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Rethinking Roe v. Wade

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In 1970, an unmarried pregnant woman filed a class action suit in federal district court in Dallas, Texas, seeking a declaratory judgment that Texas's criminal abortion laws were unconstitutional and an injunction against their enforcement.[1] The Texas criminal abortion laws, first enacted in 1854 and basically unchanged since 1856,[2] prohibited abortion except when "procured or attempted by medical advice for the purpose of saving the life of the mother."[3] A three-judge district court held that the Texas abortion laws were unconstitutionally vague and overbroad, infringing "[t]he fundamental right of single women and married persons to choose whether to have children."[4] Both the defendant (Wade, the District Attorney) and the plaintiff (who filed suit under the pseudonym, Roe) appealed to the Supreme Court of the United States.[5] The case was argued twice before the Court.[6] On January 22, 1973, the Court announced its decision in *Roe v. Wade*,[7] affirming the district court's judgment on the merits and introducing the broad doctrine of abortion privacy into constitutional law.

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1. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973). The similar claims of a childless, unpregnant couple were consolidated and a medical doctor who was a defendant in two pending state court prosecutions involving the abortion laws was permitted to intervene. But the claims of the married couple were dismissed as nonjusticiable. *Id.* at 1219.

2. *See generally* J. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 139 (1978).

3. *See Roe*, 410 U.S. at 117 n.1.

4. 314 F. Supp. at 1225.

5. Roe appealed because the district court declined to enter an injunction, finding the declaratory judgment to be adequate. The other plaintiffs also appealed. 410 U.S. at 122.

6. "It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term." City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 n.1 (1983).

7. 410 U.S. 113 (1973).

The legal effects of the *Roe* decision were revolutionary.[8] The Court's ruling demolished the constitutional underpinnings—pillars to some, stilts to others—for existing abortion laws in *all* states. Not only were century-old abortion statutes like Texas's affected, even the modern, liberalized abortion provisions of the Model Penal Code were invalidated, totally or in part, as a result of *Roe*.[9] The decision constitutionalized a controversy previously dealt with as a matter of legislative or common law policy. And it nationalized a matter previously the exclusive province of the states to regulate.

Roe v. Wade's social effects have been equally dramatic. In the first decade after *Roe* more than 12.5 million abortions were performed.[10] By 1978 abortion "had become the most frequently performed operation on adults in the United States."[11] More than 1.5 million abortions are performed annually.[12] Nearly one-third of all abortions are performed on teenagers,[13] and by 1978 the same percentage of abortions were being performed on women who previously have had one or more abortions.[14] By 1980 three hundred of every one thousand known pregnancies in the United States were terminated by abortion.[15] In eighteen metropolitan areas the number of abortions in 1980 exceeded the number of live births.[16]

This fall the Supreme Court will hear oral arguments in two cases involving the abortion privacy doctrine. If the Court ren-

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8. *See infra* notes 91-100 and accompanying text.

9. In fact, in a companion case, the Supreme Court invalidated substantial portions of the Georgia stetutes which incorporated the Model Penal Code provisions. Doe v. Bolton, 410 U.S. 179 (1973); *see also* L. WARDLE, THE ABORTION PRIVACY DOCTRINE at xi (1981).

10. Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSP. 119, 120 table 1 (1984).

11. F. JAFFE, B. LINDHEIM & P. LEE, ABORTION POLITICS 7 (1981); *see also* McCormack, *Record Number of Americans Going Under Knife*, NEXIS (United Press Int'l, Nov. 28, 1981).

12. Henshaw, Forrest & Blaine, *supra* note 10, at 120 table 1.

13. Henshaw, Forrest, Sullivan & Tietze, *Abortion in the United States, 1978*, 13 FAM. PLAN. PERSP. 6, 17 table 10, 18 table 11 (1981).

14. *Id.* at 17 table 10.

15. Henshaw, Forrest, Sullivan & Tietze, *Abortion in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSP. 5, 6 table 1 (1982).

16. In New York City, for example, there were 147,360 abortions and 125,363 live births in 1980. Smaller cities had similar ratios. In Iowa City, there were 3,370 abortions and only 1,276 live births. Richter, *1980 Abortions Outnumber Live Births in 18 U.S. Metro Areas*, National Right to Life News, Feb. 23, 1984, at 4 (the statistics for 1980 were compiled from birth data provided by the National Center for Health Statistics and abortion data gathered by the Alan Guttmacher Institute).

ders judgments on the merits in both *Diamond v. Charles*,[17] and *Thornburgh v. American College of Obstetricians and Gynecologists*,[18] it will have decided sixteen major abortion cases in just thirteen years.[19] And each time the Supreme Court applies its doctrine of abortion privacy, criticism of the Court and its abortion doctrine is rekindled and intensified.

It is time to rethink *Roe v. Wade*. As explained in Part II, the Supreme Court is in a better position today to deal with the delicate constitutional questions raised in *Roe* than it was in 1973. Before January 1973, judges and scholars had not maturely or extensively considered the ramifications of applying privacy precedents to abortion cases.[20] Laws were hostile to illegitimate children, single pregnant women, and unmarried parents, forcing many distressed women to seek abortions.[21] The world of the fetus was a new frontier, largely unexplored, and the implications for other legal dilemmas of extending a broad right of privacy to abortion were largely unrecognized.[22] In addition, the Supreme Court held a number of naive ideas about the practical implementation of its rule of unrestricted abortion.[23] Now, after twelve years of scholarly criticism, matured equal protection analysis, astounding developments in prenatal medicine, and millions of quick-fix, assembly-line abortions, the Court can more prudently and realistically balance the competing constitutional interests.

There is a compelling need for the Court to reconsider *Roe*

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17. 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted*, 105 S. Ct. 2356 (1985).

18. 737 F.2d 283 (3rd Cir. 1984), *prob. juris. noted*, 105 S. Ct. 2015 (1985). The Court possibly will not reach the merits in this case inasmuch as it has consolidated a challenge to jurisdiction with argument on the merits. *Id.*

19. The prior *major* abortion decisions have been: Roe v.Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980); H.L. v. Matheson, 450 U.S. 398 (1981); City of Akron v. Akron Center for Reproductive Health, Inc. 462 U.S. 416 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983). The Court has also rendered judgment in several other less significant abortion cases. *See, e.g.*, Connecticut v. Menillo, 423 U.S. 9 (1975); Bellotti v. Baird, 428 U.S. 132 (1976); Guste v. Jackson, 429 U.S. 399 (1977); *see also* Bigelow v. Virginia, 421 U.S. 809 (1975). The lower courts have been equally pressed by the flood of abortion cases since *Roe*. *See infra* note 41 and accompanying text.

20. *See infra* notes 36-45 and accompanying text.

21. *See infra* notes 46-56 and accompanying text.

22. *See infra* notes 57-64 and accompanying text.

23. *See infra* notes 65-72 and accompanying text.

v. Wade now: the sweeping doctrine of constitutional law *Roe* announced has proven unworkable and its rationale unpersuasive. As explained in Part III, *Roe v. Wade* has been perhaps the Supreme Court's most frequently and bitterly criticized decision, and the criticism has not come exclusively from persons philosophically opposed to the rule of unrestricted abortion.[24] After more than a decade *Roe v. Wade* has failed to receive any significant acceptance or endorsement by the democratic branches of government.[25] And *Roe* has generated a tremendous amount of litigation, miring the judiciary in a morass of regulatory details in a growing variety of peripheral applications.[26] *Roe* was an accident of history, and if any part of it is to become a legitimate part of our constitutional tradition the Court must fashion a more workable doctrine and provide a more convincing justification than it did twelve years ago.

The Supreme Court has never reconsidered *Roe*. Two years ago, Justice Powell defended the Court's reluctance to reassess the abortion privacy doctrine by suggesting that "[t]here are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*."[27] However, the excuses for refusing to reconsider *Roe* are neither compelling nor persuasive, and the Court merely postponed the inevitable. As explained in Part IV, the Court has made clear in other contexts that respect for prior decisions does not require rigid adherence to stare decisis when the doctrine enunciated in the precedent has proven unworkable in important respects, when it significantly departs from established doctrine, when it is inconsistent

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24. *See infra* notes 73-81 and accompanying text.

25. *See infra* notes 82-90 and accompanying text.

26. *See infra* notes 91-100 and accompanying text.

27. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 n.1 (1983). It is rather ironic that the Court raised the standard of stare decisis in a decision in which it significantly modified the "trimester rule" that it set forth so clearly in *Roe v. Wade*. That is, in *Roe* the Court held that during the entire second trimester of pregnancy, laws regulating "the abortion procedure in ways that are reasonably related to maternal health" were permissible. 410 U.S. at 164. In Doe v. Bolton, 410 U.S. 179 (1973), the Court invalidated a Georgia law (based on the Model Penal Code) requiring that abortions be performed only in approved hospitals because that requirement applied before the beginning of the second trimester of pregnancy. *Id.* at 193-95. Yet in *Akron* the Court held that an ordinance requiring all second trimester abortions to be performed in a hospital was unconstitutional because abortions could be safely performed in clinics during at least the first two or four weeks of the second trimester. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 437-39 (1983). Thus, in *Akron* the Court abandoned the categorical trimester approach it had adopted in *Roe*.

with the law in related areas, and when conditions underlying the doctrine have changed substantially, or have proven to be significantly different from prior assumptions. This is especially true when constitutional issues are under consideration.[28]

If the Court will learn from its experience of the past dozen years,[29] it has nothing to lose and much to gain from pruning the bramble bush it planted in *Roe v. Wade*. As outlined in Part V, the Court can make a much needed contribution to constitutional law and judicial integrity by avoiding excesses of doctrine and form when it reconsiders *Roe*.

