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ESSAY

A Legal Strategy to Overturn *Roe v. Wade* After *Webster*: Some Lessons from Lincoln

*Clarke D. Forsythe**

I. INTRODUCTION

The Supreme Court's July 1989 decision of *Webster v. Reproductive Health Services*[1] has substantially changed the constitutional and political landscape for the issue of abortion in American society. However, the *Webster* decision did not return complete authority to the states to prevent elective abortion. No clear majority of the Court favoring overturning *Roe v. Wade*[2] emerged. No opinion by a majority of the Court set forth a clear constitutional standard by which the states can regulate or prohibit abortion. And the Missouri statute upheld by the Court will have only a tangential impact on abortion practice. Consequently, one commentator has referred to *Webster* as a "non-decision."[3]

At the same time, the June 1990 Supreme Court decisions in *Ohio v. Akron Center for Reproductive Health*[4] and *Hodgson*

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1. 109 S. Ct. 3040 (1989).

2. 410 U.S. 113 (1973).

3. Crain, *Judicial Restraint and the Non-Decision in Webster v. Reproductive Health Services*, 13 HARV. J.L. & PUB. POL'Y 263 (1990). *See also* Wardle, *Time Enough:* Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 U. FLA. L. REV. 881 (1990).

4. 110 S. Ct. 2972 (1990). In this case, the Court upheld, against a facial challenge,

v. Minnesota[5] did not take the Court much further toward overturning *Roe* than did *Webster*. Although the *Hodgson* and *Akron* decisions clarified that states may constitutionally enact laws requiring parental notice of abortion, the statutes in those cases did not prohibit abortions at any time during pregnancy, but merely imposed procedural regulations designed to protect minors. Consequently, the two decisions did not substantially chip away at abortion practice or the doctrine of *Roe v. Wade*.

However, the importance of *Webster* is not in its narrow holding but in what the decision portends for the Court's future direction. The decision implies that the Court, as presently constituted,[6] will exhibit greater, although yet undetermined, deference to state abortion laws—quite a contrast from the *Roe* decision. In *Roe v. Wade*, the Supreme Court legalized abortion from conception to birth for any or no reason.[7] Now, the Court

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an Ohio statute which required a doctor to notify one parent 24 hours before an abortion could be performed on the parent's minor daughter, subject to a provision allowing for a judicial bypass.

5. 110 S. Ct. 2926 (1990). In this case, the Court upheld a Minnesota statute, against an as-applied challenge, which required a doctor or his agent, to notify both parents at least 48 hours before an abortion could be performed on their minor daughter, subject to a provision allowing for a judicial bypass.

6. For a discussion of the recent changes in the Court's makeup and the potential impact of the changes on how the Court resolves abortion issues, see *infra* notes 58-70 and accompanying text.

7. "Today, abortion is subject to less regulation in the United States than in any other country in the Western world." M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 112 (1987). The Court's rarely cited companion decision, Doe v. Bolton, 410 U.S. 179 (1973), is critical to an accurate understanding of *Roe*. The holding of *Roe* is often erroneously described as allowing unrestricted abortion only in the first trimester (the first three months) of pregnancy (speech by S. Combs, Rhetorical Criticism of Supreme Court Opinions: The Opinions in *Beal v. Doe*, 76th Annual Meeting of the Speech Communication Association, Chicago, IL, at 2 (November 1-4, 1990)) or in the first and second trimesters of pregnancy. Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade: *An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L.J. 1677, 1681 n.12; Fost, *Maternal-Fetal Conflicts: Ethical and Legal Considerations*, 562 ANNALS N.Y. ACAD. SCI. 248 (1989).

In reality, *Roe* ushered in abortion on demand from conception to birth for any reason or no reason in every state. *Roe* held that the states could prohibit abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 165. But the Court then expanded the exception for "health" of the mother to make it impossible for states to prohibit any abortion after viability. The Court held that *Roe* and *Doe* "are to be read together," *id.* at 165, and the Court defined "health" in *Doe* as "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." *Doe*, 410 U.S. at 192. *See also Roe*, 410 U.S. at 153 (stating the emotional factors a physician might consider). Prior to *Webster*, the Court invalidated virtually all state statutes which attempted to regulate abortion at or after viability. The lower courts likewise construed "health" in the third tri-

appears willing to permit substantive prohibitions, and not simply procedural restrictions, on abortion. State legislatures may now prohibit some of the more than 4,000 elective abortions performed daily in the United States.[8] For this reason, the *Webster*

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mester to be very broad. *See, e.g.*, American College of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 299 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986); Schulte v. Douglas, 567 F. Supp. 522, 526 (D. Neb. 1981); Margaret S. v. Edwards, 488 F. Supp. 181, 196 (E.D. La. 1980). *See also* M. GLENDON, *supra*, at 22, 45; Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 921 n.19 (1973); Glendon, *Intra-Tribal Warfare* (Book Review), FIRST THINGS, Aug.-Sept. 1990, at 55 (reviewing L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990)).

Whatever may be speculated about the future of abortion jurisprudence after *Webster*, because of the particular limits of Justice O'Connor's concurrence, there was, as a matter of law, no majority opinion in *Webster* setting aside the trimester framework or any other part of the holding of *Roe*. *Webster*, 109 S. Ct. at 3058 (O'Connor, J., concurring in part, and concurring in the judgment). Some lower federal courts since *Webster* have virtually ignored the decision. Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990); Doe v. Ada, No. 90-00012 (D. Guam 1990). *But see* Planned Parenthood v. Minnesota, 910 F.2d 479 (8th Cir. 1990).

8. The Alan Guttmacher Institute (AGI), a private organization long connected with Planned Parenthood, reported 1,590,800 abortions performed in 1988. Henshaw & Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 FAM. PLAN. PERSP. 102 (1990). The federal Centers for Disease Control (CDC) reported 1,303,980 abortions in 1982 and 1,268,987 abortions in 1983. CENTERS FOR DISEASE CONTROL, MORBIDITY AND MORTALITY WEEKLY REPORT: ABORTION SURVEILLANCE, 1982-1983 11SS (Feb. 1987). But the CDC acknowledges that "in 1982 the total number of abortions reported by CDC was 17% lower than that reported by the AGI, which obtains information by direct surveillance." *Id.* at 41SS. The AGI reports that "[t]he amount by which the AGI national abortion counts exceed those of the CDC ranges from 18 percent in 1977 and 1978 to 13 percent in 1987." Henshaw & Van Vort, *supra*, at 103.

Approximately "two percent of all abortions in this country are done for some clinically identifiable entity—physical health problem, amniocentesis, and identified genetic disease or something of that kind." The remainder are elective, "performed on women who for various reasons do not wish to be pregnant at this time." *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 158 (1981) (statement of Irvin M. Cushner, M.D., M.P.H., U.C.L.A. School of Public Health). *See also* Torres & Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169 (1988). "By the 1960's . . . advances in medicine meant that it was only a rare case where the pregnant woman's life could be said to be at stake. Fewer and fewer abortions were being performed to preserve the woman's life or even physical health." M. GLENDON, *supra* note 7, at 12.

Even the supposed medical or health reasons for abortion have diminished in recent years with developments in medical science and technology and patient care. The commonly cited medical conditions that are often thought to justify a therapeutic abortion are diabetes, cardiac disease, and certain forms of cancer. But advances in the management of pregnancy for diabetes result in birth outcomes that are nearly equivalent to those for non-diabetic mothers. Freinkel, Dooley & Metzger, *Care of the Pregnant Woman with Insulin-Dependent Diabetes Mellitus*, 313 N. ENG. J. MED. 96 (1985). "The majority of cardiac patients can enjoy a successful pregnancy outcome." C. Pauerstein, ed., CLINICAL OBSTETRICS AND GYNECOLOGY 630 (1987). And "[t]he few clinical reports that detail survival in patients who aborted early in pregnancy demonstrate no subse-

decision creates a changed political and legal environment, though one that is decidedly uncertain. Respected lawyers and legal scholars disagree over how far the states may now go in regulating abortion.[9] How far public opinion will permit state legislatures to go when enacting stricter abortion statutes is also unclear.

The legal and political uncertainty in the wake of *Webster* increases both the complexity of the strategic decisions that must be made and the need for prudent judgment in making those decisions. Questions of legal and political strategy, however, have repeatedly divided social reform movements in the United States. Questions of political strategy divided the anti-slavery movement in the nineteenth century.[10] Questions of legal strategy divided the NAACP and its allies in its campaign to overturn racial segregation in the twentieth century.[11] Similar questions of legal and political strategy have divided the so-called Prolife Movement over the past seventeen years.

Political strategy involves, among other things, ideals and a commitment to principle. Political *ideals* attract, motivate, and capture the imagination of people. But wise political *strategy* requires something more; it requires practical wisdom, including an accurate understanding of political power, an assessment of

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quent advantage gained by that intervention." *Id.* at 809 (citing P. DiSaia & W. Creasman, Clinical Gynecologic Oncology 428-64 (2d ed. 1984)). The same seems to be true with Hodgkin's Disease. "Pregnancy has no effect on the disease, and therapeutic abortion does not increase survival." C. Pauerstein, *supra*, at 812.

