of second-trimester abortions outside of hospital, had been determined by the trial court not to be dispositive. See *id.* This type of an intricate analysis of a summary affirmance, however, is risky. In 1979, the Court noted that "summary affirmances have considerably less precedential value than an opinion on the merits" and "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) (citations omitted). Additionally, a "summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Id.* at 183 (citation omitted). Thus, the Court's summary affirmance in *Orr* indicated only agreement with the judgment of the court below (that the plaintiffs had not succeeded in challenging the hospitalization requirement in that case) and nothing more.

358. 462 U.S. 476 (1983).

359. See *id.* at 478 (citing Mo. REV. STAT. § 188.025 (Vernon Supp. 1982)). "Hospital" was not defined in the Missouri statutes. See *id.* at 481-82 n.6. The Court, therefore, presumed that hospital meant "a general acute care facility." *Id.*

obtain an abortion."³⁶⁰ The statute failed to promote its purported interest in protecting maternal health.

The abortion statute in *Simopoulos v. Virginia*³⁶¹ also required that second-trimester abortions be performed in licensed hospitals.³⁶² A Virginia statute by implication defined hospitals as including outpatient clinics³⁶³ and defined outpatient clinics as places where abortions could be performed.³⁶⁴ As a result, Virginia allowed abortions in outpatient clinics that were licensed as hospitals.³⁶⁵ The Court found that the hospitalization requirement in *Simopoulos*, unlike those in *Akron* and *Ashcroft*, to be constitutional.³⁶⁶ Whereas the statutes in *Akron* and *Ashcroft* effectively required that second-trimester abortions be conducted in full-service hospitals, even though they could be performed as safely in outpatient clinics, the statute in *Simopoulos* allowed second-trimester abortions to be performed in licensed outpatient clinics that qualified for "hospital status" under Virginia law.³⁶⁷ The Court found that Virginia had a legitimate interest in regulating second-trimester abortions and defining standards for facilities in which these abortions could be performed.³⁶⁸ The regulations were constitutional because the licensing of clinics where second-trimester abortions were performed was not an unreasonable means by which the state furthered its compelling interest in "protecting the woman's own health and safety."³⁶⁹

D. Restrictions Concerning Potential Life

1. Physician's Standard of Care

The abortion statute in *Planned Parenthood v. Danforth*³⁷⁰ established a standard of care for the physician performing an abortion by providing that any physician who failed to maintain the life of the fetus after an abortion would be guilty of man-

360. *Id.* at 482 (quoting *Akron*, 462 U.S. at 439).

361. 462 U.S. 506 (1983).

362. *See id.* at 509-12 (citing VA. CODE ANN. § 18.2-73 (1982)).

363. *See id.* at 512-14 (citing VA. CODE ANN. § 32.1-123.1 (1979)).

364. *See id.* (citing Virginia Dept. of Health, Rules and Regulations for the Licensure of Out-patient Hospitals § 20.2.11 (1977)).

365. *See id.* at 515.

366. *See id.* at 516-19.

367. *See id.* at 516.

368. *See id.* at 516-17.

369. *Id.* at 518-19 (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)).

370. 428 U.S. 52 (1976).

slaughter.³⁷¹ The Court determined that this standard required the physicians to use their skill, care and diligence to safeguard the life and health of the fetus, but noted that the statute did not specify whether this standard would only apply after viability had been reached. Because the provision would require physicians to preserve the fetus regardless of viability, the Court concluded that the statute unconstitutionally extended the State's interest in potential life before viability.³⁷²

2. *Postviability Abortions*

Section 5(a) of the Pennsylvania abortion statute at issue in *Colautti v. Franklin*³⁷³ provided that if the fetus was viable, or if the physician had sufficient reason to believe the fetus was viable, he or she would have to exercise that degree of professional skill, care and diligence that would allow the fetus to survive the abortion, so long as a different technique was not needed to preserve the life or health of the mother.³⁷⁴