I. WHAT THE COURT DECIDED IN *Roe v. Wade*

In the 1973 *Roe* opinion, written by Justice Blackmun, the Supreme Court began with a lengthy historical survey intended to prove that "the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage."[30] Next the Court reviewed previous judicial decisions in which particular individual or family "privacy" interests had received constitutional protection and held: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[31] The Court declared that a woman's right to abortion privacy was a "fundamental" constitutional right; thus, state regulations restricting abortion could be sustained only if necessary to effectuate a compelling state interest.[32]

The Court acknowledged that protecting the lives of "persons" is a compelling state interest, but held that a human fetus is not a "person" within the meaning of the fourteenth amendment because the term "person" refers elsewhere in the Constitution to postnatal individuals. The Court acknowledged that protecting maternal health is a compelling state interest, but found this interest would only justify regulation of sanitary aspects of abortion procedure after the end of the first trimester because the risk to maternal health of first trimester abortion

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28. *See infra* notes 109-41 and accompanying text.

29. *See infra* notes 142-53 and accompanying text.

30. 410 U.S. at 129. The Court's historical review demonstrated that statutory abortion restrictions in many states were about as "recent" as the fourteenth amendment itself.

31. *Id.* at 153.

32. *Id.* at 155-56.

"may he less than mortality in normal childbirth."[33] The Court also acknowledged that protecting "potential life" in utero might he a compelling state interest. But noting "a wide diversity of thinking" among theologians, philosophers, and physicians about when life begins, the Court held that this interest could not justify abortion restrictions until the fetus is viable "because the fetus then presumably has the capability of meaningful life outside the mother's womb."[34] In sum, the Court explained that the constitutionality of abortion laws depends upon the "trimester" of pregnancy they affect; in any event, abortion may never be prohibited until after the fetus is viable.[35]

II. The Supreme Court Is in a Better Position Today than It Was in 1973 to Deal with the Abortion Issue

Introducing in 1973 the sweeping and radical constitutional doctrine of ahortion privacy to resolve a question of such recent vintage as whether the Constitution protects a woman's desire to have an ahortion was premature and imprudent. The Court is in a much better position today than it was a dozen years ago to address the constitutionality of abortion restrictions.

A. Maturation of Scholarship and Case Law

That laws prohibiting or regulating ahortion might violate an unwritten, suhstantive constitutional right of privacy was a

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33. *Id.* at 163.

34. *Id.* Here, as Professor Ely noted, the Court substituted a definition of viability for an explanation of why it is constitutionally critical. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 924 (1973) ("[T]he Court's defense seems to mistake a definition for a syllogism.").

35. The Court summarized the new doctrine of constitutional law, which I call the abortion privacy doctrine, as follows:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and ite effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriata medical judgment, for the preservation of the life or health of the mother.

Roe, 410 U.S. at 164-65. The extent of permissible restrictions on post-viability abortion were substantially limited by the Court's broad definition of the "health" exception. *See infra* note 118.

novel idea in 1973.[36] The argument that modern abortion laws, like the Model Penal Code provisions, infringed a constitutionally protected right of privacy had not received extensive or careful attention from legal scholars.[37] Just two years prior to *Roe* the Supreme Court rejected a constitutional challenge to an abortion statute, and while the right to privacy was argued in that case, the Court did not even mention it in its analysis.[38] Thus, in *Roe v. Wade*, the Supreme Court unleashed a monstrous new principle without the benefit of mature scholarship seasoned by thorough discussion. By contrast, legal scholars have now thoroughly evaluated, debated, criticized, and analyzed *Roe*'s abortion privacy doctrine for more than a dozen years.[39] The Court may have failed in shaping or cogently justi-

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36. It should be remembered that prior to *Roe* abortion had been prohibited at common law, to a greater or lesser extent, for more than six centuries. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (S. Thorne trans. 1968); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129-30 (1783 & photo. reprint 1978). Those restrictions were a part of American common law when the Constitution was adopted. *See generally* J. MOHR, *supra* note 2; R. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 25 (1969). During the 19th century common law abortion prohibitions were codified, many of them before or at the time the fourteenth amendment was adopted. *See Proposed Constitutional Amendments on Abortion: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 5-30 (1976) (statement of Professor Joseph P. Witherspoon); J. MOHR, *supra* note 2, at 149-70. No substantial question about the constitutionality of abortion laws appears to have existed before 1968.

37. Most of the attention focused on the 19th century abortion laws. The "germinal article" to consider the broadside issue, Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730 (1968), was published in 1968. E. RUBIN, ABORTION, POLITICS AND THE COURTS 41 (1982). But the *Roe* opinion did not cite this piece. Rather, the main law review article Justice Blackmun relied upon in *Roe* was 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?*, 17 N.Y.L.F. 335 (1971). The validity of Means' historical analysis has been seriously challenged. *See* Destro, *Abortion and the Constitution: The Need For a Life Protective Amendment*, 63 CALIF. L. REV. 1250, 1267-92 (1975); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 379-89 (1979).

38. United States v. Vuitch, 402 U.S. 62 (1971); Brief for Appellee at 40, *Vuitch*; Amicus Curiae Brief of Dr. William F. Colliton, Jr., and other District of Columbia Physicians at 37, *Vuitch*.

39. *Roe* has been the subject of more than 200 law review articles published since 1973. *See* vols. 16-23 INDEX TO LEGAL PERIODICALS (1973-1985); vols. 1-6 CURRENT LAW INDEX (1980-1985). Prominent articles include: Ely, *supra* note 34; Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1974); Freund, *Storms Over the Supreme Court*, 69 A.B.A. J. 1474 (1983); Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375 (1985); Morgan, Roe v. Wade *and the Lesson of the Pre-*Roe *Case Law*, 77 MICH. L. REV. 1724 (1979); Sandalow, *Federalism and Social Change*, 43 LAW & CONTEMP. PROBS., Sum.

fying the abortion privacy doctrine in *Roe*, but it at least succeeded in drawing attention to it.

Nor did the Court in 1973 have the benefit of a substantial, well-developed body of lower court decisions in which the issue and analysis had been ripened and refined.[40] In contrast, there now exists an established body of case law, including more than 250 decisions by the lower federal courts since *Roe v. Wade*,[41] in

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1980, at 29; Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 B.Y.U. L. REV. 811.

Moreover, discussion and criticism of *Roe* and its progeny are standard in constitutional law texts and treatises as well as many other monographs. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 27-29 (1975); A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976); G. GUNTHER, CONSTITUTIONAL LAW 517-47 (11th ed. 1985); H. KRAUSE, FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 327-30 (2d ed. 1983); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 630-35 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 886-990 (1978); *see also infra* notes 75-81 and accompanying text.

40. In *Roe* the Court cited 17 cases decided in federal and state courts in which constitutional questions had been raised concerning abortion restrictions. 410 U.S. at 154-55. However, some of those cases involved primarily questions of vagueness or overbreadth, not the privacy doctrine. And all of these cases had been decided within the previous four years; in fact, all but one had been decided between 1970 and 1972. *Id.*

41. The pre-1980 decisions are listed in L. WARDLE, *supra* note 9, at 313-21 tables A, B & C. The 1980-1982 decisions (totaling 30 published opinions) are listed in *Legal Ramifications of the Human Life Amendment: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3*, 98th Cong., 1st Sess. 47, 73-74 app. B (1983) (prepared statement of Lynn D. Wardle, Assoc. Prof. of Law, J. Reuben Clark Law School, Brigham Young Univ.) [hereinafter cited as *Legal Ramifications*]. The reported decisions of the federal courts since 1982 include the following: *Supreme Court Decisions*—City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983); *Court of Appeals Decisions*—Reproductive Health Servs. v. Freeman, 614 F.2d 585 (8th Cir.), *vacated*, 449 U.S. 809 (1980); Planned Parenthood Ass'n v. Kempiners, 700 F.2d 1115 (7th Cir. 1983); Women's Servs., P.C. v. Douglas, 710 F.2d 465 (8th Cir. 1983); Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983); Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983); Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983); American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), *prob. juris. noted*, 105 S. Ct. 2015 (1985); Birth Control Centers, Inc. v. Reizen, 743 F.2d 352 (6th Cir. 1984); Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted*, 105 S. Ct. 2356 (1985); Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985); Illinois v. United States, No. 84-2535 slip op. (7th Cir. Aug. 30, 1985) (available on LEXIS, Genfed library, USAPP file); *District Court Decisions*—Meadowbrook Women's Clinic v. Minnesota, 557 F. Supp. 1172 (D. Minn. 1983); West Side Women's Servs., Inc. v. City of Cleveland, 573 F. Supp. 504 (N.D. Ohio 1983); T.L.J. v. Ashcroft, 585 F. Supp. 712 (W.D. Mo. 1983); Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410 (N.D. Ohio 1984); Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984); Planned Parenthood v. Board of Medical Review, 598 F. Supp. 625 (D.R.I. 1984); National Educ. Ass'n v. Garrahy, 598 F. Supp. 1374 (D.R.I. 1984); Eubanks v. Brown, 604 F. Supp. 141 (W.D. Ky. 1984); Pilgrim Medical Group v. New Jersey Bd. of Medical Examiners, 613 F. Supp. 837 (D.N.J. 1985); Marcowitz v. Village of Oak Lawn, No. 84-C-3574 slip op. (N.D. Ill. Oct. 2, 1984) (available on LEXIS, Genfed library, Dist file); Planned Parenthood

which the abortion privacy doctrine has been applied to an incredibly wide variety of laws purportedly restricting, regulating, or discouraging abortion. In fact, since January 22, 1973, the Supreme Court alone has decided more cases dealing with the constitutional limits of abortion regulation than all state and federal courts combined decided in the entire history of the American courts before *Roe* was decided.[42]

Moreover, the pre-*Roe* decisions did not provide the Supreme Court with a carefully ripened, balanced body of judicial doctrine in which the constitutional aspects of abortion restriction had been carefully considered from different perspectives. Rather, the cases decided before *Roe* were part of a recently initiated pro-abortion "litigation campaign."[43] In an effort to circumvent the relatively slow and cumbersome legislative reform process and hasten revision or abolition of traditional abortion laws,[44] a loosely coordinated "flood of litigation" was initiated in 1969 and 1970.[45] Thus, when the Supreme Court adopted it as the supreme law of the land, the premise that the Constitution protects as a fundamental right a pregnant woman's decision to have an abortion was little more than a newly coined slogan of a group of lobbyists.