9. *Cf.* Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157 (1989); Chopko, Webster v. Reproductive Health Services: *A Path to Constitutional Equilibrium*, 12 Campbell L. Rev. 181 (1990); Kindregan, *The Dilemma of the* Webster *Decision: Deconstitutionalizing the Trimester System*, 1990 H.R.L. Rptr. 276 (Jan-Feb. 1990); Smolin, *Abortion Legislation After* Webster v. Reproductive Health Services: *Model Statutes and Commentaries*, 20 Cumb. L. Rev. 71 (1989); Wardle, *The Road to Moderation: The Significance of* Webster *for Legislation Restricting Abortion*, 17 Law, Med. & Health Care 376 (1989); Wardle, *"Time Enough":* Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 U. Fla. L. Rev. 881 (1990); Wilkins, *Mediating the Polar Extremes: A Guide to Post-*Webster *Abortion Policy*, 1991 B.Y.U. L. Rev. 403.

10. *See generally* Antislavery and Disunion, 1858-1861: Studies in the Rhetoric of Compromise and Conflict (J. Auer ed. 1963); V. Howard, Religion and the Radical Republican Movement 1860-1870 (1990); J. Thomas, The Liberator: William Lloyd Garrison (1963).

11. R. Kluger, Simple Justice (1975); Myers, *Prolife Litigation and the American Civil Liberties Tradition*, in Abortion and the Constitution: Reversing *Roe v. Wade* Through the Courts 23-56 (D. Horan, E. Grant & P. Cunningham, eds. 1987); M. Tushnet, The NAACP's Legal Strategy against Segregated Education, 1925-1950 (1987).

what is potentially achievable, recognition of the imperfect world in which we live, and an understanding of our culture and of the moral, political, social, and financial constraints on our actions. Wise political strategy is a question of statesmanship, and prudence is a key element of statesmanship.[12] Because strategy involves such a careful assessment of many factors, reasonable, informed people who otherwise agree on the ends may disagree over the means. The purpose of this article is to show how a careful consideration of these factors demonstrates the continued wisdom, at this time, of an incremental strategy to completely overturn *Roe v. Wade*.

II. Some Lessons of Statesmanship from Lincoln

In a profound analysis of the issues of the 1858 Illinois Senate campaign debates between Senator Stephen Douglas and Abraham Lincoln (the "Lincoln-Douglas debates"), Professor Harry Jaffa identified these criteria for statesmanship:

> The problem of applying the moral judgment of history to a statesman requires . . . a fourfold criterion: first, is the goal a worthy one; second, does the statesman judge wisely as to what is and what is not within his power; third, are the means selected apt to produce the intended results; and fourth, in "inconsistently" denying any intention to do those things which he could not in any case do, does he say or do anything to hinder future statesmen from more perfectly attaining his goal when altered conditions bring more of that goal within the range of possibility?[13]

These criteria implicitly embody considerations of principle, political wisdom, strategy, and practicality, which should guide the actions of reformers who seek to restore the sanctity of human life in American law and culture.

This is not to suggest that answering such strategic questions, or applying these criteria, is easy. Reasonable, informed people may differ as to their understanding of the contemporary

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12. *See generally* Aristotle, Nichomachean Ethics (M. Ostwald trans. 1978); H. Arkes, First Things: An Inquiry into the First Principles of Morals and Justice (1986); H. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates (1959). "For it is the essence of practical wisdom to adapt its judgments to differences in circumstances. The purpose of practical wisdom is always the same, and the wise statesman will act to achieve the greatest measure of justice that the world in which he is acting admits." H. Jaffa, *supra*, at 346.

13. H. Jaffa, *supra* note 12, at 370.

environment, and restoring the sanctity of human life in American law and culture deals with complex questions at the highest level of the American political and legal system. But what is more important, perhaps, are not the answers but the questions: What is the goal? What are effective means to achieve the goal? What are the constitutional and political constraints? Agreement on these questions may allow social reformers to implement with greater unity, coherence, and effectiveness a legal and political strategy to restore the sanctity of human life in American law and culture.

With Jaffa's criteria in mind, an analysis of Abraham Lincoln's role in the struggle to abolish slavery might help to formulate and implement a prudent political and legal strategy for completely overturning *Roe v. Wade* in the post-*Webster* environment. Although the parallels to slavery can be overstated, the battle over slavery parallels the abortion controversy in several ways: the core moral issue of the rights of persons; the social intensity of the conflicts; the way in which the problems fundamentally define the nature and direction of American culture; the appeal of competing moral positions for support in fundamental principles of American life; the lodging of the conflicts in Congress, in state legislatures, and in the U.S. Supreme Court; and the battle for public opinion. Slavery involved a clash of two principles—liberty and property—which are fundamental rights in the American heritage. Abortion also involves a clash of two fundamental rights—life and liberty—enunciated in the Declaration of Independence. As Michael Novak has written, abortion "involves . . . a fundamental difference over the American experiment. Does that experiment entail an ever more inclusive advance in who may be entitled to rights: blacks, Indians, women, immigrants, the unborn?"[14] Certainly, differences can be discerned between slavery and abortion. But, in certain broad political aspects at least, the ways that Lincoln and the Republican Party addressed the problem of slavery illuminate principles of statesmanship that can help in developing a legal and political strategy to overturn *Roe v. Wade*.

The fight against slavery was essentially a political battle that degenerated into out and out war.[15] Slavery was a burning

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14. Novak, *Fight over Abortion Not Just a Matter of One's Religion*, St. Petersburg Times, Nov. 22, 1989, at 17A.

15. A short but excellent analytical history is contained in R. SEWELL, A HOUSE DIVIDED: SECTIONALISM AND CIVIL WAR, 1848-1865 (1988). *See generally* A. NEVINS, THE

political issue throughout the 1850s, and the status of slavery in the western territories was an integral part of the conflict. Disunion was threatened. A militant anti-slavery movement grew in the North while the South became more desperately committed to slavery. The constitutional authority of Congress to restrict slavery was the focus of angry debates. The "Compromise of 1850"—by which California was admitted to the Union as a free state, the slave trade in the District of Columbia was abolished, and a federal fugitive slave code was enacted—did not settle the slavery issue but provided only a temporary pause in the controversy.[16] The Kansas-Nebraska Act of 1854—which repealed the 1820 Missouri Compromise and allowed expansion of the slave states—reignited the slavery issue, which never subsided before the Civil War broke out.[17] It has been suggested that the Kansas-Nebraska Act provoked Lincoln to reenter politics in 1854; this led, four years later, to Lincoln's challenge to Senator Stephen Douglas in the 1858 Illinois Senate race.[18]

The Lincoln-Douglas debates during the 1858 Illinois Senate campaign resulted in the intellectual framing of the slavery issue. In its 1857 decision in *Dred Scott v. Sandford*,[19] the Supreme Court held that Congress had no power to exclude slavery from a United States territory. Therefore, the black slave, Dred Scott, was not entitled to liberty even though he had been taken to live in a territory in which Congress had excluded slavery.[20] Douglas was "pro-choice" on slavery in the modern sense of the term.[21] He supported "popular sovereignty" on slavery—the no-

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EMERGENCE OF LINCOLN: DOUGLAS, BUCHANAN, AND PARTY CHAOS 1857-1859 (1950); A. NEVINS, THE EMERGENCE OF LINCOLN: PROLOGUE TO CIVIL WAR 1859-1861 (1950); D. POTTER, THE IMPENDING CRISIS, 1848-1861 (1976); G. VIDAL, LINCOLN: A NOVEL (1984).

16. Act of Sept. 9, 1850, ch. 49, 9 Stat. 446 (1850). "Those who looked closely at the process and results of the compromise, however, saw plainly that it had at best forestalled, not ended, sectional confrontation—that in important respects it was not a true compromise at all." R. SEWELL, *supra* note 15, at 34.

17. Act of May 30, 1854, Sec. 14 ch. 59, 10 Stat. 277, 283 (1855). In the aftermath of the Kansas-Nebraska Act, "Northern Democrats paid dearly for their party's role in overturning [the Missouri Compromise]. In the congressional elections of 1854 and 1855, free state Democrats suffered crushing reverses, losing all but twenty-five of the ninety-one seats they had held on the eve of the Kansas-Nebraska explosion." R. SEWELL, *supra* note 15, at 47.

18. D. ZAREFSKY, LINCOLN, DOUGLAS AND SLAVERY: IN THE CRUCIBLE OF PUBLIC DEBATE 5 (1990).

19. 60 U.S. (19 How.) 393 (1856).

20. *Id.*

21. *See* H. ARKES, BEYOND THE CONSTITUTION 36-38 (1990); D. ZAREFSKY, *supra* note 18, at 196 (comparing Mario Cuomo on abortion with Douglas on slavery).

tion that the people in the territories should decide for themselves whether to allow slavery. He supported the *Dred Scott* decision, at least publicly. Lincoln opposed popular sovereignty because he believed that slavery was inherently evil—there could be no moral "choice" for slavery. He staunchly opposed the *Dred Scott* decision and warned that the Court might extend that decision to mean that no *state* could exclude slavery. Lincoln sought to restore the 1820 Missouri Compromise—which had "forever" prohibited slavery in a large portion of the Louisiana Purchase but had been repealed in the 1854 Kansas-Nebraska Act. The Missouri Compromise, Lincoln believed, had put slavery "in the course of ultimate extinction" to which it should be returned.[22]

Little of what Lincoln said in the debates had not been said before. But Lincoln's clarity, eloquence, and strength of conviction, together with the particular importance of that Senate race and the publicity surrounding the debates, framed the issue in a way that permanently took hold. In the sixth debate, in Quincy on October 13, 1858, Lincoln acknowledged that there were differences of opinion on the slavery question but, to his mind, the "difference of opinion, reduced to its lowest terms, is no other than the difference between the men who think slavery a wrong and those who do not think it wrong. The Republican Party think it wrong—we think it a moral, a social and a political wrong."[23] Likewise, in the 1859 Ohio campaign, Lincoln forthrightly stated, "We want, and must have, a national policy, as to slavery, which deals with it as being a wrong."[24] He articulated the Republican Party's opposition to the *Dred Scott* decision in terms that parallel the contemporary opposition to *Roe v. Wade*:

> We nevertheless do oppose that decision as a political rule, which shall be binding on the voter to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the

22. THE LINCOLN-DOUGLAS DEBATES OF 1858 at 132 (R. Johannsen ed. 1965). *See generally* H. JAFFA, *supra* note 12; D. ZAREFSKY, *supra* note 18; H. ARKES, *supra* note 21, at 36-38.