The Court determined that this viability-determination requirement was ambiguous and void for vagueness.³⁷⁵ The Court noted that, in criminal law, a statute must give a person of average intelligence adequate warning of what is criminally punishable or the statute is unconstitutionally vague.³⁷⁶ The statute in *Colautti* did not meet the Court's standard for two reasons. First, the statute was unclear about the standard of care that was to be applied to give the physicians "sufficient reason to believe that the fetus may be viable."³⁷⁷ Second, that statute was unclear as to the distinction between "viable" and "may be viable."³⁷⁸ More specifically, the requirement was unconstitutionally vague because it was unclear whether the statute required an individual-subjective or a collective-objective standard.³⁷⁹ The decision whether the fetus "is viable" was specifically established based on the attending physician's "experience, judgment or professional competence," an indi-

371. See *id.* at 82 (citing MISSOURI H.R. REP. NO. 1211, 77th Gen. Assb., 2d Sess., § 6(1) (1974)).

372. See *id.* at 83.

373. 439 U.S. 379 (1979).

374. See *id.* at 380 n.1 (citing 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977)).

375. See *id.* at 390.

376. See *id.* (citation omitted).

377. *Id.* at 391 (quoting 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977)).

378. *Id.* at 392-93 (quoting 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977)).

379. See *id.* at 391.

vidual point of reference.³⁸⁰ The Court found, however, that the standard for whether there was "sufficient reason to believe that the fetus may be viable" was unclear. It could have been the perspective of the attending physician or that of other medical people or a committee of experts.³⁸¹

Furthermore, the *Collauti* statute was unclear as to whether the phrase "may be viable" meant viability as the phrase had been interpreted in *Roe* and *Planned Parenthood*, or whether it referred to an unknown penumbral or "gray" area prior to the stage of viability.³⁸² Thus, the statute threatened a physician with potential civil or criminal liability without clearly stating what actions would subject him or her to such liability.³⁸³

The phrase "may be viable" could also have referred to a distinct condition separate from "viability."³⁸⁴ Before viability, however, the state may not seek to further its interest in potential life "by directly restricting a woman's decision whether or not to terminate her pregnancy."³⁸⁵ Thus, viability is the critical point and "no attempt to stretch the point of viability one way or another" has ever been accepted by the Court.³⁸⁶ Because the statute in *Collauti* potentially allowed regulation of abortions before viability for the purpose of protecting potential life, it was inconsistent with *Roe*, and, therefore, unconstitutional.

In *Planned Parenthood Association v. Ashcroft*,³⁸⁷ the Court examined a statute that required the presence of a second physician at the abortion of a viable fetus to safeguard the life of the fetus, so long as safeguarding the fetus did not endanger the health or life of the mother.³⁸⁸ The Court in *Ashcroft* stated that by giving prompt medical care to a fetus delivered alive, the second phy-

380. *Id.* (quoting 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977)).

381. *Id.* (quoting 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977)).

382. *Id.* (quoting 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977)(citations omitted)).

383. *See id.* at 394.

384. *Id.* at 393 (quoting 35 PA. CONS. STAT. ANN. § 6605(a) (Purdon 1977)).

385. *Id.* at 386. The *Collautti* Court noted that the Court's decision in *Maier v. Roe* might seem contradictory in that it authorized the state to withhold funding of abortions for indigent women even though that might influence the abortion decision before viability. *See id.* at 386 n.7 (citing *Maier v. Roe*, 432 U.S. 464, 471-77 (1977)). But the *Collautti* Court also noted that the state may not impose direct obstacles, such as the potential criminal penalties present in this case, to further its interest in the potential life of the fetus before viability. *See id.*

386. *Id.* at 389.

387. 462 U.S. 476 (1983).

388. *See id.* 483 (citing Mo. REV. STAT. § 188.030.2 (Vernon Supp. 1982)). The Court noted that most third-trimester abortions were emergency operations necessary to save the life or health of the mother because, otherwise, they were prohibited. *See id.* at 485.

sician could ensure that the State's interests were protected more adequately than if only one physician were present.³⁸⁹ Because the second physician furthered the state's compelling interest in safeguarding life during the birth of a viable fetus, the Court found the requirement constitutional.³⁹⁰