B. Clarification of Related Legal Doctrines

When *Roe v. Wade* was decided in 1973 invidious legal doctrines exacerbated the abortion dilemma and distorted the Court's perception of the constitutional interests implicated. For

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League v. Bellotti, 608 F. Supp. 800 (D. Mass. 1985); Glick v. McKay, No. CV-R-85-331-ECR slip op. (D. Nev. July 17, 1985) (available on LEXIS, Genfed library, Dist file); C.L.G. v. Webster, No. 85-4302-GV-C-5 slip op. (W.D. Mo. Aug. 7, 1985) (available on LEXIS, Genfed library, Dist file).

42. *See supra* note 40.

43. E. RUBIN, *supra* note 37, at 29-55, 175 n.1.

44. Actually, proponents of liberalized abortion laws had achieved significant reforms rather quickly: in just six years prior to *Roe* more than one-third of the states had enacted legislation liberalizing abortion (adopting the Model Penal Code provisions in most cases). *See* L. WARDLE & M. WOOD, A LAWYER LOOKS AT ABORTION 42-43 (1982).

45. E. RUBIN, *supra* note 37, at 46.

> Although a well-organized litigation campaign on the model of the NAACP—Legal Defense Fund campaigns for school desegregation and the abolition of capital punishment never developed, an informal network of communication resulted, and groups bringing suits in different cities exchanged ideas and legal strategies. Several lawyers worked in a number of these suits.

Id. at 52; *see also id.* at 47; Lampe, *The World in Perspective*, in ABORTION AND SOCIAL JUSTICE 89, 99 (T. Hilgers & D. Horan eds. 1972).

instance, in 1973 illegitimacy entailed overwhelming stigma and legal inferiority for the illegitimate child and his or her mother.[46] Unmarried mothers were discriminated against in education and government assistance programs.[47] Unwed fathers had few rights and the law reflected a rigid expectation that they would assume few responsibilities.[48] In general, the law ignored the plight of single parents.

These intolerant laws and customs created a cruel trap in which traditional criminal abortion laws operated as an attention-getting saw-toothed clamp. It is no wonder that many young women, facing such stigma and under the strain of coping with an unexpected and unwanted pregnancy, were driven to abortion, even illegal abortion. The plight of these distressed women in 1973 was spotlighted in the abortion cases.[49] But rather than evaluating the constitutionality of the invidious laws that were forcing desperate women to seek the radical remedy of abortion, the Court decided to constitutionally sanction abortion. Ironically, the Court itself was not and is not without some responsibility for perpetuating the harsh laws and customs that by 1973 were pushing growing numbers of desperate women into the tragedy of abortion.[50]

Today the Court can consider the constitutionality of abortion restrictions in a significantly different context. The Court has moved on to assess the constitutionality of the laws that pressured many women into seeking abortion. Women's rights

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46. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 155-80 (1968); H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 21-42 (1971); Turton, *Unequal Protection of the Illegitimate Child*, 13 S. TEX. L.J. 126 (1971); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

47. *See generally* Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1137-59 (1981); Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972) (high school regulation prohibiting married students from participating in extracurricular activities).

48. *See* H. CLARK, *supra* note 46, at 176-77; Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971).

49. *See Abortion—Part IV: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary on S.J. Res. 6, S.J. Res. 10, S.J. Res. 11, and S.J. Res. 91*, 94th Cong., 1st Sess. 300 (1976) (statement of Sarah Weddington); B. WOODWARD & S. ARMSTRONG, THE BRETHREN 183, 230 (1979); *see also* E. RUBIN, *supra* note 37, at 45-48.

50. *See, e.g.*, Labine v. Vincent, 401 U.S. 532 (1971) (upholding, less than two years before *Roe*, a statute denying right of illegitimates to inherit, even though acknowledged as children by deceased). The first Supreme Court decision to hold that a law discriminating against women violated the equal protection guarantee was decided in 1971. Reed v. Reed, 404 U.S. 71 (1971).

and stature have generally been enhanced by the Court.[51] Laws discriminating against pregnant women have been invalidated or amended.[52] The Court has established that the Constitution does not shelter laws or government practices that discriminate against children born out of wedlock[53] or their unmarried mothers.[54] The Court has recognized the parental rights of unwed fathers and emphasized their familial and support duties.[55] The Court has even facilitated access to contraceptives.[56] Yet, ironically, while it has done much to abolish the stigma of birth out of wedlock, the Court has created a whole new class of illegitimates. The unborn are subject to the most invidious form of discrimination: denial of legal protection for their very lives. *Roe* set this new illegitimacy beyond the reach of legislative reform.

C. Recognition of Scientific Knowledge and Legal Implications

When it considered the fetus in 1973, the Supreme Court entered generally unexplored territory. Similarly, in 1973 the Court did not appreciate fully the implications that adopting a broad notion of constitutional privacy entailing a right to destroy a developing life-in-being would have for other medico-legal dilemmas. Since *Roe*, however, in vitro fertilization, embryo transfers, amniocentesis, ultrasound imaging, in utero surgery on the fetus, and the wonders of prenatal and perinatal medicine

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51. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Westcott, 443 U.S. 76 (1979); American Export Lines v. Alvez, 446 U.S. 274 (1980); Kirchberg v. Feenstra, 450 U.S. 455 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

52. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (per curiam); Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (amending Title VII to prohibit discrimination based on pregnancy or childbirth).

53. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Jiminez v. Weinberger, 417 U.S. 628 (1974); Trimble v. Gordon, 430 U.S. 762 (1977); Mills v. Habluetzel, 456 U.S. 91 (1982); Picket v. Brown, 462 U.S. 1 (1983). *But see* Fiallo v. Bell, 430 U.S. 787 (1977); Lalli v. Lalli, 439 U.S. 259 (1978).

54. *See, e.g.*, Califano v. Westcott, 443 U.S. 76 (1979); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

55. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); *see also* Quilloin v. Walcott, 434 U.S. 246 (1978); Mills v. Habluetzel, 456 U.S. 91 (1982); Pickett v. Brown, 462 U.S. 1 (1983); Lehr v. Robertson, 463 U.S. 248 (1983).

56. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). The Court's activity in this area began before the *Roe* decision. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

have rushed into an amazed world.[57] The humanity of the fetus, including its responsiveness to pain stimuli, has become widely known and a source of embarrassment for the defenders of unrestricted abortion.[58]

The past twelve years have also sharpened our awareness of the implications of a broad abortion privacy doctrine. Accepting the notion that abortion is a pregnant woman's basic constitutional right has changed the abortion decision from a profound, troubling, and sensitive dilemma to an ordinary matter "much like elective cosmetic surgery."[59] Other troubling implications

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57. An excellent example of this is Justice Blackmun's statement in *Roe* that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." 410 U.S. at 160. As authority for that statement, Justice Blackmun cited the then-current edition of a standard obstetric's text. The most recent edition of that text notes the survival of infants below 500 grams (22 gestational or menstrual weeks), which is 20 weeks from conception. J. PRITCHARD, P. MACDONALD & N. GANT, WILLIAMS OBSTETRICS 467, 748-50 (17th ed. 1985); *see also* Dunn & Stirrat, *Capable of Being Born Alive*, LANCET, March 10, 1984, at 553, 554; Matthews, *Infant Born 18 Weeks Premature at 17 Ounces Survives After 7 Weeks*, Wash. Post, Mar. 31, 1983, at A2, col. 2. Just four years after *Roe* was decided the World Health Assembly recommended that all national perinatal statistics should include fetuses and infants "delivered weighing at least 500 g or . . . the corresponding gestational age (22 weeks) or body length (25 cm crown-heel) whether alive or dead." Dunn & Stirrat, *supra*, at 554 (quoting 1 WORLD HEALTH ORGANIZATION, INT'L CLASSIFICATION OF DISEASES: DEFINITIONS AND RECOMMENDATIONS 763-68 (9th ed. 1979)); *see also* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 457 n.5 (1983) (O'Connor, J., dissenting).

In their preface to the 1980 edition of WILLIAMS OBSTETRICS, Doctors Pritchard and MacDonald wrote:

> Happily, we have entered an era in which the fetus can be rightfully considered and treated as our second patient. . . . Fetal diagnosis and therapy have *now* emerged as legitimate tools the obstetrician must possess. Moreover, the number of tools the obstetrician can employ to address the needs of the fetus *increases each year.* We are of the view that it is *the most exciting of times to be an obstetrician. Who would have dreamed—even a few years ago—that we could serve the fetus as physician?* Or, that the well-being and growth of the fetus could be monitored accurately and that the status of fetal health could be addressed? *It is an exciting time,* and we welcome you to join in this exciting adventure, Maternal-Fetal Medicine.

J. PRITCHARD & P. MACDONALD, WILLIAMS OBSTETRICS at vii (16th ed. 1980) (emphasis added).

58. Letter from Dr. Richard T.F. Schmidt, Past President, American College of Obstetricians and Gynecologists and 25 other Physicians to President Ronald Reagan (Feb. 13, 1984) (endorsing the president's statement affirming "the humanity and sensitivity of the human unborn" and specifically confirming the responsitivity to pain stimuli of the fetus); Wallis, *Silent Scream*, TIME, Mar. 25, 1985, at 62 (controversy generated by pro-life movie, *Silent Scream*, containing ultrasound imaging recording a fetus during an actual abortion); Collins, Zielinski & Marzen, *Fetal Pain and Abortion: The Medical Evidence*, in STUDIES IN LAW & MEDICINE No. 18 (Am. United for Life Legal Defense Fund 1984).

59. R. BENSON, CURRENT OBSTETRIC & GYNECOLOGICAL DIAGNOSIS & TREATMENT 550

are arising in areas of medical experimentation on prenatal subjects,[60] medical treatment for prematurely born infants,[61] medical decision making for the terminally ill,[62] and adoption.[63] Even the terrible, growing epidemic of postnatal child abuse has been linked to abortion.[64]

(5th ed. 1984).