23. THE LINCOLN-DOUGLAS DEBATES OF 1858, *supra* note 22, at 254.

24. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 435 (R. Basler ed. 1953).

> foundation for spreading that evil into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.[25]

Lincoln pointed out that it was logically impossible for Douglas to say that the people had a "right" to have slaves:

> When Judge Douglas says he "don't care whether slavery is voted up or down," whether he means that as an individual expression of sentiment, or only as a sort of statement of his views on national policy, it is alike true to say that he can thus argue logically if he don't see any thing wrong in it; but he cannot say so logically if he admits that slavery is wrong. He cannot say that he would as soon see a wrong voted up as voted down. When Judge Douglas says that whoever or whatever community wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that any body has a right to do wrong.[26]

As Lincoln apparently understood, one cannot logically support a right to a choice unless one views what might be chosen as good and legitimate in and of itself. Lincoln thereby articulated the logical fallacy of the "I'm personally opposed . . ." position more than 130 years ago.[27] Lincoln appealed to a tradition of moral reasoning which seems to have largely vanished from American politics—a tradition which understood that the very notion of "rights" relied on immutable truths that cannot be controlled by the changing personal feelings of individuals or cultural differences.[28] For instance, the Declaration of Indepen-

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25. *Id.* at 255. Professor Jaffa added the following:

> Lincoln's argument vis-a-vis the Court was simple: we shall never interfere with any disposition of property in accordance with a Court decision; who the Court decides is a slave shall be a slave. But the dicta of the Court shall not determine the policy of the Congress and the President, it shall not nullify the will of the American people, deliberately expressed through free elections. If there was no present way of giving effect to a Congressional enactment forbidding slavery in the territories, then (such was the inference Lincoln intended) the people should employ the political means open to them to change the composition of the Court.

H. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS 106 (1965).

26. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 256-57 (R. Basler ed. 1953).

27. *See* H. ARKES, *supra* note 12, at 24-25 (1986). "[O]pinions are characterized by their truth or falsity, not by their moral goodness or badness, as choices are." ARISTOTLE, *supra* note 12, at 59.

28. *See generally* H. ARKES, *supra* note 21, at 19, 36-38, 40-48; H. ARKES, *supra* note 12; M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978).

dence declares that all are "endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."[29] "Inalienable" rights cannot be surrendered or transferred.[30] Similarly, such rights cannot be protected if they are subject to the varying feelings of individuals. In this way, Lincoln articulated clear moral principles against slavery despite uncertain public opinion concerning the issue.

It is necessary, however, to compare Lincoln's principled rhetoric with his strategic prudence. Moral rhetoric, regarding slavery or abortion, can rarely be perfectly or immediately incorporated into public policy. In hindsight, some might suppose that Lincoln was an "abolitionist." But he was very much a moderate on the political spectrum of 1860, and, compared to staunch anti-slavery advocates Massachusetts Senator Charles Sumner and Ohio Governor Salmon P. Chase, Lincoln was a moderate within his own party. Lincoln's moderation in the 1858 Senate race was expressed through his demand on principle that the extension of slavery be halted and that slavery be put on a "course of ultimate extinction," while he advocated at that time--as a matter of political action—only the restoration of the Missouri Compromise. Lincoln demanded the restoration of the Missouri Compromise—which restricted the expansion of the slave states—based on the strict moral principle that slavery was wrong.[31]

Lincoln's strategic moderation continued during his presidency. He was extremely sensitive to the potential secession of the border states and the implications secession could have on the effort to preserve the Union (which he believed to be a necessary but not a sufficient condition for freeing the slaves). Lincoln came into conflict with his first Secretary of War, Simon Cameron, by failing to enlist free slaves in the Union forces in 1861;[32] he enraged Radical Republicans in 1861 and 1862 by re-

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29. The Declaration of Independence para. 2 (U.S. 1776).

30. M. WHITE, *supra* note 28, at 196, 203-28; Pangle, *The Philosophical Understandings of Human Nature Informing the Constitution*, in CONFRONTING THE CONSTITUTION 10 (A. Bloom ed. 1990).

31. "No one was, in general, more prone than Lincoln to follow that dictate of prudence by which one attempts always to remove evils without shocking the prejudices that support them—allowing time and circumstances to wear down the prejudice . . . . [T]his was implicit in the gradualism with which Lincoln approached all concrete questions of reform." H. JAFFA, *supra* note 12, at 276.

32. V. HOWARD, RELIGION AND THE RADICAL REPUBLICAN MOVEMENT 1860-1870, at 19 (1990).

scinding orders by General David Hunter and by General John C. Fremont to free slaves in certain states, for fear of losing the border states;[33] he proposed a Joint Congressional Resolution in March, 1862 that would have compensated states for the gradual abolition of slavery;[34] and he pocket-vetoed the Wade-Davis bill in 1864, which placed severe constraints on the ability of Southern states to rejoin the Union.[35] Lincoln was continually criticized by the Radical Republicans for his failure to act more aggressively against slavery.[36] As one scholar has written,

> Stanton came to hold Lincoln in high esteem; but some of the Radical Republicans never did. They found it hard to understand that in pursuing his objectives—preserving the Union and emancipating the slaves—Lincoln had to proceed cautiously to avoid alienating the border slave states (thus driving them to secession) and offending northern public opinion (which was by no means sympathetic to abolitionism at first). He also thought it important to synchronize his policies with progress on the battlefield (which came slowly at first) if he was to avoid making futile and perhaps even counterproductive gestures.[37]

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33. Lincoln sent Major General John C. Fremont to Missouri to raise an army in July, 1861. In August, Fremont "issued a proclamation establishing martial law in the state, one section of which freed the slaves of all persons resisting the government." T. WILLIAMS, LINCOLN AND HIS GENERALS 36 (1952). Lincoln revoked the slavery portion. T. WILLIAMS, LINCOLN AND THE RADICALS 38-41 (1972); V. HOWARD, *supra* note 32, at 12-17. In April, 1862, Union General David Hunter took command of the South Carolina Sea Islands. He asked the War Department for permission to "enlist black men into the Union army." Though the request was not answered, Hunter recruited the blacks nevertheless. In May, 1862, he "proclaimed martial law throughout South Carolina, Georgia, and Florida" and pronounced "slavery incompatible with martial law," declaring the slaves in those states to be free. Lincoln nullified Hunter's action. FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861-67, at 29 (I. Berlin ed. 1982).

34. ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865 307-08 (The Library of America, ed. 1989) [hereinafter ABRAHAM LINCOLN].

35. In mid-1864, Congress debated and passed the Wade-Davis reconstruction bill. Senators Sumner and Chandler were present at the White House on the day the bill was to be signed. Chandler entered the President's room to ask if he had signed the bill. When Lincoln said, "No," Chandler protested, pointing to the emancipation provision for the reconstructed states as "the important point." Lincoln responded, "That is the point on which I doubt the authority of Congress to act." When Chandler replied, "It is no more than you have done yourself," Lincoln answered, "I conceive that I may in an emergency do things on military grounds which cannot be done constitutionally by Congress." Lincoln pocket-vetoed the bill. M. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869, at 82-83 (1974). *See generally* T. WILLIAMS, LINCOLN AND THE RADICALS (1972).

36. *See generally* V. HOWARD, *supra* note 32, at 8-13 (1990).

37. P. BOLLER, JR., PRESIDENTIAL ANECDOTES 126 (1981).

During his Presidency, Lincoln consistently sought to determine what political objectives he did or did not have power to achieve. In so doing, Lincoln took public opinion into consideration. Lincoln recognized the power—though not the absolute moral authority—of public opinion. He once said, "[I]n a government like ours, public sentiment is everything, determining what laws and decisions can and cannot be enforced."[38] In this, Lincoln echoed James Madison in *Federalist No. 49*: "[T]he people are the only legitimate fountain of power . . . ."[39]

During the Reconstruction battle over the protection of civil and political rights for freed blacks, political leaders were forced to make similar strategic decisions. A Republican Senate leader, William Fessenden, expressed an understanding of political moderation:

> I have been taught since I have been in public life to consider it a matter of proper statesmanship, when we aim at an object which we think is valuable and important, if that object . . . is unattainable, to get as much of it and come as near it as we may be able to do.[40]

Even the so-called Radical Republicans understood this. Senator Wade, who co-authored the Wade-Davis reconstruction bill in 1864, excluded a requirement of black suffrage from the bill because it would, in his judgment, "sacrifice the bill."[41]

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38. H. JAFFA, *supra* note 12, at 231, 286-87, 309-10. "Our government," Lincoln said, "rests in public opinion. Whoever can change public opinion, can change the Government practically just so much." *Id.* at 309.