The statute in *Thornburgh v. American College of Obstetricians & Gynecologists*³⁹¹ also contained several requirements for postviability abortions. First, it required a physician to use the same standard of care for postviability abortions as was used during the birth of any child intended to be born and not aborted. It also required a physician to use the abortion technique that provided the best opportunity to abort the fetus alive, unless doing so presented a significantly greater medical risk to the mother's health.³⁹² The Court in *Thornburgh* agreed with the court of appeals' finding that these provisions would force physicians to choose between the life of the mother and that of the fetus, with no requirement that maternal health be the paramount consideration.³⁹³ The Court had rejected this type of "trade-off" between the woman's health and additional "percentage points" of fetal survival in *Colautti v. Franklin*,³⁹⁴ and it likewise rejected it in *Thornburgh*.³⁹⁵

The *Thornburgh* Court also rejected the constitutionality of a statute that required a second physician be present during abortions performed when viability would be possible.³⁹⁶ The statute ordered the second physician to take "all reasonable steps necessary . . . to preserve the child's life and health."³⁹⁷ Unlike the statute in *Ashcroft*, however, this statute did not contain an exception for emergency situations when the mother's health was endangered while waiting for the second physician's arrival.³⁹⁸ Because it "[contained] no such comforting or helpful language and [evinced] no intent to protect a woman whose life may be at risk," the Court

389. *See id.*

390. *See id.* at 485-86.

391. 476 U.S. 747 (1986).

392. *See id.* at 768 (citing 18 PA. CONS. STAT. ANN. §§ 3210(b)-(c) (Purdon 1982)).

393. *See id.* at 768-69.

394. *See Colautti v. Franklin*, 439 U.S. 379, 400 (1979).

395. *See Thornburgh*, 476 U.S. at 769.

396. *See id.* at 769-72 (citing 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1982)).

397. *Id.* at 770 (quoting 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1982)).

398. *See id.* at 770-71 (citing 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1982)). Actually, no express emergency exception existed in *Ashcroft* either. But Justice Powell found the exception implicit in the Missouri statute's recognition that preserving the fetus could not pose an increased risk to the mother. *See id.* at 770 (citation omitted).

found this provision was intended to chill the performance of late abortions, and thus, was unconstitutional.³⁹⁹

3. *Viability Testing of Fetuses*

The statute in *Webster v. Reproductive Health Services*⁴⁰⁰ required the testing of fetuses aged twenty weeks or more before an abortion could be performed.⁴⁰¹ The Court construed this restriction as requiring only those tests that are useful to determine viability.⁴⁰² The Court found this requirement was related to "promoting the state's interest in potential human life."⁴⁰³ The *Webster* Court upheld this viability-testing requirement,⁴⁰⁴ effectively creating a presumption of viability at twenty weeks. The Court determined that the additional expense for the abortion, and the added restraint on the physician's discretion, were justified by the furtherance of the state's interest in protecting potential life.⁴⁰⁵ Therefore, the Court found that the statute was constitutional.

Justice O'Connor agreed with the plurality's viability-testing decision, but did not agree that the viability-testing requirements conflicted with prior Supreme Court abortion decisions.⁴⁰⁶ Therefore, Justice O'Connor found it unnecessary to reinspect the constitutional soundness of *Roe*.⁴⁰⁷ Asserting that it is not the Court's custom to resolve issues of a constitutional character unless essential to a resolution of the case,⁴⁰⁸ Justice O'Connor declared that "when the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe*, there will be time enough to examine *Roe* [a]nd to do so carefully."⁴⁰⁹

E. Conclusion

Bopp and Coleson's attempt to denigrate the Court's abortion decisions as lacking internal coherence and as being unfaithful to the *Roe* trimester framework are unsupported. As demonstrated in

399. *Id.* at 770-71.

400. 109 S. Ct. 3040 (1989).

401. *See id.* at 3047 (citing MO. REV. STAT. § 188.029 (1986)).

402. *See id.* at 3054-55.

403. *Id.* at 3055.

404. *See id.* at 3055, 3057.

405. *See id.* at 3057.

406. *See id.* at 3060 (O'Connor, J., concurring).

407. *See id.*

408. *See id.* at 3060-61 (citation omitted).

409. *Id.* at 3061.

this section, the Court has not treated the right to choose an abortion as inviolate. When faced with statutes advancing a state's compelling interests, the Court has upheld the constitutionality of those statutes. Bopp and Coleson appear unable to differentiate between legitimate attempts to advance those state interests and illegitimate attempts to negate a woman's constitutionally-protected right to choose.