60. *See* Ethics Advisory Board, Department of Health, Education and Welfare, Report and Conclusions: HEW Support of Human In Vitro Fertilization and Embryo Transfer, 44 Fed. Reg. 35,033 (1979); *see also* SUBCOMM. ON HEALTH OF THE SENATE COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., 1ST SESS., FEDERAL REGULATION OF HUMAN EXPERIMENTATION, 1975 (Comm. Print 1975); 45 C.F.R. 46.201-211 (1984) (restriction on research on fetus, embryos, and in vitro research); D. MALONEY, PROTECTION OF HUMAN RESEARCH SUBJECTS 361-77 (1984); Steinfels, *In Vitro Fertilization: Ethically Acceptable Research*, 9 HASTINGS CENTER REP. 5 (1979); *Case Number 477: The Fetus As Organ Farm*, 8 HASTINGS CENTER REP. 23 (1978); *Correspondence*, 9 HASTINGS CENTER REP. 4 (1979).

61. Medical treatment for prenatal patisnts includes bladder surgery, inserting shunts, ex utero surgery, and reinsertion of the fetus into the womb. *See* Draynor, *Treating the Unborn*, SCIENCE DIG., Sept. 1982, at 67.

62. *See, e.g., In re* Karen Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); Pettit v. Chester County Hosp., 8 FAM. L. RPTR. (BNA) 2729 (Pa. Chester Cty. Ct. of Com. Pleas, Aug. 25, 1982); PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORIAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 23-40 (1983).

63. One consequence of abortion has been a dramatically increased backlog of couples awaiting children for adoption. In 1984, "more than 2 million couples were in contention for the 58,000 children placed [for adoption], a ratio of 35 to 1." Wilson & Hitchings, *Adoption: It's Not Impossible*, BUS. WK., July 8, 1985, at 112; *see also* Bachrach, *Adoption As A Means of Family Formation: Data From the National Survey of Family Growth*, 45 J. MARR. & FAM. 859 (1983) (noting rising demand for adoptable children and decreasing supply of adoptable children); Charney, *The Rebirth of Private Adoptions*, 71 A.B.A. J., June 1985, at 52, 53 (North American Council on Adoptable Children estimated that 100,000 children would be available for adoption in 1985, down 75,000 from 1970). The discrepancy in the estimated number of children available for adoption results from different definitions of "children available." The North American Council on Adoption (N.A.C.A.) estimate of 100,000 includes older children as well as infants and children whose parents' rights have not been terminated, but "could be." Telephone interview with Joe Kroll of the N.A.C.A. (Sept. 28, 1985). The National Adoption Committee estimate of 58,000 refers to actual adoptions and includes an estimated 8,000 foreign adoptions, 10,000 special needs children adopted, and 40,000 healthy, normal American infants adopted. Telephone interview with Jeff Rosenberg, Director of Public Policy, National Adoption Committee (Oct. 3, 1985).

64. *See, e.g.*, H. BROWN, DEATH BEFORE BIRTH 60-62 (1977). "Among the probable results of early abortion we must list the rapidly growing problem of child abuse, which has reached almost epidemic proportions." *Id.* at 60; *see also* Pfouts, Schopler & Henley, *Deviant Behaviors of Child Victims and Bystanders in Violent Families*, in EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY 79 (R. Hunner & Y. Walker eds. 1981). Just as the bystanders in the family are affected detrimentally by spouse abuse and child abuse, bystanders in a society in which 1.5 million annual abortions are performed may be detrimentally affected by the ethic of violence toward bothersome children perpetuated by that practice.

D. Recognition of the Exploitive Practices of the Abortion Industry

Finally, in 1973 the Court was extremely naive about how the medical profession would implement legalized abortion on demand. The Court's opinion was predicated on a model of compassionate medical consultation featuring the pregnant woman's personal physician.[65] The reality of modern abortion practice differs quite dramatically from the model the Court described in *Roe* and its progeny. Nearly 500,000 abortions are performed annually on teenage girls.[66] Many of the girls on whom abortions are performed are fifteen years old and younger.[67] And while nearly half of all teens who obtain abortions do so without parental knowledge,[68] "the coercion of the pregnant teen-ager [to have an abortion] is more common than you might think."[69] More than fifty-five percent of all 1.5 million annual abortions are performed in abortion clinics.[70] More than five hundred facilities (mostly clinics) performed more than one thousand abortions each in 1982.[71] The method of operation at many of these clinics is fast-track, quick-fix, volume-for-profit.[72] Thus, the

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65. *See, e.g., Roe,* 410 U.S. at 165-66; Doe v. Bolton, 410 U.S. 179, 195-200 (1973); Colautti v. Franklin, 439 U.S. 379, 387 (1979); *see also* Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship,* 1978 B.Y.U. L. Rev. 783, 785.

66. *See, e.g.,* Henshaw & O'Reilley, *Characteristics of Abortion Patients in the United States, 1979 and 1980,* 15 Fam. Plan. Persp. 5, 6 table 1 (1983).

67. *Id.* The Supreme Court has heard one case involving a challenge to a state abortion law brought by a fifteen-year-old girl seeking an abortion. H.L. v. Matheson, 450 U.S. 398 (1981). The record in another case that went to the Supreme Court revealed that girls as young as ten years old had sought abortions. Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1371 (E.D. Mo. 1975), *modified,* 428 U.S. 52 (1976).

68. Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescent's Use of Family Planning and Abortion Services,* 12 Fam. Plan. Persp. 284, 287 (1980).

69. Moon, *Why I Don't Do Abortions Anymore,* Med. Econ., Mar. 4, 1985, at 61, 62.

70. Henshaw, Forrest & Blaine, *supra* note 10, at 119, 123.

71. *Id.* at 122 table 4, 124 table 6.

72. The mode of operation of one such clinic has been described as follows:

> "The counseling . . . occurs entirely on the day the abortion is to be performed. . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another. . . . The physician takes no part in this counseling process . . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques. . . .
>
> "The abortion itself takes five to seven minutes. . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting usually of five patients. . . . After the abortion [the physi-

abortion decision is generally not made by the pregnant woman in consultation with her personal physician who knows her well and who has evaluated what may be best for her. Abortions are most often performed in abortion clinics by doctors whose livelihoods depend in whole or in part on performing abortions quickly and who frequently do not even see the woman involved until she is in the stirrups.

III. *Roe* Is Unpersuasive and Unworkable

Incorporating the doctrine of abortion privacy as part of the supreme law of the land resulted from an accident of history. The accident was that in 1973 and for more than a decade afterward a majority of the seats on the Supreme Court were occupied by persons who believed that the states should no longer be permitted to restrict abortion.[73] Whether the abortion privacy doctrine—indeed, whether any broad right to privacy—will continue to be part of United States constitutional law ten or twenty years after the "Burger Court" has left the bench depends upon whether the Court's rationale for this extraordinary resurrection of substantive due process has been persuasive and whether the Court's doctrine has proven workable. After twelve years of failure on both counts, the Supreme Court should either overhaul the *Roe* doctrine or abandon it as a "derelict in the stream of the law."[74]

A. Roe*'s Rationale is Unconvincing*

Intense criticism of *Roe v. Wade* began immediately in 1973 and bas continued unabated.[75] Legal scholars have sharply criticized the Court for introducing such a revolutionary constitu-

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cian] spends a brief period with the minor and others in the group in the recovery room . . . ."

428 U.S. at 91 n.2 (Stewart, J., concurring) (quoting Brief for the Appellants at 43-44, Bellotti v. Baird, 428 U.S. 132 (1976)) (omissions by the court).

73. The unpredictable nature of *Roe* is underscored by the fact that a majority of the justices appointed by President Nixon, who campaigned for a "strict construction" of the Constitution, voted with the majority.

74. North Dakota State Bd. of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156, 167 (1973).

75. *See, e.g.*, Ginsburg, *supra* note 39, at 379 (noting the unrelenting "searing criticisms of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun, . . . annual proposals for overruling *Roe* by constitutional amendment, and a variety of measures in Congress and state legislatures to contain or curtail the decision"); *see also supra* note 39.

tional doctrine without more substantial or persuasive justification. Professor Cox summarized these criticisms well when he wrote:

> My criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment . . . . Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.[76]

Such criticism has not come exclusively from those philosophically opposed to the substantive rule of law introduced in *Roe;* some of the sharpest volleys have been fired by persons supportive of or sympathetic to decriminalizing abortion.[77] The Court's opinion in *Roe* is so inadequate that scholars supportive of the result have been anxious to "rewrite" the Court's opinion.[78] Even judges, whose loyalty and adherence to the *Roe* doctrine of abortion privacy has been an example of forbearance and solidarity,[79] have criticized the unpersuasive opinion in *Roe*.[80] And as recent attempts to limit federal court jurisdiction illustrate, *Roe* has damaged the Supreme Court's reputation and credibility in a way that portends ominously for the independence and integrity of the federal judicial system.[81]

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76. A. Cox, *supra* note 39, at 113-14. Many others have echoed this criticism. *See, e.g.*, A. Bickel, *supra* note 39, at 27-29; Blasi, *The Rootless Activism of the Burger Court*, in The Burger Court: The Counter-Revolution That Wasn't 198, 212 (V. Blasi ed. 1983); Ely, *supra* note 34, at 935-37; Epstein, *supra* note 39, at 183-85; Wardle, *supra* note 39, at 820-27.

77. *See, e.g.*, Ely, *supra* note 34, at 952; Ginsburg, *supra* note 39, at 380-86. Professor Cox himself is not known to be a "right-to-lifer."

78. *See, e.g.*, Regan, *Rewriting* Roe v. Wade, 77 Mich. L. Rev. 1569 (1979); L. Tribe, *supra* note 39, § 15-10, at 928; Ginsburg, *supra* note 39, at 380-86; Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 57-59 (1977); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 9, 19-25 (1973).