39. A. HAMILTON, J. MADISON & J. JAY, THE FEDERALIST PAPERS 313 (Mentor ed. 1961) [hereinafter THE FEDERALIST PAPERS]. Hamilton wrote in *Federalist Papers No. 84* that "the only solid basis of all our rights" is "public opinion, and the general spirit of the people and the government." *Id.* at 514-15.

40. M. BENEDICT, *supra* note 35, at 17.

41. *See generally id.* at 70-83. Likewise, in the aftermath of the Union Army's disastrous defeat at Bull Run (the First Manassas) in July, 1861, some congressional members believed that the purpose of the war should be clearly defined as only for the preservation of the Union so as to fortify public opinion behind the war. John J. Crittenden introduced a resolution in Congress which stated, among other things, that "this war is not waged . . . [for any purpose] of overthrowing or interfering with the rights or established institutions" of the Southern states, "but to defend and maintain the supremacy of the Constitution, and to preserve the Union . . . and that as soon as these objects are accomplished the war ought to cease." T. WILLIAMS, LINCOLN AND THE RADICALS 32 (1972). "Such a definition of the purposes of the conflict ran counter to every principle in the Jacobin creed." However,

> [t]hey agreed with Wade that to do anything else would fatally weaken and divide popular support of the war. They were willing, temporarily, to subordinate their own convictions in order that the conflict might be continued. For they knew that war meant the death of slavery, and they were confi-

In this way, Lincoln sought to achieve his principled objectives within the context of public policy. But, in so doing, he considered the political and constitutional constraints on his actions and balanced them in assessing the means he chose to reach the desired ends.

III. Political and Constitutional Constraints

In the aftermath of the *Webster* decision, those who seek to restore the sanctity of human life in American law need to emulate both Lincoln's rhetorical eloquence, conviction, and clarity and his strategic understanding of politics.[42] A clear, complete, and dispassionate understanding of constitutional and political constraints is essential. In the wake of *Webster* there are two overriding constraints on what the Prolife Movement has the power to achieve: first, the Supreme Court's interpretation of the Constitution (constitutional constraints) and second, public opinion (political constraints). A misunderstanding of either could be perilous.

A. Constitutional Constraints

The overriding goal of the Prolife Movement is to restore the law's protection of women and children.[43] This includes protection of the lives of unborn children,[44] protection for women

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dent that the exigencies of the struggle would enable them to circumvent the Crittenden resolution.

Id. at 33.

42. Politics, in this sense, includes constitutional litigation (e.g., lawsuits involving abortion statutes) because legal strategy is one form of political strategy. It is an attempt to achieve political effects through the legal process. *See generally* K. Ripple, Constitutional Litigation (1984).

43. For an understanding of the nature and extent of the law's protection of unborn children before *Roe v. Wade*, see generally Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979); Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U.L. Rev. 563 (1987); Kadar, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 Mo. L. Rev. 641-50 (1980); Linton, *Enforcement of State Abortion Statutes After* Roe: *A State-By-State Analysis*, 67 U. Det. L. Rev. 157 (1990); Witherspoon, *Reexamining* Roe: *Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

44. *See* sources cited *supra* note 43. There are at least 28 reported decisions from 17 jurisdictions which expressly state that the purpose of the 19th century abortion laws, at least in part, was to protect the life of the unborn child. *See* Rosen v. Louisiana Bd. of Medical Examiners, 318 F. Supp. 1217, 1222-32 (E.D. La. 1970) (three-judge court), *vacated and remanded*, 412 U.S. 902 (1973) (interpreting Louisiana law); Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); Dougherty v. The People, 1 Colo. 514, 522-23

from male coercion of women to abort,[45] protection for women from psychological or physical injury,[46] and protection from

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(1872); Passley v. State, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942); Nash v. Meyer, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934); State v. Alcorn, 7 Idaho 599, 613-14, 64 P. 1014, 1019 (1901); Joy v. Brown, 173 Kan. 833, 839-40, 252 P.2d 889, 892 (1953); State v. Miller, 90 Kan. 230, 233, 133 P. 878, 879 (1913); State v. Watson, 30 Kan. 281, 284, 1 P. 770, 771-72 (1883); State v. Rudman, 126 Me. 177, 180, 136 A. 817, 819 (1927); Smith v. State, 33 Me. 48, 57-59 (1851); Hans v. State, 147 Neb. 67, 72, 22 N.W.2d 385, 389 (1946), *vacated*, 147 Neb. 730, 25 N.W.2d 35 (1946); Edwards v. State, 79 Neb. 251, 254-55, 112 N.W. 611, 613 (1907); State v. Siciliano, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); State v. Gedicke, 43 N.J.L. 86, 89-90, 96 (1881); State v. Hoover, 252 N.C. 113, 135, 113 S.E.2d 281, 283 (1960); State v. Powell, 181 N.C. 515, 106 S.E.2d 133 (1921) (*but see* State v. Jordan, 227 N.C. 579, 580, 42 S.E.2d 674, 675 (1947) (regarding pre-quickening abortion)); State v. Tippie, 89 Ohio St. 35, 39-40, 105 N.E. 75, 77 (1913); State v. Barker, 28 Ohio St. 583, 586 (1876); Wilson v. State, 2 Ohio St. 319, 321 (1853); Bowlan v. Lunsford, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); State v. Auspland, 86 Or. 121, 131-32, 167 P. 1019, 1022-23 (1917); State v. Atwood, 54 Or. 526, 531, 102 P. 295, 297 (1909), *aff'd on rehearing*, 54 Or. 526, 104 P. 195 (1909); State v. Steadman, 214 S.C. 1, 7-8, 51 S.E.2d 91, 93 (1948) (statute prohibiting pre-quickening abortion was intended to change the common law rule and prevent "the destruction of a child before it has quickened"); State v. Howard, 32 Vt. 380, 399-401 (1859); Anderson v. Commonwealth, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949); State v. Cox, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938). *See also* People v. Belous, 71 Cal. 2d 954, 978, 458 P.2d 194, 209, 80 Cal. Rptr. 354, 369 (1969) (Burke, J., dissenting) (abortion statute "was designed to protect not only the mother's life but also that of the child"); People v. Lovell, 40 Misc. 2d 458, 459, 242 N.Y.S.2d 958, 959 (1963) (abortion legislation was "designed to protect the natural right of unborn children to life").

45. Franco, Tamburrino, Campbell, Pentz & Jurs, *Psychological Profile of Dysphoric Women Postabortion*, 44 J. AM. MED. WOMEN'S ASSOC. 113, 113 (1989) (Of the women the author surveyed after abortion, "more than one-third felt they had been coerced into the decision."). "On the whole, from the early 60's to the mid-80's, national polls have reported that a slightly higher percentage of men than women express favorable attitudes toward abortion." H. RODMAN, B. SARVIS, & J. BONAR, THE ABORTION QUESTION 141 (1987). "Men have obvious interests that are served by easy access to abortion." M. GLENDON, *supra* note 7, at 50. "Deregulation of abortion, among other things, makes it simpler for men to decline to assume responsibility for children. In this connection, it is striking how many of Carol Gilligan's [C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)] subjects in her chapter on the abortion decision stated that one of the reasons they were seeking abortions was because the men in their lives were unwilling to give them moral and material support in continuing with pregnancy and childbirth. This fact surely must have been central to their moral dilemma, but Gilligan, surprisingly, never picks up on this aspect of her data." M. GLENDON, *supra* note 7, at 52. *See also* S. NATHANSON, SOUL CRISIS: ONE WOMAN'S JOURNEY THROUGH ABORTION TO RENEWAL (1989); A. SHOSTAK & G. MCLOUTH, MEN AND ABORTION: LESSONS, LOSSES AND LOVE (1984); M. DENES, IN NECESSITY AND SORROW: LIFE AND DEATH IN AN ABORTION HOSPITAL (1976).

46. *See* S. NATHANSON, *supra* note 45; A. SPECKHARD, THE PSYCHO-SOCIAL ASPECTS OF STRESS FOLLOWING ABORTION (1987); M. DENES, *supra* note 45; Note, *Abortion Counseling: To Benefit Maternal Health*, 15 AM. J. LAW & MED. 483, 488-90 (1989); McAll & Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80 S. MED. J. 817 (1987).

It is often stated that abortion is physically safer than childbirth, indeed, that abor-

profiteering and unscrupulous abortionists.[47] Simply put, those who oppose abortion as the killing of unborn children do so on the same basis that Lincoln opposed slavery: there are certain natural rights upon which citizens cannot simply "agree to disagree" and which cannot be violated consistent with a good and just society. The right to life of all human beings—born and unborn—is one of these.[48]

Because our society operates in a constitutional democracy, a successful strategy to reach that goal must be developed within the constraints of the Constitution. The Constitution vests the

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tion is safer than childbirth at any time of pregnancy. But the accuracy of this cliche is substantially undermined by the inaccurate nature of abortion complication reports in the United States. There is no coherent or comprehensive national or state system for reporting abortion complications. Atrash, *Legal Abortion in the United States: Trends and Mortality*, 35 CONTEMPORARY OBSTETRICS & GYNECOLOGY, 58 (1990).

However, a leading abortion textbook states that "[i]n medical practice, there are few surgical procedures given so little attention and so underrated in its potential hazard as abortion." W. HERN, ABORTION PRACTICE 101 (1984). The legalization of abortion has *not* had a dramatic impact in reducing abortion-related maternal mortality. *See* Cates, *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982). The Centers for Disease Control (CDC) in Atlanta reported a total of 193 legal-abortion-related deaths between 1972 and 1985. Atrash, *Legal Abortion Mortality and General Anesthesia*, 158 AM. J. OBSTETRICS AND GYNECOLOGY 420, 421 (1988). But the CDC itself estimates that it underreports deaths. Cates, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J. A.M.A. 192, 193 (1982). The authors who advocate the relative safety of abortion also acknowledge that the incidence of maternal mortality and morbidity is significant in absolute medical and economic terms.