IV. THE LEGAL STATUS OF FETUSES IN CONTEXTS OTHER THAN ABORTION

This section will establish that the protection that *Roe* affords to a fetus is harmonious with protections provided in other areas of the law.⁴¹⁰ The most important of these areas are tort, wrongful death, equity and criminal law. An effective, harmonious and provable legal standard is necessary for consistent judicial treatment of the fetus. The viability distinction promulgated in *Roe* and its progeny creates just such a consistent framework.

Although Bopp and Coleson agree that such a framework is needed, they argue that *Roe* has made a "consistent and principled policy of protecting unborn life almost impossible."⁴¹¹ Their argument is based on the Court's refusal to recognize the state's interest in protecting the fetus throughout pregnancy.⁴¹² Although they concede that national guidelines on abortion have resulted from *Roe*,⁴¹³ they agree with Justice O'Connor's contention that these guidelines have resulted in an illogical treatment of the fetus.⁴¹⁴ This contention results from Bopp and Coleson's failure to recognize a woman's interests along with the interests of the fetus and the state.⁴¹⁵

When the interests of the woman are taken into account, it becomes clear that the *Roe* framework, of protecting the woman's choice before viability, and protecting the state's interest in the

410. Actually, *Roe* does not directly protect the fetus but rather recognizes the state's compelling interest in the fetus at viability. See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

411. Bopp & Coleson, *supra* note 2, at 246.

412. See *id.* at 246-47.

413. See *id.* at 246.

414. See *id.* (citing *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting)).

415. Bopp and Coleson's exclusion of women from any input into the analysis makes their argument not only inhuman but inappropriate. By restricting their discussion to pregnancy, fetal rights, and state interests, they have completely eliminated the woman and her rights. By so doing, they have provided less protection for the woman than they say the *Roe* Court provided for the fetus.

fetus after viability, also is the correct framework in legal areas other than abortion. This section reviews the existing law in other legal areas and demonstrates that it fits within the *Roe* viability framework. Bopp and Coleson incorrectly characterize these areas of the law as being in conflict with the legal framework of *Roe*. This illusory conflict does not withstand close scrutiny.

A. Tort Law

This section will consider the treatment of the fetus in tort law. After a brief discussion of the history of the decisions on prenatal injury, this section will conclude that viability serves as the appropriate basis for providing a consistent and fair judicial determination of the divergent interests of the pregnant woman and the state.

Historically, a fetus was seen as a part of the mother and any damage to the unborn, nonviable fetus was actionable only by the mother.⁴¹⁶ The courts were unwilling to impose upon a defendant a "duty of conduct to a person who was not in existence at the time" that a tortious act occurred.⁴¹⁷ This reasoning changed,⁴¹⁸ however, and now "every state has recognized prenatal harm as a legitimate cause of action for a child subsequently born."⁴¹⁹ In general, the only two requirements for recognition of this harm are that the fetus be born alive and that the harm occur prior to birth.⁴²⁰ The crux of this analysis is that the right to recover attaches only when the child is born alive.⁴²¹ Although every jurisdiction still main-

416. Justice Holmes articulated an early application of this idea in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884). In *Dietrich*, the Massachusetts Supreme Court denied recovery for injuries to the fetus because it saw the fetus as having no separate existence. *See id.* at 17.

417. W. PROSSER & W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 55, at 367-68 (5th ed. 1984).

418. *See, e.g., Bonbrest v. Kotz*, 65 F. Supp. 138, 140-42 (D.D.C. 1946) (allowing malpractice action by child injured in womb, despite lack of common-law precedent).

419. Bopp & Coleson, *supra* note 2, at 248-49 (citation omitted). This would seem to be a logical corollary to the viability distinction of *Roe* in that tort recovery is allowed only if the fetus has been born, irrespective of when the injury occurred. Thus, it would be logical to presume that recovery for fetal injury would not be allowed if the fetus had never been born.

420. *See Mathieu, Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice*, HARV. J.L. & PUB. POL'Y 19, 25 (1985).