79. L. Wardle, *supra* note 9, at 303.

80. "For these judges, the justices' opinions on abortion in *Roe* lacked sufficient reasoning to justify this judicial excursion into the field of morals." Caldeira, *Judges Judge the Supreme Court*, 61 Judicature 208, 212 (1977). Many of the judges surveyed "labeled *Roe v. Wade* massive 'judicial legislation.'" *Id.*

81. Recent attempts in Congress to limit the jurisdiction of the courts are the most notable example of loss of confidence in the federal judiciary. *See, e.g.*, S. 158, 97th

B. The Coequal Branches Have Refused to Endorse Roe

The democratic branches of both federal and state governments have not accepted or endorsed *Roe*. State legislatures have repeatedly expressed their dissatisfaction with the *Roe* doctrine by enacting statutes to restrict abortion to the full extent permitted under that doctrine.[82] From 1973 to 1984 state legislatures enacted more than 250 different bills regulating abortion.[83] Additionally, at least twenty-three state legislatures have sent memorials requesting Congress to propose an anti-abortion amendment to the Constitution,[84] and at least nineteen state legislatures have passed petitions to convene a constitutional convention to propose a human life amendment to the Constitution.[85]

Similarly, in every session since *Roe* was decided Congress has been flooded with proposals directly or indirectly expressing dissatisfaction with the abortion privacy doctrine. In less than thirteen years nearly six hundred separately numbered resolutions pertaining to abortion have been introduced in Congress, including 270 joint resolutions proposing anti-abortion amendments to the Constitution.[86] Congress has enacted more than

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Cong., 1st Sess. (1981); SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 1ST SESS., HUMAN LIFE BILL—S. 158 29 (Comm. Print 1981); Freund, *supra* note 39, at 1480.

82. *See, e.g.*, S. REP. No. 465, 97th Cong., 2d Sess. 2-5 (1982); Pearson & Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J.L. & PUB. POL. 427 (1985).

83. In the first decade after *Roe*, 228 separate abortion acts or bills were enacted by state legislatures. Busb, *Fertility-Related State Laws Enacted in 1982*, 15 FAM. PLAN. PERSP. 111, 111 table 1 (1983). In 1983 another 19 abortion acts were enacted, and in 1984 12 additional abortion bills were enacted. Telephone interview with Terry Sollom, Alan Guttmacher Institute, Public Policy Dept. (Sept. 27, 1985).

84. The memorials are listed in L. WARDLE & M. WOOD, *supra* note 44, at 219-22.

85. *Id.* at 211-16.

86. The resolutions introduced during the first decade after *Roe* are listed in *Legal Ramifications, supra* note 41, at 71, apps. D-1 to D-6.

The following resolutions pertaining to abortion were introduced in the 98th Congress:

(A) Proposed Amendments to the Constitution: H.R.J. Res. 15, H.R.J. Res. 26, H.R.J. Res. 59, H.R.J. Res. 73, H.R.J. Res. 82, H.R.J. Res. 84, H.R.J. Res. 92, H.R.J. Res. 114, H.R.J. Res. 116, H.R.J. Res. 223, H.R.J. Res. 248, H.R.J. Res. 438, H.R.J. Res. 641, H.R.J. Res. 648, S.J. Res. 3, S.J. Res. 4, S.J. Res. 8, S.J. Res. 9, S.J. Res. 13, S.J. Res. 14, S.J. Res. 24, S.J. Res. 356.

(B) Proposed Legisletion and Resolutions: H.R. Con. Res. 93, H.R. Con. Res. 200, H.R. Con. Res. 345, H.R. Con. Res. 407, H.R. 428, H.R. 512, H.R. 513, H.R. 523, H.R. 614, H.R. 618, H.R. 1603, H.R. 1904, H.R. 2230, H.R. 2491, H.R. 2552, H.R. 2719, H.R. 3021, H.R. 3415, H.R. 3521, H.R. 3913, H.R. 4139, H.R. 4857, H.R. 4984, H.R. 5119, H.R. 5335, H.R. 5493, H.R. 5534, H.R. 5560, H.R. 5600, H.R. 5745, H.R. 5798, H.R. 5899, H.R.

twenty "prolife" bills in recent years,[87] and several highly publicized congressional hearings have featured prominent criticism of the abortion decisions.[88] Support is growing, in the Senate at least, for a Human Life Amendment.[89] And strong congressional opposition to funding abortion provided the only confrontations with the Supreme Court in which the abortion privacy doctrine has been restricted in any significant way.[90]

C. Roe *Has Opened a Pandora's Box of Litigation*

This legislative activity has only increased the frustration for elected lawmakers. The Supreme Court's abortion privacy doctrine invites pro-choice litigation and mandates strict judicial supervision of any effort to implement any legislative policy not supportive of abortion. Thus, in less than thirteen years more than 250 published federal court opinions have dealt with abor-

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6028, H.R. 6237, H.R. 6329, H.R. 6374, H.R. 6409, H.R. Amdt. No. 159, S. Con. Res. 21, S. Con. Res. 78, S. Con. Res. 135, S. 26, S. 210, S. 467, S. 572, S. 946, S. 1003, S. 1025, S. 1892, S. 2452, S. 2616, S. 2622, S. 2628, S. 2793, S. 2836, S. 2853, S. 3026, S. 3056, S. 3069, S. 3075, S. 3086.

The following resolutions pertaining to abortion were introduced in the 99th Congress (to October, 1985):

(A) Proposed Amendments to the Constitution: H.R.J. Res. 24, H.R.J. Res. 87, H.R.J. Res. 91, H.R.J. Res. 94, H.R.J. Res. 138, H.R.J. Res. 140, H.R.J. Res. 147, H.R.J. Res. 165, S.J. Res. 5, S.J. Res. 19, S.J. Res. 21.

(B) Proposed Legislation and Resolutions: H.R. Con. Res. 102, H.R. Res. 212, H.R. 80, H.R. 203, H.R. 55, H.R. 608, H.R. 927, H.R. 947, H.R. 978, H.R. 155, H.R. 2252, H.R. 2287, H.R. 2358, H.R. 2369, H.R. 2468, H.R. 2486, H.R. 2540, H.R. 2577, H.R. 2691, H.R. 2867, H.R. 2897, H.R. 2965, H.R. 3036, S. Res. 163, S. Res. 212, S. 46, S. 504, S. 522, S. 881, S. 938.

87. For a partial list of anti-abortion bills enacted, see *Legal Ramifications, supra* note 41, at 71, apps. D-1 to D-6.

88. *See, e.g., Abortion—Part IV: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary on S.J. Res. 6, S.J. Res. 10, S.J. Res. 11, and S.J. Res. 91,* 94th Cong., 1st Sess. (1976); *Human Life Federalism Amendment: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 110, S.J. Res. 17-19,* 97th Cong., 1st Sess. (1981); *Legal Ramifications of the Human Life Amendment: Hearings Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary on S. J. Res. 3,* 98th Cong., 1st Sess. (1983).

89. While proposals to amend the Constitution have been introduced in both houses of Congress since 1973, proponents of these proposals did not succeed in winning committee endorsement until 1981 when the Subcommittee on the Constitution of the Senate Judiciary Committee endorsed an amendment that would reverse *Roe v. Wade.* Two years later supporters of a similar proposal got the proposed Hatch-Eagleton amendment through the same subcommittee and committee and on to the floor of the Senate where the Senate split 50-50 on the issue of amending the Constitution to reverse *Roe v. Wade. See infra* note 107 and accompanying text.

90. *See, e.g.,* Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Harris v. McRae, 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980).

tion restrictions.[91] By comparison, during the decade before *Roe v. Wade* only eighteen published federal court opinions dealt with abortion, and sixteen of those were decided during the 1970-1973 litigation campaign of the abortion law reformers.[92] Every new round of abortion cases draws the federal judiciary more deeply into the morass of detail-regulation involving increasingly strained applications of the abortion privacy doctrine.[93] So sweeping is the *Roe* doctrine of abortion privacy that the judiciary cannot avoid the endless entanglement of strictly scrutinizing every piece of federal, state, or local legislation or regulation that even indirectly affects abortion. And the philosophy behind the abortion privacy doctrine has been so powerfully and absolutely pro-abortion that *no* meaningful regulation of abortion or the abortion industry has survived judicial review.[94] Zoning ordinances,[95] informed consent requirements,[96] parental notice requirements,[97] spousal notification provisions,[98] laws regulating disposal of fetal remains,[99] insurance coverage option requirements[100] have all been held to violate the abortion privacy doctrine.

D. The Contrast With Gender and Race Doctrines

The failure of the Supreme Court abortion decisions to persuade or to be practically implemented starkly contrasts with the success of the Court's gender discrimination decisions. The

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91. *See supra* note 41 and accompanying text. A great number of federal court abortion decisions have not been published. *See* L. WARDLE, *supra* note 9, at xiii nn.15-16.

92. These cases are listed in *Legal Ramifications, supra* note 41, at 66-67 app. A.

93. *See, e.g.*, L. WARDLE & M. WOOD, *supra* note 44, at 157-59; *Legal Ramifications, supra* note 41, at 50-54.

94. Restrictions on public funding of abortions—passed and vigorously supported by Congress—are the only significant restrictions the Supreme Court has upheld.

95. *See, e.g.*, Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410 (N.D. Ohio 1984); West Side Women's Servs., Inc. v. City of Cleveland, 573 F. Supp. 504 (N.D. Ohio 1983).

96. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Women's Medical Center, Inc. v. Roberts, 530 F. Supp. 1136 (D.R.I. 1982).

97. *See, e.g.*, T.L.J. v. Ashcroft, 585 F. Supp. 712 (W.D. Mo. 1983); Zbaraz v. Hartigan, 584 F. Supp. 1452 (N.D. Ill. 1984).

98. *See, e.g.*, Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981); Planned Parenthood v. Board of Medical Review, 598 F. Supp. 625 (D.R.I. 1984).

99. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 451-52 (1983); Leigh v. Olson, 497 F. Supp. 1340 (D.N.D. 1980).