> The scope of the problem of abortion complications is large, both numerically and economically. For example, in 1977 nearly 100,000 women in the United States sustained complications of abortion, and 16 died. . . . Excluding the indirect costs of lost productivity, the estimated direct cost of treating women who suffered complications in 1977 was over $22 million.

Grimes & Cates, *Abortion: Methods and Complications*, in HUMAN REPRODUCTION: CONCEPTION AND CONTRACEPTION 796 (E. Hofez 2d ed. 1980).

47. "It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal health and mental well-being in light of the fact that the record in this case shows that the relationship is nonexistent." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 473 (1983) (O'Connor, J., dissenting). *See also* D. REARDON, ABORTED WOMEN: SILENT NO MORE (1987); *The Abortion Profiteers*, Chicago Sun-Times, Nov. 12, 1978 at 1 (results of five-month, detailed investigation into conditions at Chicago clinics); *Tragic End to Ghanaian's Dream*, Newsday, June 9, 1989, at 6 (death of 28-year old immigrant after abortion at unregulated "storefront" clinic in Brooklyn); *Hospital Shut Down as Health Risk Will Reopen for Abortions Tomorrow*, L. A. Herald Examiner, Feb. 12, 1988, at A-1; Sontag, *Do Not Enter*, MIAMI HERALD TROPIC MAG., Sept. 17, 1989, at 8; Sontag, *Clinic Story Stirs Debate on Abortion*, Miami Herald, Sept. 22, 1989, at 1A; Sontag, *State Inspectors Close Kendall Abortion Clinic*, Miami Herald, Sept. 27, 1989, at 1A; Viglucci, *HRS Shuts Second Abortion Center*, Miami Herald, Sept. 28, 1989, at 1B; Viglucci, *Abortion Clinic Closed in Hialeah*, Miami Herald, Oct. 14, 1989, at 1B.

48. *See* H. JAFFA, *supra* note 25, at 77, 81.

Supreme Court with power to interpret the Constitution.[49] The Supreme Court's interpretation of the Constitution in *Roe v. Wade* resulted in the non-enforcement of abortion laws that had been enforced—changing with developments in medical science and technology—during the preceding 200 years of American history.[50] Abortion on demand followed. The Court has effectively kept state and local officials from enforcing abortion laws. Thus, *Roe v. Wade* must be overturned.

The *Webster* decision did not overturn *Roe v. Wade*. Until *Roe* is overturned, the Supreme Court, and the lower federal courts, are still entrenched in the business of examining this country's abortion laws. The Court's interpretation of the Constitution's due process clause still binds both those who make the laws—legislators—and those who enforce the laws—district attorneys and county prosecutors.

Because of these constitutional constraints, an incremental or gradualist strategy has been pursued to overturn *Roe v. Wade* through constitutional litigation in the courts.[51] The strategy entails the passage of carefully drafted state abortion legislation. Such legislation is invariably challenged as unconstitutional in the courts by organizations such as the American Civil Liberties Union (ACLU) and Planned Parenthood, and the ensuing lawsuits are appealed to the United States Supreme Court.[52] The legislation is carefully designed to present particular abortion issues to the courts that test Supreme Court doctrine and that will encourage the courts, and ultimately the Supreme Court, to cut back on *Roe v. Wade* or to readdress and overrule it.

This incremental approach is based on an understanding of several important institutional principles. First, this approach recognizes that American constitutional doctrine usually evolves slowly. The American judiciary "rarely takes a giant step to establish a new doctrine or definitively reject an old one."[53] The

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

50. *See, e.g.*, J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES (1979); Horan, Forsythe & Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 ST. LOUIS U. PUB. L. REV. 229 (1987).

51. This is explained at length in ABORTION AND THE CONSTITUTION: REVERSING *Roe v. Wade* THROUGH THE COURTS, *supra* note 11.

52. *See generally* Grant, *Abortion and the Constitution: The Impact of* Thornburgh *on the Strategy to Reverse* Roe v. Wade, in ABORTION AND THE CONSTITUTION: REVERSING *Roe v. Wade* THROUGH THE COURTS, *supra* note 11, at 245-58.

53. Myers, *supra* note 11, at 24. "[C]onstitutional doctrine unfolds incrementally."

small step the Court took in *Webster* is only one recent example of this. Second, an understanding of the current judicial perspective is necessary. Based upon what the Court has done in the past with previous cases (precedents) and upon the Court's current makeup, there is uncertainty about how the court might receive any given abortion statute. Third, "advances in constitutional doctrine . . . are based not only on the facts of the case but also on a broader understanding of the issue's significance and impact."[54] Fourth, a successful incremental approach should give the Court an opportunity to uphold a state statute "within the established rule of law, and simultaneously offer[] the Court an opportunity to re-examine its precedents to forge a more just rule."[55] Hence, if constitutional interpretation is a primary constraint on restoring the sanctity of human life in American law, and constitutional doctrine generally evolves incrementally, then a strategy to overthrow that constraint should likewise be incremental.

The statute at issue in *Webster* is a good example of this incremental approach,[56] and the state's success with the statute

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K. RIPPLE, *supra* note 42, at 122.

54. Myers, *supra* note 11, at 24-25. This is the role of "constitutional facts" in constitutional litigation. *See* K. RIPPLE, *supra* note 42, at 53-62. *See also* Marshall, *An Evaluation of Recent Efforts to Advance Racial Integration in Education through Resort to the Courts*, 21 J. NEGRO ED. 316 (1952).

55. Myers, *supra* note 11, at 26. *See* K. RIPPLE, *supra* note 42, at 126-27.

56. The following are the most important provisions of Missouri House Bill 1596 at issue in *Webster*, now codified as statutes:

> The general assembly of this state finds that:
>
> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;. . .

Mo. REV. STAT. § 1.205 (1)-(2) (1990).

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

Id. § 188.029.

> It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

reaffirms the effectiveness of the approach.[57] The Missouri legislature recognized that current constitutional constraints existed. Consequently, they drafted a statute that did not attempt to prohibit abortion generally, or to prohibit any particular abortion, because of the hostile makeup of the Supreme Court at the time the statute was drafted. The Missouri legislature recognized, based on the Court's recent precedents, that the Court would not be easily persuaded to allow much more regulation of abortion than was included in the Missouri statute. The statute was upheld by the Supreme Court, and a new majority of justices has emerged which does not exhibit the same level of hostility toward abortion legislation as the previous majority.[58]

Id. § 188.205.

> It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

Id. § 188.210.

> It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Id. § 188.215.

57. The manner in which the Court in *Webster* collectively addressed the Missouri statute and the question of overruling *Roe v. Wade* reflects enduring principles of constitutional adjudication which underlie an incremental approach, the most basic being that it is difficult to get the votes of a majority of the Court at any one time to completely repudiate an important series of precedents. Only Justice Scalia would have voted for outright overruling. Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring in part and concurring in the judgment). Whatever the speculation about how Justices Rehnquist, White, and Kennedy might have responded to an O'Connor vote for overruling, they in fact concluded that "[t]his case . . . affords us no occasion to revisit the holding of *Roe*" (*id.* at 3058) and voted only to reject the trimester framework (as one part of *Roe*, thus chipping away at *Roe*). *Id.* at 3057 n.15. In failing to vote to overrule *Roe*, Justice O'Connor specifically cited the very jurisprudential rules which underlie an incremental strategy to overrule a precedent (e.g., not framing a constitutional decision broader than necessary (*id.* at 3060-61 (citing Ashwander v. TVA, 297 U.S. 288 (1936)); not addressing constitutional questions prematurely (*id.*); not addressing or overruling precedent without "good cause" (*id.* at 3061 (citing Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984))). Therefore it is possible that the only reason the Court did not overrule *Roe* in *Webster* is that the plurality lacked the vote of Justice O'Connor. But this begs the question: the Court did not overrule *Roe* because it could not get five justices to agree to overrule *Roe*. This is because at least one Justice would not agree to "move that fast," thereby reaffirming, by example, the institutional rules which constrain overruling precedent. *See* K. RIPPLE, *supra* note 42, at 102-07.

58. *See Webster*, 109 S. Ct. at 3057 (opinion of Rehnquist, C.J., joined by White, J.,

However, despite its reaffirmance of the incremental strategy, *Webster* signals that great uncertainty remains. If this new majority holds, new cases may give the Court an opportunity to chip away further at *Roe v. Wade* or to overturn it altogether. Because of this new five-member majority (and possibly six-member majority with the appointment of Justice Souter), the *Webster* decision effectively gives states greater authority to regulate abortion, but only in ways that are yet to be defined by the courts. No majority opinion in *Webster* articulated a uniform rule for courts to use in reviewing abortion statutes and no majority identified specific types of legislation (except the Missouri statute) that might withstand constitutional scrutiny in the federal courts. In other words, the *Webster* decision leaves the lower federal courts, as well as state legislators, with only general and vague guidance.