421. This concept is harmonious with *Roe*, where the Court found that there had been a reluctance to attribute any legal rights to fetuses, "except in narrowly defined situations and except when the rights are contingent upon live birth." *Roe v. Wade*, 410 U.S. 113, 161 (1973). One of the oldest of these situations is the ability of the fetus to inherit. To recognize the parents' desire to provide for children not yet born, courts have been willing to

tains this requirement, there is a split of authority on whether recovery should be allowed for injuries that occur before viability.⁴²² Regardless of this split, the significant point, for purposes of an applicable standard, is not when the injury occurred but when the claim arises. No claim for recovery can be made until after the child is born. It is irrelevant whether the injury occurred before or after viability. As one commentator stated:

In compensating those infants who have been harmed as the result of prenatal injuries and were born alive, the courts have implicitly found that the true damage is suffered after birth, i.e., having to go through life with some defect or deformity. Thus, the damage has not actually been suffered by the viable or non-viable fetus, but by the human being who must now live with the handicap caused by the tortfeasor.⁴²³

Bopp and Coleson fail to recognize this point and instead assert justifications for allowing recovery for previability injuries.⁴²⁴ None of their justifications is appropriate to the issue of recovery; each is used simply to ascertain when the harm occurred, and, therefore, whether recovery should be allowed. What Bopp and Coleson fault as the "viability test"⁴²⁵ is merely the means by which some courts distinguish between recoverable and nonrecoverable harms once the fetus has been born. It is the requirement of birth that is important for recovery, not the timing of the harm.

Thus, by requiring the fetus to be born before a tort cause of action arises, courts require that the fetus become a person under

grant the fetus status as a person, if it is subsequently born alive. "Relatives of the decedent conceived before his [or her] death but born thereafter inherit as if they had been born in the lifetime of the decedent." UNIF. PROBATE CODE § 2-108 (1982).

422. See W. PROSSER & W. KEETON, *supra* note 417, § 55, at 368. In New York, for example, the courts distinguish between previability and postviability injuries. In *Albala v. City of New York*, 54 N.Y.2d 269, 429 N.E.2d 786, 787 (1981), the New York Court of Appeals refused recovery for injuries suffered before viability. In *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691, 695 (1951), the New York Court of Appeals allowed a surviving fetus to recover for prenatal, postviability injury. The *Albala* court distinguished *Woods* by noting that "at the time the tort [was] committed [in *Woods*] there [were] two identifiable beings within the zone of danger, each of whom [was] owed a duty independent of the other." *Albala*, 429 N.E.2d at 787. Cf. *Hornbuckle v. Plantation Pipe Line*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960).

423. Mathieu, *supra* note 420, at 25 n.21.

424. See Bopp & Coleson, *supra* note 2, at 249-50. Among the justifications they present are the irrelevance of fetal age, the similar type of harm, biological separability, and legal causation. See *id.*

425. *Id.*

the *Roe* definition.⁴²⁶ The fact that the courts allow recovery for injuries that occur before viability is not determinative. There is no right to recover until the child is born. Therefore, existing tort law is consistent with the *Roe* methodology.

B. *Wrongful Death*

Wrongful death statutes generally provide for a cause of action based on "any wrongful act, neglect or default" that causes death.⁴²⁷ Interpreting these statutes under *Roe's* fourteenth amendment definition of a fetus as not being a person, a wrongful death cause of action for fetuses would be limited to those injured *in utero*, born alive, but subsequently dying. Some states, however, depending on their underlying statutory definition of "person" or the way in which their courts choose to interpret the wrongful death statutes, allow recovery for stillborns.⁴²⁸ In *Summerfield v. Superior Court*,⁴²⁹ for example, the Arizona Supreme Court held that the word "person" in Arizona's wrongful death statutes includes "a stillborn, viable fetus."⁴³⁰ In harmonizing its decision with *Roe*, the court stated:

[W]hile we recognize the binding authority of *Roe v. Wade*, we do not believe that allowing recovery to the parents of a tortiously killed, viable fetus negates the pronouncement in *Roe* that the state has an interest in the fetus after viability. In fact, it may further the policy of *Roe* by permitting the state to protect 'a woman's right to continue her pregnancy by recognizing [recovery] . . . for harm caused by interference with that right.'⁴³¹

Other states, however, have chosen not to include a stillborn fetus within the wrongful death statutory definition of "person."⁴³²

426. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).