100. *See, e.g.*, American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), *prob. juris. noted*, 105 S. Ct. 2015 (1985); National Educ. Ass'n v. Garrahy, 598 F. Supp. 1374 (D.R.I. 1984).

contrast is particularly notable because the Court dealt with both subjects during the same time period and because the impact of both lines of decisions upon existing state laws was revolutionary.[101] Legislatures which steadfastly refused to endorse the abortion privacy doctrine have embraced the principles of gender equality enunciated by the Court and incorporated them into numerous laws. Judge Ruth Bader Ginsburg succinctly described the contrast between the abortion privacy and gender equality lines of cases when she wrote:

> The Court's gender classification decisions overturning state and federal legislation, in the main, have not provoked large controversy; the Court's initial 1973 abortion decision, *Roe v. Wade*, on the other hand, became and remains a storm center. *Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action.[102]

The abortion decisions' failure to generate significant legislative support or moral enthusiasm also contrasts with the controversial racial equality decisions of the Supreme Court. Ten years after the Court decided *Brown v. Board of Education*[103] Congress enacted far-reaching legislation to ensure that racial minorities received equal protection of the laws.[104] During the same period legislatures in many states enacted statutes prohibiting racial discrimination.[105] And by 1964 the civil rights movement had acquired tremendous moral weight and credibility. Ten years after *Roe*, however, Congress had adopted a highly publicized provision prohibiting the use of federal funds to pay

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101. The seminal gender discrimination decision was Reed v. Reed, 404 U.S. 71 (1971). Other major cases to develop the doctrine of gender equality include Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976); Kirchberg v. Feenstra, 450 U.S. 455 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

102. Ginsburg, *supra* note 39, at 376 (footnotes omitted).

103. 347 U.S. 483 (1954); *see also* Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

104. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1982)); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

105. *See, e.g.*, CAL. CIV. CODE §§ 51-52 (West 1982 & Supp. 1985); IOWA CODE ANN. §§ 601A.1-601A.19 (West 1975 & Supp. 1985); N.Y. CIV. RIGHTS LAW §§ 1-84 (McKinney 1976 & Supp. 1984).

for abortions,[106] the movement to amend the Constitution to reverse *Roe* was gaining strength,[107] and defenses of the *Roe* rule of unrestricted abortion frequently were prefaced witb the apologetic declaration: "personally I do not believe in abortion, but . . ."[108]

IV. The Doctrine of Stare Decisis Poses No Obstacle to Reconsidering *Roe v. Wade*

The Court's invocation of stare decisis in 1983 underscored rather than diminished the need for the Supreme Court to reconsider its abortion privacy doctrine.[109] Significantly, the Court limited its reaffirmation under the doctrine of stare decisis to the "basic principle" of *Roe*[110] "that the right of privacy . . . encompasses a woman's right to decide whether to terminate her pregnancy."[111] The Court did not reaffirm the other elements essential to the *Roe* analysis: the absence of any compelling state interest to justify laws prohibiting or restricting abortion before a fetus is viable, the trimester model of analysis, the relevance of the doctor's decision to the exercise of the woman's right to choose abortion, and so forth. This carefully limited reliance on the doctrine of stare decisis suggests that the Supreme Court al-

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106. Act of Oct. 31, 1983, Pub. L. No. 98-139, Title II, § 204, 97 Stat. 878. Similar "Hyde Amendments" and other acts of Congress have reduced federal funding of nontherapeutic abortions every year since 1976. 1983 Cong. Q. Almanac 310 (listing laws reducing funding for abortions); L. Wardle, *supra* note 9, at 233 n.307.

107. In 1983, for the first time, proponents of a Human Life Amendment were able to bring their proposal to the floor of the Senate for a vote. S.J. Res. 3, 98th Cong., 1st Sess., 129 Cong. Rec. S9303-11 (daily ed. June 28, 1983). Forty-nine members of the Senate voted to overturn *Roe* by Constitutional amendment. *Id.* at S9310. Senator Helms, the lone abstainer, refused to vote for the amendment proposed by Senators Hatch and Eagleton because it did not go far enough to outlaw abortion. *Id.* at S9307-08.

108. *See, e.g., Pressing the Abortion Issue,* Time, Sept. 24, 1984, at 20 (Geraldine Ferarro's controversial stand on abortion); *Where Carter Stands on the Issues,* Newsweek, May 10, 1976, at 36-37 (Jimmy Carter's position on abortion).

109. It is interesting that the Court would raise the subject since neither the parties in that case nor the United States government, which filed a brief urging greater judicial restraint in applying the doctrine of abortion privacy, had asked the Court to reverse *Roe.* Indeed, the Solicitor General reminded the Court that "[t]he cases now before the Court do not directly raise the question whether *Roe v. Wade, supra,* was correctly decided. The government, therefore, does not address that issue." Brief for the United States Amicus Curiae at 5 n.1, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

110. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 n.1 (1983).

111. *Id.* at 419.

ready may be willing to reconsider many of the critical aspects of the *Roe* opinion.

There are particularly compelling reasons why the Supreme Court should reconsider *Roe v. Wade* now. First, as Justice Powell reminded the Court on another occasion: "It is . . . not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand."[112] The unrelenting criticism of *Roe*,[113] the refusal of the coequal branches of government to endorse it,[114] and the continuing suggestions of substitute justifications[115] demonstrate the need for the Court to reexamine its abortion privacy doctrine.

Second, the fundamental principle of consistency that underlies the doctrine of stare decisis should impel the Court to review its abortion privacy doctrine in order to achieve harmony in the law regarding the status of prenatal human life. As Justice Brennan recently explained, "the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time."[116] *Roe v. Wade* is stunningly inconsistent with the policy of many other rules of law expressing the value and worth of prenatal human life. In numerous other contexts federal and state laws recognize and protect potential legal rights of the living human fetus.[117] While the Supreme Court's abortion cases deny any legal protection for the prenatal life of the fetus,[118] the

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112. Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring).

113. *See supra* notes 75-81 and accompanying text.

114. *See supra* notes 82-90 and accompanying text.

115. *See supra* note 78 and accompanying text.

116. Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 391 (1983).

117. *See generally* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233 (1969); Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982); Silas, *An issue is born*, 71 A.B.A. J., Aug. 1985, at 21; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 369 (1971); Otten, *Women's Rights vs. Fetal Rights Looms as Thorny and Divisive Issue*, Wall St. J., Apr. 12, 1985, at 27, col. 4.

118. Under *Roe* states may not prohibit or restrict pre-viability abortions in any way. While post-viability abortions may generally be proscribed, the Court, in dicta, declared that after viability the state may not proscribe abortions that are necessary to preserve the life *or health* of the pregnant woman. *Roe*, 410 U.S. at 164. In describing

prenatal life of the fetus is recognized and respected in other areas of the law: torts,[119] crimes,[120] inheritance,[121] trusts,[122] insurance,[123] welfare,[124] civil rights,[125] public health,[126] and, ironi-

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the factors which legitimately could be considered in exercising this "medical judgment" the Court noted:

> Specific and direct *harm medically diagnosable* even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a *distressful life* and future. *Psychological harm* may be imminent. Mental and physical health may be taxed by *child care*. There is also the *distress*, for all concerned, *associated with the unwonted child*, and there is the problem of bringing a child into a family already *unable*, psychologically and otherwise, *to care for it*. In other cases, as in this one, the additional difficulties and *continuing stigma* of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultetion.

Id. at 153 (emphasis added). Thus, even after the fetus is viable, it appears that the atate cannot stop a woman who wants an abortion from obtaining one. *See* Colautti v. Franklin, 439 U.S. 379 (1979).

119. Most stetes allow recovery for the wrongful death of the fetus during some or all of its prenatal development. *See, e.g.*, Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639 (1980); Comment, *Torts—The Right of Recovery for the Tortious Death of the Unborn*, 27 How. L.J. 1649 (1984); Note, *Childhood's End: Wrongful Death of a Fetus*, 42 LA. L. REV. 1411 (1982). Recovery for prenatal injuriea is also widely recognized. Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401; Nota, *Tort Recovery for the Unborn Child*, 15 J. FAM. L. 276 (1977); Annot., 40 A.L.R.3D 1222, § 2[b] (1971). The clear trend since 1946 is to ignore the viability distinction. *Id.* at § 3[a]. Indeed, predicating the right to recover for prenatal tortious injuries on viability has received significant criticism since *Roe* added its endorsement to the significance of viability. Robertson, *supra*, at 1415; Morrison, *Torts Involving the Unborn—A Limited Cosmalogy*, 31 BAYLOR L. REV. 131, 141 (1979).

120. *See, e.g.*, CAL. PENAL CODE § 187 (West Supp. 1985); IOWA CODE ANN. § 707.7 (West 1979); LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1985); R.I. GEN. LAWS § 11-23-5 (Supp. 1984); UTAH CODE ANN. § 76-5-201(1) (Supp. 1983). *See generally* Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97 (1985).

121. The fifteen states which bave adopted the Uniform Probate Code allow the unborn fetus to inherit as if it were born within the lifetime of the decedent if it is afterborn. UNIF. PROBATE CODE §§ 2-108, 2-302, 8 U.L.A. 22 (1983).

122. The potential beneficial interests of a fetus are protected so long as the fetus is subsequently born alive. G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 163, at 147 (Rev. 2d ed. 1979); 2 A. SCOTT, LAW OF TRUSTS § 112.1, at 878 (3d ed. 1967).

123. *See, e.g.*, Endo Lahoratories, Inc. v. Hartford Ins. Group, 747 F.2d 1264 (9th Cir. 1984); Alabama Farm Bureau Mut. Casualty Ins. Co. v. Pigott, 393 So. 2d 1379 (Ala. 1981); Annot., 15 A.L.R. 4TH 548 (1982). *But see* Hoel v. Crum & Forster Ins. Co., 51 Ill. App. 3d 624, 366 N.E.2d 901 (1977).

124. 42 U.S.C. § 606(b) (1982) (reversing Burns v. Alcala, 420 U.S. 575 (1975)).

125. *See, e.g.*, Douglas v. Town of Hartford, 542 F. Supp. 1267, 1270 (D. Conn. 1982) (viable fetus is a "person" within meaning of 42 U.S.C. § 1983 (1982)). *But see* Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D. Fla. 1974). International recognition of prenatal human rights came as early as 1959 with the Declaration of tbe Rights of the Child, passed unanimously by the United Nations General Assembly: "[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appro-

cally, child abuse.[127]

Moreover, there are other reasons why the Court should revise *Roe* in the interest of consistency. The Court's recognition of the tremendous significance of the abortion decision is hard to reconcile with the Court's refusal to acknowledge the existence of any noteworthy state interest in the matter before viability.[128] Furthermore, making the value of prenatal life legally dependant on private preferences does not harmonize with basic notions of equality. *Roe* creates a doctrine under which there is full legal protection against destruction of a fetus receiving treatment in one room of a hospital or clinic, and absolutely no protection against destruction of another fetus in the next room, where the only difference is that in the first room the pregnant mother is willing to bear the child, even if it is unwanted, and in the second room the pregnant woman prefers not to continue to be pregnant. That the attempt of a distressed woman to kill her child shortly after birth is deemed a repugnant criminal act of child abuse or attempted homicide while the attempt of the same woman to kill the same child shortly before birth is deemed a fundamental constitutional liberty is an arbitrary discrepancy too large to ignore.