Moreover, because it is impossible to predict what will happen with this new majority, it is impossible to tell whether *Webster* only injured *Roe* or inflicted a mortal wound. Will the majority survive, as presently constituted, for the next five to ten years—enough time for additional abortion cases to make their way up through the federal court system to the Supreme Court? Will Justice Souter (and other potential appointees in the next five years) strengthen the new Rehnquist plurality, resurrect the old Blackmun majority, or join Justice O'Connor's approach?[59]

Even if the current majority holds, however, Justice O'Connor's hesitance in *Webster* to overturn *Roe* should not be underestimated. Of the nine justices, she was the only one who thought that the Missouri statute did not in any way conflict with the *Roe* decision. This is an indication of her willingness to avoid confrontation with *Roe*, even in marginal ways, if at all possible. While she will probably uphold well-crafted informed consent legislation, given her 1983 opinion in *Akron v. Akron Center for Reproductive Health*,[60] how far will she go in uphold-

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and Kennedy, J.); *id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting, joined by Rehnquist, J., and White, J.).

59. *Compare Webster*, 109 S. Ct. at 3057 (opinion of Rehnquist, C.J., joined by White, J., and Kennedy, J.); *id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment) *with Akron*, 462 U.S. at 461 (O'Connor, J., dissenting), *with Webster*, 109 S. Ct. at 3058 (O'Connor, J., concurring in part and concurring in the judgment), *and with Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part and dissenting in part, joined by Brennan, J., and Marshall, J.).

60. 462 U.S. 416, 452 (1983) (O'Connor J., dissenting).

ing substantive prohibitions on abortion in the first trimester when ninety percent of all abortions are performed? Will she attempt to avoid a direct confrontation? If pushed too far by a direct conflict, could her vote be lost to the Blackmun minority? What would be the political impact of such a loss, given Justice O'Connor's position as a Reagan appointee and as the only woman justice to this point? Justice O'Connor's particular approach in *Webster* reaffirms the principles underlying the incremental strategy.[61]

While it is difficult to say how long this new majority will last and how far this majority will go in curtailing *Roe v. Wade*, *Webster* changes the legislative, and thus the political, landscape by opening the door for states to substantively prohibit some abortions. Before *Webster*, it was politically and constitutionally impossible for the legislatures to pass substantive prohibitions of abortion. Instead, they could only skirt the margins of *Roe* with procedural restrictions. After *Webster*, substantive prohibitions are possible because the new majority has stated that states have a "compelling interest" in protecting the life of the unborn child "throughout pregnancy."[62] But the extent of allowable substantive prohibitions is obscured by Justice O'Connor's adoption of an "undue burden" standard for evaluating the constitutionality of abortion legislation.[63] Her standard

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61. *See supra* note 57 and accompanying text. *See also* Estrich, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 122-23 (1989) ("[T]he real audience is one woman. Sandra Day O'Connor, the only woman in American history to sit on the United States Supreme Court, is in the position single-handedly to decide the future of abortion rights"); Note, *Potential Fathers and Abortion: A Woman's Womb is not a Man's Castle*, 55 BROOKLYN L. REV. 1359, 1362 n.11 (1990) ("However, if presented with anything other than an unduly burdensome standard, it is conceivable that [Justice O'Connor] would uphold *Roe* to avoid being the deciding vote to overrule one of the most important rights afforded to women in the twentieth century, considering she was the first woman to be appointed to the Supreme Court.").

With the confirmation of Justice Souter to replace Justice William Brennan, emphasis on Justice O'Connor as "the deciding vote" may no longer be accurate; however, because she may possibly be casting the fifth or sixth vote, her past-expressed views on abortion must be carefully examined.

62. *Cf. Webster*, 109 S. Ct. at 3057 ("the State's 'compelling interest' in protecting potential human life throughout pregnancy") (opinion of Rehnquist, C.J.; White, J., Kennedy, J., concurring); *id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment) (advocating overruling of *Roe*); *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) ("State possesses compelling interests in the protection of potential human life . . . throughout pregnancy").

63. Justice O'Connor has proposed the following test for the review of abortion legislation:

Our recent cases indicate that a regulation imposed on "a lawful abortion 'is

raises many questions. What is an "undue burden" on the abortion right, and how "compelling" is the state's interest in protecting the unborn child throughout pregnancy? Is a burden "undue" if it obstructs any abortion, or any abortion within the first trimester, or any abortion performed for rape, incest, or fetal abnormality? It is not easy to predict what substantive restrictions fall within or without the "undue burden" standard because the standard has never been coherently applied and because a full majority of the Court appears unwilling to adhere to it.

The significance of Justice O'Connor's hesitance to join the Rehnquist plurality in *Webster* to overturn *Roe* should not be underestimated. The "undue burden" standard allows judges great subjectivity to determine what burdens are "undue" and what state interests are "compelling" or "legitimate." The standard also contradicts Justice O'Connor's prior statements that the states have a compelling interest in "potential human life" throughout pregnancy.[64] Many people read an intent to overturn *Roe* into her statements in *Akron v. Akron Center for Reproductive Health*, but the "undue burden" standard is so inherently ambiguous that the natural evolution of the standard may not yield the result of overturning *Roe*. And, in other applications of substantive due process, Justice O'Connor has demonstrated an inclination to "balance the difference" between conflicting visions of constitutional principle.[65]

It may be that before *Hodgson v. Minnesota*,[66] Justice

> not unconstitutional unless it unduly burdens the right to seek an abortion.' In my view, this "unduly burdensome standard" should be applied to the challenged regulation throughout the entire pregnancy without reference to the particular "stage" of pregnancy involved. If the particular regulation does not "unduly burden" the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.

Akron, 462 U.S. at 453; *see also Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); Planned Parenthood Assoc. v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in part and dissenting in part).

64. *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting).

65. *See, e.g.*, Employment Div., Dept. of Human Resources of Oregon v. Smith, 110 S. Ct. 1595, 1606 (1990) (O'Connor, J., concurring); Michael H. v. Gerald D., 109 S. Ct. 2333, 2346 (1989) (O'Connor, J., concurring); Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 905 (1989) (Blackmun, J., with whom Justice O'Connor joined, concurring). I am grateful to Professor Robert Destro for bringing this point and these opinions to my attention.

66. 110 S. Ct. 2926 (1990).

O'Connor "had never met an abortion restriction she didn't like," but it is also true that she has addressed only relatively minor procedural restrictions on abortion. These procedural restrictions are very different from statutes that substantively prohibit abortion. In addition, the first abortion provision that she has found unconstitutional—the pure parental notice provision without judicial bypass in *Hodgson*—is not substantive in nature, but is merely a procedural restriction with no demonstrated impact on minors' abortions. In short, it is far from clear that Justice O'Connor will join with a majority if the Court decides to overturn *Roe v. Wade*.[67]

The change in the Court's composition following the resignation of Justice William Brennan on June 30, 1990 and the subsequent appointment of Justice David Souter of New Hampshire also factors into the calculus of the Supreme Court's abor-

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67. Moreover, the reasoning she employed to strike down the provision in *Hodgson* is unpersuasive. Justice O'Connor struck down the Minnesota two-parent pure notice provision with no judicial bypass on a mere facial challenge. The two-parent notice requirement had been in effect in Minnesota from August, 1981 to March, 1986, with a bypass procedure, but the pure notice provision with no bypass had never gone into effect. In *Webster*, Justice O'Connor adopted a standard of review for facial challenges that had been articulated in United States v. Salerno, 481 U.S. 739, 745 (1987):

> A facial challenge . . . is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

Webster, 109 S. Ct. at 3060.

Despite this standard, Justice O'Connor reasoned that the two-parent pure notice provision was invalid "[g]iven its broad sweep and its failure to serve the purposes asserted by the State in too many cases. . . ." *Hodgson*, 110 S. Ct. at 2950. Thus, she did not follow her own standard for facial challenges: failure to serve state interests in "too many cases" is not "no circumstances" in which the statute is valid.

However, even on her own terms of apparently using the record evidence regarding the judicial bypass to strike down the pure notice provision, there was apparently no evidence in the *Hodgson* record that the statute had ever been *applied* by any state officials, including state judges, to require minors to notify distant, absent, or abusive parents. In other words, there appears to have been no judicial application of the "reasonably diligent effort" language which required any minor to contact an absent or abusive parent. Minn. Stat. § 144.343(3) (1990). There *were* instances in the record in which minors apparently *volunteered* to notify such parents (at the apparent direction of abortion clinic personnel or their lawyers in order to *create* a record in the case), but there is no evidence that any such notifications were a result of the application of the statute by state officials or judges. (Indeed, during the four and one-half years of the statute's enforcement, "bypass petitions had been filed in 3,573 cases and granted in 3,558 of them. Six petitions were withdrawn, nine petitions were denied and one had been appealed." Hodgson v. Minnesota, 853 F.2d 1452, 1458 n.10 (8th Cir. 1988) (en banc), *aff'd*, 110 S. Ct. 2926 (1990)). This crucial distinction was apparently overlooked.

tion position, thereby affecting the strategy to be employed to overturn *Roe*. Justice Brennan joined the 7-2 majority in *Roe v. Wade* and, in the ensuing years, opposed virtually any restrictions on abortion and supported the coercion of abortion funding by the state and federal governments.[68] It is doubtful that *any* nominee by President Bush could be as extreme as Justice Brennan in compelling the states to allow abortion on demand throughout pregnancy. But Justice Souter's views on abortion are a big question mark. He does not demonstrate—either in his writings or in his public comments—that he is either philosophically or emotionally committed to the principle of the sanctity of human life.[69] In the 227 opinions he wrote while on the New Hampshire Supreme Court—approximately 85 of which were on constitutional questions—he showed himself to be strongly committed to precedent. Judge Souter might have voted not to create a right to abortion if he were on the *Roe* Court in 1973, but, of course, he will not be writing on a clean slate; therefore, what he would do with *Roe* today is a matter of conjecture.