427. W. PROSSER & W. KEETON, *supra* note 417, § 127, at 946.

428. See, e.g., *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 368 (1974) (parents of eight and one-half month old stillborn fetus entitled to maintain action for fetus' wrongful death); *Summerfield v. Superior Court*, 144 Ariz. 467, 698 P.2d 712, 724 (1985) (word "person" in wrongful death statute includes stillborn, viable fetus, allowing parents to maintain action for wrongful death).

429. 144 Ariz. 467, 698 P.2d 712 (1985).

430. 698 P.2d at 723.

431. *Id.* (quoting Kadu, *The Law of Tortious Parental Death Since Roe v. Wade*, 45 Mo. L. REV. 639, 664 (1980)).

432. See *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *In re Troy D.*, 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (1989); *Raymond v. Bartsch*, 84 A.D.2d 60, 447 N.Y.S.2d 32 (1981); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Olejniczak v. Whitten*, 605 S.W.2d 142 (Mo. 1980).

The United States Supreme Court in *Roe* addressed this issue by noting that:

Some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life In short, the unborn have never been recognized in the law as persons in the whole sense.⁴³³

Courts have given various justifications for the inclusion of stillborns under wrongful death statutes, such as a willingness to consider the unborn to be persons, the capacity of postviable fetuses for biological independence, legislative intent to include fetuses within the definitional confines of the statute, and medical evidence of viability as a basis for the separability of the fetus.⁴³⁴

Such justifications and distinctions again do nothing to undermine the attachment of viability as the basis for recovery and are entirely harmonious with the thinking of *Roe* as to when the interests of the fetus and the state should be given weight. By limiting recovery for stillborn fetuses to those attaining viability, the courts are, in essence, imposing the same trimester scheme found in *Roe*.⁴³⁵ Only when the fetus has attained the requisite level of viability should it be capable of inclusion under the wrongful death statutes. It is at viability that the state's interest in preserving life is strong enough to warrant inclusion.

Bopp and Coleson also argue that *Roe* should be overturned because the lower courts have applied it inconsistently.⁴³⁶ This is an appropriate justification for overturning a Supreme Court decision, but does not compel the Court to grant review. One of the basic procedural rules the Court considers in granting review is whether the lower courts are in disagreement.⁴³⁷ The decision to

433. *Roe v. Wade*, 410 U.S. 113, 162 (1973) (footnote omitted).

434. See W. PROSSER & W. KEETON, *supra* note 417, § 55, at 369-70; Comment, *Torts—The Right of Recovery for the Tortious Death of the Unborn*, 27 HOWARD L.J. 1649 (1984).

435. See *Roe*, 410 U.S. at 164-65.

436. Bopp & Coleson, *supra* note 2, at 254, 351-52.

437. Sup. Ct. R. 17.1. The Rule states:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the

grant review is left to the discretion of the Court.

Finally, in making these decisions on recoverable harms, courts have

glossed over crucial differences between fetuses and persons, and have lost sight of the interests that narrow legal recognition of the fetus traditionally has attempted to protect. . . . Most importantly, the courts have failed to recognize the fundamental differences between a woman deciding to terminate her own pregnancy and a third party intruding upon her body to end that pregnancy against her will.⁴³⁸

C. Equity

Another area of the law in which recognition for the fetus has been asserted is equity. Some courts use their equitable power to impose restrictions on women that the existing statutory schemes and common law would not allow. Bopp and Coleson discuss this equitable power as a source for recognizing fetal rights over women's rights.⁴³⁹ They argue that the fetus is gaining increased rights through courts that are willing to protect the health of the fetus over that of the woman.⁴⁴⁰ For example, decisions regarding in-womb surgery, court-ordered caesarian sections, and suits recognizing maternal prenatal negligence suggest that the rights of the fetus may be increasing.⁴⁴¹ What Bopp and Coleson fail to realize is that the "right" to be born healthy attaches only after the right to be born attaches, which again rests upon the viability of the

decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Id.

438. Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 610-11 (1986).

439. See Bopp & Coleson, *supra* note 2, at 261-68.

440. See *id.* at 262.

441. See Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, XVI REV. L. SOC. CH. 277, 283-84 (1987-88).

fetus.