Roe is also inconsistent with the realities and trends of prenatal medicine, as Justice O'Connor noted two years ago:

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priate legal protection, before as well as after birth." G.A. Res. 1386, 14 U.N. GAOR Supp. (no. 16), at 19, U.N. Doc. A/4354 (1959).

126. Public health warnings about the dangers of smoking and drinking for prenatal child health are becoming common. *See, e.g.*, 15 U.S.C.A. § 1333(a)(1)-(3) (Supp. 1985) (surgeon general's new health warnings for cigarette packages); Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 73-75 (1984); Otten, *supra* note 117.

127. *See, e.g.*, Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940); Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 (1983). *But see In re* Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981); Comment, *The Right of the Fetus to be Born Free of Drug Addiction*, 7 U.C.D. L. REV. 45 (1974). Some courts have ordered medical treatment for pregnant women on the ground, inter alia, that such treatment was necessary to protect the life of the unborn child. People v. Pointer, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357 (1984); Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981); Custody of a Minor, 378 Mass. 712, 393 N.E.2d 379 (1979); Raleigh Fitkin—Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964). *See generally* Parness & Pritchard, *supra* note 117, at 293-95.

128. *See* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 535 (1983) ("If the fetus she carries is significant enough to give rise to such a lofty claim [i.e., the right to escape a parent-child relationship], it is significant enough to bar an abortion as the earliest form of child abuse."); *see also infra* notes 143-44 and accompanying text.

> The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.[129]

Third, reconsidering precedent is particularly appropriate when the precedent "marked a significant departure" from established understanding and prior law.[130] *Roe*'s ruling that the right to destroy the life of an unborn child is a private matter significantly departed from prior understanding of the right of privacy: the seminal "privacy" decision of the Supreme Court (the leading case cited in *Roe*'s explanation of why the decision to have an abortion is protected by the Constitution) noted an exception "in order to guard against the taking of the life of an unborn child."[131] Moreover, the validity of laws restricting abortion had been accepted for hundreds of years before *Roe*.[132] And just two years before it decided *Roe*, in its first-ever ruling on the constitutionality of abortion laws, the Court upheld against a claim of privacy a District of Columbia abortion prohibition

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129. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

130. Mitchell v. W.T. Grant Co., 416 U.S. 600, 627 (1974) (Powell, J., concurring); *see also* Monell v. Department of Social Servs., 436 U.S. 658, 695 (1978); Thomas v. Washington Gas Light Co., 448 U.S. 261, 273 (1980) (Stevens, J., plurality opinion).

131. Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891). In this case a woman brought an action against a railroad company for negligence in the construction and care of a sleeping berth that fell on her while she was a passenger. She alleged that she had suffered permanent and increasing physical injuries from the accident. Three days before the trial the defendant moved for an order to compel the woman to submit to a medical examination. The trial court denied the motion and the case went to trial resulting in a $10,000 verdict for the plaintiff. The railroad appealed and the Supreme Court defined the issue on appeal to he "whether, in a civil action for an injury to the person, the court, on application of the defendant, . . . may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for." *Id.* at 251. The Court answered "no," and affirmed the judgment of the circuit court. The Court declared that "[n]o right is held more sacred or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person free from all restraint or interference of others unless by clear and unquestionable authority of law." *Id.* The Court noted that there were very few exceptions to the general rule that "no order or process commanding such an exposure was ever known to the common law." However, one such exception mentioned by the Court was the writ *de ventre inspiciendo*, "to ascertain whether a woman convicted of a capital crime was quick with child, [which] was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother." *Id.* at 253.

132. *See supra* note 36.

very similar to the Texas provisions invalidated in *Roe*.[133] Thus, when the history of legal protection for prenatal life is weighed in the balance, the claim to preservation of *Roe* for the sake of consistency-over-time is insignificant, if not misplaced.

Fourth, in *Roe* and its progeny the courts have deviated substantially from reasonable and workable methods of constitutional analysis, resorting to extreme and rigid approaches. As Justice O'Connor observed in her 1983 dissenting opinion: "The Court's analysis . . . is inconsistent both with the methods of analysis employed in previous cases dealing with abortion, and with the Court's approach to fundamental rights in other areas."[134] Regrettably many courts have resorted to a rigid, sweeping application of the doctrine of stare decisis in abortion cases.[135] Professor Llewellyn noted many years ago that:

> no phase of our law [is] so misunderstood as our system of precedent. The basic false conception is that a precedent or the precedents will in fact (and in a "precedent-system" ought to) simply dictate the decision in the current case . . . .
>
> Now the truth is this: only in times of stagnation or decay does an appellate system even faintly resemble such a picture of detailed dictation by the precedents . . . .[136]

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133. United States v. Vuitch, 402 U.S. 62 (1971).

134. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452-53 (1983) (O'Connor, J., dissenting).

135. For instance, one court declared: "The decision in *Roe* leaves no room for the slightest deviation . . . ." Doe v. Mundy, 378 F. Supp. 731, 735 (E.D. Wis. 1974), *aff'd*, 514 F.2d 1179 (7th Cir. 1975). Ironically, the court subsequently reversed itself and vacated the preliminary injunction it had entered based on this turgid analysis. Doe v. Mundy, 441 F. Supp. 447 (E.D. Wis. 1977). In another case, a California appellate court declared: "Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person." People v. Smith, 59 Cal. App. 3d 751, 757, 129 Cal. Rptr. 498, 502 (1976); *see also* Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D. Fla. 1974); Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176 (1973). *See generally* Parness, *supra* note 120, at 103 ("[T]he decision in *Roe* has been grossly misunderstood."). The Supreme Court itself misread *Roe* when, in *Akron*, it explained that the city ordinance requiring physicians to inform their abortion patients that "the unborn child is a human life from the moment of conception" was "inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions." City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444 (1983). Thus, the Court misread *Roe*'s holding that a state may not adopt a theory of when life begins to justify laws prohibiting abortion, *see Roe*, 410 U.S. at 159-62, to mean a state may not adopt and teach a theory of when life begins.

136. K. LLEWELLYN, THE COMMON LAW TRADITION 62 (1960). Likewise, Professor Brilmayer noted that "unquestioning adherence to precedent may cause undesirable results. The evolution of the common law may be stultified . . . ." Brilmayer, *Judicial*

The extreme results reached by lower courts in abortion cases has produced a regressive formalism in this area of law.[137] When the underlying principles are so unworkable that rigid application of stare decisis results, it is time to reconsider the precedent.[138]

Finally, "[t]he doctrine of stare decisis has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible.' "[139] When the precedent is one that "lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine,"[140] stare decisis is an especially unconvincing justification for failure to undertake corrective reconsideration.

Of course, the intense criticism of *Roe* might make it difficult for some public bodies to reappraise a seminal and controversial decision. Reappraisal might give the appearance of "caving in" to public opinion or other branches of government. But the Supreme Court need not worry about petty political appearances. The Court's willingness to revise former doctrines in light of the "lessons of experience and the force of better reasoning"[141] is the best evidence of and best justification for continued confidence in the profound role of the Supreme Court in American government.

V. Seven Mistakes for the Supreme Court to Avoid When It Reconsiders *Roe v. Wade*

In reconsidering *Roe v. Wade* the Supreme Court should learn from the experience of the past dozen years and avoid the elements of substance and form that have proven so problematic. The Court (1) should not characterize the multifaceted is-

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Review, Justiciability and the Limits of the Common Law Method, 57 B.U.L. Rev. 807, 812 (1977) (footnote omitted).

137. *See, e.g.*, H. Hart, The Concept of Law 126 (1961); L. Wardle, *supra* note 9, at 303-05; Traynor, *The Limits of Judicial Creativity*, 63 Iowa L. Rev. 1, 13 (1977).

138. *See generally* Monell v. Department of Social Servs., 436 U.S. 658, 693-98 (1978).

139. Thomas v. Washington Gas Light Co., 448 U.S. 261, 272-73 n.18 (1980) (Stevens, J., plurality opinion) (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)); *see also* United States v. Scott, 437 U.S. 82, 101 (1978) (Brennan, J., dissenting); Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring).

140. Ely, *supra* note 34, at 943; *see also* Sandalow, *supra* note 39, at 35.

141. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (Brandeis, J., dissenting); *see also* United States v. Scott, 437 U.S. 82, 101 (1978) (Brennan, J., dissenting).

sue of public policy as one strictly of personal privacy; (2) should not appear to reject the value and worth of human life before birth; (3) should not ignore the important state interest in fostering fundamental values on which our democracy rests; (4) should not establish a rule that treats as irrelevant the profound moral dilemmas that unrestricted abortion creates; (5) should not create a rule that leaves no room for state legislatures to work on solving the abortion dilemmas; (6) should not write an opinion that overreaches and tries to prescribe too much; and (7) should not adopt a "medical-model" for a constitutional right.

First, privacy may be a necessary doctrine for resolving the conflicting interests implicated in abortion, but it is not sufficient. Applying a privacy framework of analysis to determine the extent states may regulate abortion is like forcing a square peg into a round hole. The issue implicates such profound, historically grounded, deeply controversial interests of "public" policy that characterizing it as solely a matter of "privacy" is misleading. The taking of human life,[142] incipient or in its prime, in our legal tradition has never before been, and for the sake of future civilization never should be, deemed a purely private matter. The essential interdependence of all human beings in our society is an uncompromising prerequisite for perpetuating our democracy. In a democracy, how can the Court say that one entire class of developing human beings does not deserve any legal protection? If the essence of the "privacy" doctrine is personal choice, how can the right to choose unpopular or unconventional lifestyles be protected by law if the right to life of unwanted human beings is not? Is not the notion of "privacy" trivialized when the decision is reduced in constitutional terms to "it doesn't really matter"? How can any activity that requires the consent of one party, the assistance of a second, and the destruction of a third be considered a matter of privacy?