Until Justice Souter addresses his first abortion case, there will be no reliable evidence as to how he will deal with *Roe v. Wade*. That opportunity will come this Term in the Bush Administration's appeal of regulations which prohibit abortion counseling or referral to abortion services with federal funds under Title X of the Public Health Service Act.[70] However, this appeal merely involves restrictions on federal funding of abortion activities and not substantive prohibitions on abortion at any time during pregnancy; therefore, the case will not strike at the heart of the doctrine of *Roe v. Wade*. Thus, this appeal may

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68. Ohio v. Akron Center for Reproductive Health, 110 S. Ct. at 2984 (joining opinion of Justice Blackmun, supporting invalidation of one-parent notice with judicial bypass). *Cf. Hodgson*, 110 S. Ct. at 2951 (joining opinion of Justice Marshall, supporting invalidation of two-parent notice requirement with no judicial bypass and invalidation of two-parent notice with judicial bypass, as applied); *Thornburgh*, 476 U.S. at 750-72 (joining opinion of Justice Blackmun, striking down informed consent requirements, restrictions on method of abortion for post-viability abortions, etc.); *Akron*, 462 U.S. at 416-52 (joining opinion of Justice Powell striking down 24-hour waiting period before abortion for adult women, and informed consent requirement before abortion).

69. *See, e.g.*, Smith v. Cote, 513 A.2d 341, 355-56 (N.H. 1986) (Souter, J., concurring). *But see* Eastland, *Deconstructing David Souter*, 42 NAT'L REV. 37 (1990).

70. New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 110 S. Ct. 2559 (1990). The author was counsel for the Association of American Physicians and Surgeons as *amicus curiae* in Support of Respondent, the Secretary of Health and Human Services, in *Rust v. Sullivan* and *New York v. Sullivan*, argued Oct. 30, 1990.

provide only minimal evidence of Justice Souter's views of *Roe v. Wade*.

These difficult questions must be addressed in considering the constitutional constraints on the Movement's ability to achieve its short-term objectives. They cannot be prudently ignored. They cannot be brushed aside. Political questions cannot be considered to the exclusion of constitutional questions. The two concerns—political and constitutional—must be addressed each time state or federal abortion legislation is under consideration.

B. Political Constraints

In tandem with constitutional considerations, the second major constraint on a strategy to overturn *Roe v. Wade*—public opinion—must be considered. A successful strategy for restoring the sanctity of human life in our democratic republic requires recognition that we live in a mass, heterogeneous society in which government rests on the "consent of the governed."[71] As Professor Jaffa has stated, "The first task of statesmanship is not legislation, but the molding of that opinion from which all legislation flows."[72] Public sentiment is as fundamentally important to protecting the lives of the unborn as it was to freeing the slaves and protecting their rights. Reversal of *Roe v. Wade* by the Supreme Court is not enough. Passing a constitutional amendment is not enough because the Constitution is not a self-enforcing document. Both will necessarily depend, for their effectiveness, on the passage and enforcement of protective legislation at the state level. Ultimately, nothing will suffice except a deep and abiding conviction in the American people that unborn children deserve the restoration of legal protection from being killed. *Roe v. Wade* will not be "overturned" just by overturning the decision in the Supreme Court. It must be overturned in the hearts and minds of the American people. Public sentiment will

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71. *See* H. JAFFA, *supra* note 25, at 90.

72. *Id.* at 91. During the 1858 debates at Ottawa, Illinois, Lincoln said, "In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who molds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed." THE LINCOLN-DOUGLAS DEBATES OF 1858, *supra* note 22, at 64-65; H. JAFFA, *supra* note 12, at 310. "The task of statesmanship, in part," Jaffa wrote, "is to clarify the alternatives that are before the country and to compel the people to a genuine and not a spurious or illusory choice." *Id.* at 81.

determine which laws are passed and which laws will be enforced. In this regard, the English jurist James Fitzjames Stephen made a practical observation of great wisdom:

> Legislation ought in all cases to be graduated to the existing level of morals in the time and country in which it is employed. You cannot punish anything which public opinion, as expressed in the common practice of society, does not strenuously and unequivocally condemn. To try to do so is a sure way to produce gross hypocrisy and furious reaction. . . . Law cannot be better than the nation in which it exists, though it may and can protect an acknowledged moral standard, and may gradually be increased in strictness as the standard rises.[73]

Perhaps Stephen overstated the case, but there is a substantial measure of truth in what he wrote.

In seeking to change public sentiment, it would be foolish to overlook *Roe v. Wade*'s tremendous power over the past seventeen years in teaching the public—through the imposition of the Court's ruling throughout every state and county—that unborn children are not persons and that taking the lives of unborn children on demand throughout pregnancy is a good thing—a good solution to social problems, a "right." The great myth about *Roe v. Wade* is that it "liberalized" abortion law. The truth, in fact, is that *Roe* virtually *abolished* abortion law throughout the fifty states. That nationwide dictate has had a pervasive, disastrous effect upon American public opinion. Until 1966, *no state* allowed abortion except to save the life of the mother.[74] Between 1966 and 1973, nineteen states cut back their legal protection for the unborn child, but not nearly as far as *Roe*. Even on the eve of *Roe v. Wade*, other states, like Michigan, rejected the "liberalization" of abortion laws.[75]

Today, in contrast, depending on what polls one relies upon, a clear majority seems to support legalized abortion in cases of rape and incest, and at least a strong minority *seems* to support abortion on demand. Some polls indicate that a majority views abortion as murder, while a majority also thinks that abortion should be legalized.[76] In 1991, the public seems torn between the

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73. J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 159-60 (R. White ed. 1967).

74. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 118 (1980); Linton, *supra* note 43.

75. *See* Linton, *supra* note 43.

76. *See* M. GLENDON, *supra* note 7, at 41 & nn.153-58.

conviction that abortion is murder and the translation of that conviction into a public policy of protection for unborn children. Many commentators often wonder why there is no ability to achieve consensus on the humanity of the unborn child. A consensus of strong protection for the unborn did exist at one time.[77] While the consensus was weakened between 1966 and 1973, it was ultimately destroyed by *Roe v. Wade*. To think that this effect of *Roe* on public sentiment can be reversed overnight is foolishness; to think that it can be reversed in a generation may be naive.

At the same time, the assumption that *Roe v. Wade*'s effects on public opinion cannot be positively reversed is untested. The powerful effect of the law on attitudinal change should not be underestimated.[78] The extent to which the effects of *Roe v. Wade* can be reversed is still the test of the Prolife Movement during 1991 and beyond. The degree to which the passage of protective legislation is essential in this effort should not be underestimated. Because law has perhaps an unequaled impact in shaping public opinion, it may be impossible to accurately determine what degree of protection for the unborn is politically and culturally sustainable until some laws which protect the unborn child are enacted and are able to work their effect on public sentiment, as only laws can.[79]

When attempting to change public opinion, Madison's observations in *Federalist No. 49* should be recalled:

> If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect.[80]

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77. *See* M. OLASKY, THE PRESS AND ABORTION 1838-1988 (1988); Forsythe, *supra* note 43; Linton, *supra* note 43.

78. *See generally* I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY (1980); P. DEVLIN, THE ENFORCEMENT OF MORALS (1979); LAW AND MORALITY: A READER (L. Blom-Cooper & G. Drewry ed. 1976); W. MUIR, LAW AND ATTITUDE CHANGE (1973); H. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY (1971); H. HART, LAW, LIBERTY, AND MORALITY (1979).

79. *See* M. GLENDON, *supra* note 7, at 6-7.

80. THE FEDERALIST PAPERS, *supra* note 39, at 314-15.

Our democratic republic ultimately rests on public opinion; if public opinion concerning abortion is to be successfully turned around, it will be necessary to lead and shape, in Madison's words, the "prejudices of the community" and to "fortify opinion" through examples that are both "ancient" and "numerous."[81] What "examples" or authorities can fortify public opinion in favor of the most comprehensive protection of the unborn child? Certainly our legal history and tradition of protecting unborn children,[82] the experience of women who have incurred and deeply regretted abortions,[83] modern medical science's (fetology's) treatment of the fetus as a patient, and religious conviction[84] are compelling "examples" of why unborn children should be protected.[85] These examples must be employed in creative ways to turn public sentiment around.

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81. *Id.* at 315.

82. *See generally* J. KEOWN, ABORTION, DOCTORS AND THE LAW (1988); J. NOONAN, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (1970); Forsythe, *supra* note 43; Horan, Forsythe & Grant, *supra* note 50; Dellapenna, *supra* note 43.

Recent scholarship has determined that, contrary to contemporary, popular histories of abortion, abortion was never viewed as a "right" at any time of pregnancy in Anglo-American law. Numerous indictments and appeals of felonies have been found that date back to 1200 A.D. *See* Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Appellants in Turnock v. Ragsdale, and Cross-Petitioners in Hodgson v. Minnesota, at 3-6 nn.2, 3, 8, 9. And, after 1500 A.D., cases which prosecuted abortion became more common. *Id.* at 8.

> By the early Eighteenth Century, the criminality of abortion under the common law appears well established. Courts had given increasingly clear holdings that some abortions were crimes; there was no decision indicating that any form of abortion was lawful. Secondary authorities, especially after 1600, equally supported the criminality of abortion.

Id. at 11.