Bopp and Coleson then argue that fetal rights are linked to the right of parents to be the natural guardians of their children, the right of family privacy and family autonomy.⁴⁴² These links are part of the interests protected by *Roe* and, therefore, only reinforce the concept of viability. By imposing this balancing upon the various interests, Bopp and Coleson are, in effect, agreeing that such a balancing should occur.⁴⁴³ That is exactly the point of *Roe*. It is by allowing this balancing to shift as the interests of the mother, the fetus, and the state vary, that national guidelines are provided with flexibility for case-by-case interpretation.

Bopp and Coleson cite a series of cases allowing various invasive procedures on the mother to ensure fetal health.⁴⁴⁴ In all these cases, however, the fetus was viable at the point of state intervention.⁴⁴⁵ This recognition of the state's interest in protecting potential life is consistent with *Roe* and demonstrates the compatibility of the abortion cases and these cases. The one case that Bopp and Coleson cite as supporting state previability intervention, *Taft v. Taft*, was reversed by the Massachusetts Supreme Judicial Court upon a finding that "[n]o case has been cited to us, nor have we found one, in which a court ordered a pregnant woman to submit to a surgical procedure in order to assist in carrying a child not then viable to term."⁴⁴⁶ Thus, even though courts may be willing to balance the fetus' needs for medical care against the woman's right to reject that care, such balancing has occurred only in cases involving viable fetuses.⁴⁴⁷ This result is completely consistent with *Roe*'s viability framework.

D. Criminal Law

The last area of the law that should be considered in light of *Roe*'s framework involves criminal punishment for injury to or death of a fetus. Bopp and Coleson imply that fetuses at any stage

442. See Bopp & Coleson, *supra* note 2, at 262.

443. Bopp and Coleson admit that such a balancing should take place when they state that "[w]hile women's rights must be placed in the balance, it is certainly equitable that unborn fetuses be allowed to develop without preventable handicaps and injuries." *Id.* at 266 (footnote omitted).

444. See *id.* at 263-65 (citations omitted).

445. See *id.*

446. *Id.* at 265 (citing *Taft v. Taft*, 388 Mass. 331, 334 n.4, 446 N.E.2d 395, 397 n.4 (1983)).

447. See *id.* at 263-265.

of development are owed protection under the criminal law.⁴⁴⁸ The cases on which they rely, however, distinguish among stages of fetal development and favor protection based on birth or viability.

Bopp and Coleson contend that the distinction between birth and viability is arbitrary because it is illogical not to punish one who kills an "unborn" fetus and to punish one who kills a "born alive" fetus.⁴⁴⁹ In their article,⁴⁵⁰ Bopp and Coleson maintain that "the only satisfactory way to make the law logically consistent is to give the unborn protection in all contexts."⁴⁵¹ They fail to show, however, in what ways the viability criterion does not work or why the punishment for harm to the fetus should not attach at viability.

In *Keeler v. Superior Court*,⁴⁵² for example, the California Supreme Court held that a viable fetus was not a "person" at the time that an injury resulting in its being stillborn occurred. This distinction between "person" and fetus for the purposes of a homicide statute was subsequently rejected by the California Legislature, which later amended the homicide statute to make it unlawful to "kill a human being or a fetus."⁴⁵³ Another California decision, *People v. Smith*,⁴⁵⁴ rejected the Legislature's amendment when it was applied to a nonviable fetus. Upholding the *Roe* framework, the California Court of Appeals held that only after viability could the destruction of a fetus "constitute murder or other form of homicide."⁴⁵⁵

Bopp and Coleson find this result "[a]mazing."⁴⁵⁶ They argue that the treatment of the unborn should be consistent in all legal contexts. The result in *People v. Smith*, however, is not unwarranted. In fact, the more logical approach is to retain the national standard that has resulted from *Roe* and to provide for legal recognition and protection of the fetus only after viability. In addition, if Bopp and Coleson's requirement for consistency is eliminated, it would seem logical to allow the state to protect nonviable fetuses

448. See *id.* at 268-81.

449. See *id.* at 281.

450. See *id.* at 268-76 (citing *Keeler v. Superior Ct.*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970)(en banc); *People v. Smith*, 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (1976)).

451. *Id.* at 269.

452. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970)(en banc).

453. CAL. PENAL CODE § 187 (West 1988).

454. 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976).

455. *Id.* at 755, 129 Cal. Rptr. at 502.