Pregnancy *is* a profoundly personal matter for the pregnant woman herself, as well as her family and the father of her unborn child. It is most significant because of the enormous responsibility it represents: the parent-child relationship may be the most complicating, demanding, long-lasting, frustrating and heart-breaking personal relationship known in life or law. Thus, focusing on what a pregnancy may become, the decision whether

142. *See infra* paragraph in text following note 144.

to terminate a pregnancy has been deemed fundamentally a private matter to justify a rule that gives the pregnant woman an opportunity to escape such an important personal obligation.[143] But the powerful doctrine of *parens patriae* bespeaks a profound public interest in the parent-child relationship that is as timely as it is timeless. Those who focus exclusively on what pregnancy may *become* ignore that it *is*. By the time a woman is considering abortion she *has* become (not will become) pregnant; it is too late to *avoid* a dependency relationship, for one already exists. The question is whether the woman's interest in *escaping* the greater parental responsibilities that are imminent relieves her of the responsibility not to destroy the fetus that actually exists. Surely that policy decision cannot be adequately evaluated without recognizing the public interest in the nature of *parens patriae*, or evaluating the alternatives available whereby the full burdens and complications of parenthood may be avoided without destroying the fetus and pretending it never existed.[144]

Second, the Court's conclusion in *Roe* that unborn human beings are not "persons" is strained legal fiction. It is intuitively troubling. After all, if human beings in the last, decaying stages of life—whose conditions may totally curtail their participating in society—are deemed "persons," why not those in the beginning, growing stages of life as well? The Court's adoption of an arbitrary biological distinction—pre-/post-birth (or viability)—as a constitutionally mandated demarcation line for extending legal protection against the most invidious form of discrimination (killing) is fundamentally inconsistent with enlightened modern decisions forbidding discrimination on the basis of other arbitrary biological distinctions such as race, sex, and handicaps.

The Court's refusal to recognize the "potential life" of the fetus before viability, and its finding that that life is less significant even after viability than a woman's interest in avoiding inconvenience, has provoked more anger and instinctive opposi-

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143. *See* Ross, *Abortion and the Death of the Fetus*, in MORAL ISSUES 239 (J. Narveson ed. 1983). *See generally* Karst, *supra* note 78, at 57-59. *But see* Hafen, *supra* note 128, at 534-36.

144. Indeed, the dilemma of unwanted parenthood is not new, nor does it arise solely before birth. Adoption, foster care, day care, shared parenting, and child protection service provide a number of alternative solutions to the dilemma. While perhaps not as simple as abortion, they are not as violent either.

tion to *Roe* than any other element of the Court's decision. The refusal suggests that the Supreme Court denies the worth, if not the very existence, of prenatal human life. And it resulted in part from an unnecessary mistake: the Court carelessly confused the *potential legal interests* of a human life *in utero* with what it called the legal interests of a "*potential life*" *in utero*. The philosopher's-disagree-about-when-life-begins dodge is transparently shallow: even a legitimate philosophical argument regarding when life begins—or, for that matter, when it ends—is not inherently relevant to, much less dispositive of, the constitutional question.[145] Of course, the ultimate question is not when "life" begins, but, rather, whether under the Constitution states may extend to the fetus some of the protection it extends to fully born members of society. In general, the Court's adoption of a pseudo-biological approach in *Roe* was disastrous: in the last quarter of the twentieth century the biological facts of human reproduction are too well known for the Court to expect the public to embrace the fiction that the embryo or fetus is not a genetically autonomous, living, growing human being.

Third, apart from protecting prenatal human life, the States have a profound interest in preserving the fundamental values of our civilization and form of government. At least two such values underlie laws restricting abortion. One is the value of preventing violence. Abortion is an act of violence. It is cruel and inhumane, and it is almost always fatal. Are there no risks to a democratic society posed by the raising of a generation that has accepted the practice of killing defenseless victims to avoid personal inconvenience? The second value is protecting weak and vulnerable members of society. While the new principle of privacy may be welcomed by the powerful, self-sufficient, and aggressive, does not *Roe* entail the abandonment in principle of the weak, burdensome, handicapped, and "unwanted" among us?

Fourth, in *Roe v. Wade* the Supreme Court declared that the *only* constitutionally relevant factor, at least until the fetus is viable, is the pregnant woman's desire to have an abortion. Thus, *Roe* completely disregards the moral dilemmas that trouble many modern Americans: the use of abortion for birth

145. *See* Bok, *Ethical Problems of Abortion*, 2 HASTINGS CENTER STUD. 33 (1974). If uncertainty exists about the existence or moral status of prenatal life, the fetus ought to be given benefit of the doubt.

control, financial advantage, population control, spiting an estranged spouse, and other reasons of mere convenience. The Court's exclusive emphasis in *Roe* on what is often a moral triviality and its total rejection of the relevance of all other considerations that make abortion a genuine moral dilemma is unacceptable.

Fifth, one reason for the vigorous opposition to the *Roe* rule of abortion privacy is its imposition by judicial fiat.[146] Persons subject to *Roe* had no opportunity in 1973 to help create or modify the law. And they have had no realistic opportunity since. The increasing and deplorable incidence of violence against abortion clinics may be partially attributable to the quasi-totalitarian way the rule of unrestricted abortion privacy has been created and perpetuated in our democracy. The political process, which usually produces the valuable side-effect of educating the public to both sides of a controversy, has not been allowed to operate.[147]

Public policy on such a fundamental and controversial question affecting the whole of society as the legality of abortion ought to be established in a democracy through democratic processes. Some principles clearly defined in or historically accepted as part of the supreme law of the land may provide some boundaries to the range of permissible, or required, abortion restriction. Yet *Roe*'s detailed, absolute doctrine of abortion privacy cannot make a credible claim to being mandated by the text of the Constitution or any other source of legitimate constitutional doctrine.

As a classic example of "judicial legislation" *Roe* represents a substantial shift in the constitutional balance of powers.[148] The legality of abortion is precisely the kind of policy issue that legislatures are well-suited to address, and that courts are not. Legislatures can investigate facts and pursue different lines of consideration without the restrictions of a "case or controversy"

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146. *See Roe*, 410 U.S. at 221-22 (White, J., dissenting).

147. Each such decision [of the Supreme Court to strike down controversial social legislation] takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.

R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 321 (1941), *cited in* Fullilove v. Klutznick, 448 U.S. 448, 490-91 (1980).

148. *See generally Legal Ramifications*, *supra* note 41, at 47-70.

requirement, courtroom rules of evidence and procedure, and other rules that bind the judiciary. Elected representatives are directly accountable to the citizens they serve, unlike life-tenured federal judges, and are more likely to reflect the basic values of society.[149] Moreover, as Professor John Hart Ely wrote shortly after the Supreme Court decided *Roe*: "[P]recisely because the claims involved are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them—certainly not under the guise of enforcing the Constitution."[150] Likewise, Justice Frankfurter long ago criticized

> the imposition by judges of their private notions of social policy [on the states] because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal dooms of the Constitution.[151]

In an area of public concern in which dramatic changes of circumstances are not only expected but common, the ability of ordinary legislation to be interpreted hy courts and amended by legislatures is a distinct advantage over the set-in-concrete character of constitutional law. Thus, the Supreme Court should remember that its responsibility to preserve the democratic system that has fostered an unprecedented enjoyment of human rights is just as important as its privilege to nurture the development of new constitutional liberties.

Sixth, the Supreme Court went too far in *Roe*. Rather than just deciding the case before it, the Court tried to anticipate future cases and decide them in advance, without record or evidence or experience. The result was a legal doctrine that reads like a set of hospital regulations. The Court erred in *Roe* in part because it overreached. The abortion doctrine is too impatient. The greater wisdom of case-by-case evolutionary development of constitutional doctrine once again has been demonstrated. A good judge is not simply a better legislator. There really is and

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149. Sandalow, *supra* note 39, at 35-36: "The number of states whose statutes were invalidated as a result of *Roe v. Wade* indicates, at a minimum, a consensus that abortion should be subject to greater control than is permitted under the Court's decision. . . . Sensitivity to the values of federalism would . . . bave counseled a decision permitting the states to shape their abortion laws, at least in some measure, according to local preferences."

150. Ely, *supra* noto 34, at 935 n.89.

151. F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 49-51 (1930).

must be a difference between the perspectives and methods of judicial and legislative lawmaking.

Seventh, in *Roe* the Supreme Court adopted a medical model for its new right of abortion privacy:[152] the right required the assistance of a physician, and the three-part framework of shifting interests was keyed to the medical concept of trimesters in pregnancy. This model for a constitutional right is seriously flawed. Changes in medical technology have already necessitated modification of this model.[153] To characterize any medical procedure as a fundamental constitutional right is to step onto a slippery slope, and to so characterize a nontherapeutic procedure is to step over the edge. If the Supreme Court is to have credibility ten or twenty years from now and the authority to contribute to the preservation and development of liberty in America, it must not exercise so recklessly its power to interpret the Constitution.

VI. Conclusion

It is time for the Supreme Court to reexamine and revise *Roe v. Wade*. The doctrine of abortion privacy should be modified to provide more workable standards and more reasonable analysis. The Supreme Court now has an excellent opportunity to correct the excesses without rejecting the positive principle of *Roe*. The Court should acknowledge that regulating or restricting abortion is a matter of profound public, as well as poignantly private, concern. The Court should clearly reaffirm the constitutional worth of all human life—even when it is in utero, unwanted, and easily disposable. The Court should recognize the importance of fostering through law respect for human life and care for the weak and vulnerable. The Court should accept as legally relevant the profound moral concerns regarding abortion on demand. The Court should acknowledge that balancing the competing interests to determine the legality of abortion is more appropriate for legislatures than for courts. The Court should reasonably accommodate the policy decisions of state legislatures about abortion restrictions. In sum, the Court should reaffirm the importance of individual autonomy without rejecting the value of all human beings in a matter of such profound per-

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152. *See* Freund, *supra* note 39, at 1480.

153. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 431, 434 (1983); *see also id.* at 454 n.2 (O'Connor, J., dissenting).

sonal and social significance as the dilemma of unwanted pregnancy.