456. Bopp & Coleson, *supra* note 2, at 269.

that are victims of homicide when their mothers have chosen to carry them to term. This would resolve Bopp and Coleson's concern for "protecting a woman's fundamental right of choosing to carry her child to term."⁴⁵⁷ It would also protect the woman's right to choose whether to terminate her pregnancy without facing possible homicide charges.

Bopp and Coleson also argue in favor of overturning the "born alive" rule.⁴⁵⁸ This is commendable, because it would be consistent with *Roe* in establishing that punishment under the criminal law, as in tort and wrongful death, should attach upon a determination of viability. Bopp and Coleson also would allow the states to protect fetuses throughout a woman's pregnancy. But that approach has been rejected consistently in a variety of legal contexts, including the criminal law. If consistency is the goal that is desired, viability is the approach that will allow consistent recognition of both the woman's rights and the state's interests.⁴⁵⁹

E. Respect

Bopp and Coleson argue that respect for fetuses has been recognized in contexts outside of abortion law in the form of "recognition of the dignity of human life."⁴⁶⁰ They see this respect demonstrated by statutes that require humane disposal of fetal remains and that proscribe fetal experimentation.⁴⁶¹ They conclude that *Roe* is inconsistent with these statutes and that "despite the dictates of *Roe*, the people through their elected representatives continue to express their belief in the essential humanity of the unborn."⁴⁶²

Their view of *Roe* as out-of-step with recognizing the dignity of human life is inaccurate. *Roe*'s dictates are not contrary to hu-

457. *Id.* at 270 (footnote omitted). It is interesting to note that Bopp and Coleson's apparent concern with protecting a "woman's fundamental right" to choose to carry her child to term runs contrary to their statement that "[n]o privacy interests [are] involved on the part of the woman." *Id.*

458. *See id.* at 272.

459. In the tort law context, a valuable justification remains for retaining the "born alive" rule to allow recovery by a child who is injured *in utero* and then born. Recognizing this validity, however, does not undermine the use of the viability standard in other contexts. It is logical to require that the fetus be born before its tort claim arises. On the other hand, if the injury were the result of a wrongful act, the state should be able to bring criminal charges against the "bad actor" only if the fetus were viable when injured.

460. Bopp & Coleson, *supra* note 2, at 281.

461. *See id.* at 281-82.

462. *Id.* at 282.

manity. In fact, *Roe* recognized this dignity by acknowledging the state's interests in protecting potential human life once the fetus reaches viability.⁴⁶³ It is Bopp and Coleson who are out-of-step in their refusal to recognize the woman's concomitant dignity that the Court protected in *Roe*.

Bopp and Coleson are mistaken in arguing that *Roe* and its progeny are inconsistent with the treatment of the fetus in other areas of the law. Recognition in other legal contexts requires either that the fetus be born alive, thus becoming a "person" under the fourteenth amendment, or that the fetus be viable at the time of injury or death to receive protection. This is the same standard found in *Roe*. It permits states to protect viable fetuses by regulating abortions after viability. In an attempt to show the inapplicability of *Roe*, Bopp and Coleson have actually demonstrated the need for an effective, consistent and provable standard. *Roe's* viability test is such a standard.

V. CONCLUSION

Bopp and Coleson view *Roe v. Wade* as "anomalous, absolute, and ripe for reversal."⁴⁶⁴ *Roe*, however, reached a meaningful balance between the important competing interests that all deserve constitutional recognition. The decision recognized that a woman's liberty and privacy interests are at stake in the choice whether to have an abortion or to bear a child. *Roe* also recognized the state's interests in protecting maternal health and potential human life.

Supporters on both sides of the abortion discussion point out ways in which *Roe* should be altered to give their view more protection, either by declaring that the woman's choice is absolute throughout her pregnancy, or by declaring that the state's interests are compelling throughout the woman's pregnancy. Neither of these alternatives, however, correctly acknowledges the delicate balance that is necessary under our constitutional scheme. *Roe* correctly acknowledged that balance and it would be devastating to both sides to lose its mediating effect.

Bopp and Coleson's call for *Roe's* reversal refuses to consider the woman's interests. Once the woman is factored back into the discussion, the need for the compromise that *Roe* represents becomes clear.

463. *Roe v. Wade*, 410 U.S. 113, 164-165 (1973).

464. Bopp & Coleson, *supra* note 2, at 181.