This law was received in colonial America. "In just one colony, no less than three prosecutions for criminal abortion arose before 1664." *Id.* at 17-18 (citing Proprietary v. Lambrozo, 53 Md. Archives 387-91 (1663); Proprietary v. Brooks, 10 Md. Archives 464-65, 486-88 (1656); Proprietary v. Mitchell, 10 Md. Archives 171-86 (1652)).

83. *See, e.g.*, S. NATHANSON, *supra* note 45; D. REARDON, *supra* note 47; J. BURTCHAELL, RACHEL WEEPING (1984); L. FRANCKE, THE AMBIVALENCE OF ABORTION (1978); McConnell, *Living With* Roe v. Wade, 90 COMMENTARY 34 (Nov. 1990); Franco, Tamburrino, Campbell, Pentz, & Jurs, *supra* note 45; McAll & Wilson, *supra* note 46.

84. In comparison, evangelical religion was a primary influence for much of the antislavery movement and the work of the Radical Republicans during the Civil War and Reconstruction. *See generally* V. HOWARD, *supra* note 32. "[C]hurches furnished the chief institutional vicinage in which the antislavery impulse throve during the Civil War and Reconstruction." *Id.* at 1.

85. Few Americans understand that, while elective abortion kills approximately 1.5 million healthy unborn children per year, modern medicine can and does treat unborn children, to some degree or another, at virtually any time of gestation. *See generally* M. HARRISON, M. GOLBUS, & H. FILLY, THE UNBORN PATIENT: PRENATAL DIAGNOSIS AND TREATMENT (1984); THE FETUS AS A PATIENT '87: PROCEEDINGS OF THE THIRD INT'L SYM-

Determination of what is and what is not within the Prolife Movement's power to achieve requires—as a practical matter in the legislative arena—specific, informed, and timely decisions on the state level by the local leaders, based on a thorough evaluation of the Movement's particular strengths in each state. The Prolife Movement in the different states is of widely differing strengths.[86] In each state, consideration must be given to the state's history, its particular laws, its demographic makeup, the strength of grass root networks, and the respect, abilities, and strengths of prolife legislators. All of these factors contribute to varying strengths of the Prolife Movement in each state. The forces in each state will have to analyze their needs and strengths and then tailor their legislation to fit accordingly. The differing strengths of the Movement in the various states, and the differences in abortion laws that already exist on the books, may mean that there can be no "model" abortion legislation, and that, within certain boundaries, each state must consider legislation on its own terms, for its own unique conditions. Therefore, the Movement has not fastened on one "Grand Plan" for legislation in the wake of *Webster*; but then Lincoln, in attempting to fashion a plan for reconstruction, was accused the day before his assassination of "grop[ing] like a traveller in an unknown country without a map."[87] Cultural questions of such complexity which must be fashioned for different states do not easily lend themselves to a "Grand Plan."

C. Devising the Means to Produce the Intended Result

The statesman, as Jaffa points out, must not only judge "wisely as to what is and what is not within his power," he must also determine whether the means selected are appropriate to produce the intended results.[88] Devising the appropriate means

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POSIUM (K. Maeda ed. 1987); THE FETUS AS A PATIENT, PROCEEDINGS OF THE FIRST INTERNATIONAL SYMPOSIUM (A. Kurjak ed. 1985); E. VOLPE, PATIENT IN THE WOMB (1984); Manning, *Reflections on Future Directions of Perinatal Medicine*, 13 SEM. PERIN. 342 (1989); Schulman, *Treatment of the Embryo and the Fetus in the First Trimester*, 35 AM. J. MED. GENETICS 197 (1990).

86. By comparison, anti-slavery sentiment was of differing strengths in different states in the 1850's. R. SEWELL, *supra* note 15, at 49.

87. E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 74 (1988).

88. H. JAFFA, *supra* note 12, at 370. "[I]t is the essence of practical wisdom to adapt its judgments to differences in circumstances. The purpose of practical wisdom is always the same, and the wise statesman will act to achieve the greatest measure of justice that

to produce the intended result of restoring protection for the unborn requires a focus on *both* constitutional and political constraints. *Roe v. Wade* must first be overturned because it acts as both a political and legal obstacle to the normal workings of the democratic process.[89]

Like the NAACP in its litigation campaign to eliminate racial segregation, however, the Prolife Movement faces division over strategic questions. Within the prolife camp are, among others, the "No Compromisers" and the "Grand Compromisers." Some prolife advocates suggest that no compromise may be made at any time, anywhere. They support nothing less than the full and immediate incorporation of moral theology on abortion into law in such a way that precludes any exceptions for abortion (pregnancy termination) even to save the life of the mother. Others in the Prolife Movement, however, suggest that the "Grand Compromise" must be made. They suggest forever abandoning efforts to legislate on the "hard cases" and conceding these cases away in an attempt to strike a compromise in favor of protecting unborn children from abortion on demand. These positions perhaps are more clearly identified with individuals than with any particular prolife organizations. Most organizations and individuals in the Movement may fall between these two positions.

The current constitutional constraints that continue to bind the Prolife Movement in the wake of *Webster* may ironically provide a basis for joint action on state legislation between all actors in the Prolife Movement until *Roe v. Wade* is truly overturned. This possibility for harmonious joint action exists because the constitutional constraints after *Webster* continue to prevent the states from enacting legislation which prohibits all abortions. When one examines public opinion polls, the curious pattern of events that has materialized since *Webster* indicates that the constitutional constraints and the political constraints may set approximately the same limits on what is within the power of the Prolife Movement to obtain in the short-term—the passage and successful defense of incremental legislation.

Efforts to enact abortion laws in the wake of *Webster* must continue to respect our constitutional framework and the institution—the Supreme Court—which is given the authority to in-

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the world in which he is acting admits." *Id.* at 346.

89. *See, e.g.*, M. GLENDON, *supra* note 7, at 2, 34; J. NOONAN, *supra* note 50.

terpret the Constitution, and any such plan must take into account the constraints of constitutional litigation in this country. Abortion laws must still be crafted with an eye to what is "constitutional," with an eye to their effect on the court system and their ultimate review by the Supreme Court. The goal, as long as *Roe v. Wade* remains good law, is the passage *and* successful defense of abortion legislation that will work to chip away at and eventually cause the Supreme Court to overrule *Roe v. Wade*. This does not mean that legislation should not seek to embody and articulate clear principles in support of the humanity of the unborn child. Before *Webster*, however, even the declaration in a state statute of the principle of the humanity of the unborn child was practically impossible.[90] But *Webster*, for the first time, allows states to support and articulate a "compelling state" interest in the life of the unborn child *throughout pregnancy*. Education of the public through rhetoric which articulates the principle of the humanity of the unborn child is one key task of statesmanship.[91]

Webster confirmed the efficacy and wisdom of an incremental approach to abortion legislation, at least for the time being. After the incremental step taken in *Webster*, legislators may proceed further with restrictive abortion laws, but they must still be cautious about constitutional considerations. Another reaffirmation of *Roe v. Wade*—this time supported by Reagan justices—must be avoided. Such a reaffirmation of *Roe v. Wade* could occur if the Court is presented with and strikes down a poorly crafted abortion bill that does not carefully consider con-

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90. It is quite clear that, had Justice Blackmun written for a majority in *Webster*, the Court would have struck down the Missouri preamble as unconstitutional. *See* 109 S. Ct. at 3068-69 & n.1.

91. Lincoln, in his famous Peoria speech of 1854, which symbolized his "re-entry" into politics, set forth a ringing declaration of party and principle on the slavery question:

> Let us turn slavery from its claim of "moral right" back upon its existing legal rights, and its arguments of "necessity." Let us return it to the position our fathers gave it; and there let it rest in peace. Let us re-adopt the Declaration of Independence, and with it, the practices and policy, which harmonizes with it. Let north and south—let all Americans—let all lovers of liberty everywhere—join in the great and good work. If we do this, we shall not only have saved the Union; but we shall have so saved it, as to make, and to keep it, forever worthy of the saving. We shall have so saved it, that the succeeding millions of free happy people, the world over, shall rise up, and call us blessed, to the latest generation.

A. Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 247 (R. Basler ed. 1953).

stitutional analysis or the current climate on the Supreme Court. Support for *Roe v. Wade* by any Reagan justice—in conjunction with the new Blackmun minority—could truly "bottom out" the drive of the Prolife Movement to overturn *Roe v. Wade.*

The current constitutional and political constraints point to certain types of legislation that could serve as appropriate, gradualist means to achieve the intended goal. First, it is possible to exclude certain types of legislation that, *while valuable for other purposes*, will not have a direct impact on a strategy to overrule *Roe v. Wade.* These include procedural regulations like parental involvement laws, informed consent, and public health reporting legislation. These laws simply do not act directly to protect the unborn child or to prohibit any abortion and, for this reason, do not call into question the central doctrines of *Roe v. Wade.* On the other hand, there is no inkling of support on the Court for the constitutionality of laws which prohibit all abortions without exception. And, there is insufficient evidence, at this time, that the current Court will uphold a statute that excepts abortion only to save the life of the mother. At this point in time, these two constitutional parameters point us in the same direction as the political constraints—toward moderate legislation which attempts to prevent the performance of abortions at some point in pregnancy for some reasons.

All this being said, is such a strategic approach that relies on incremental legislation moral? In the wake of *Webster*, some lawyers have criticized substantive abortion legislation that contains any exceptions for abortion as being immoral. According to this view, such legislation "denies the principle" that human life must be protected; such legislation "would admit in principle the liceity of abortion"; it would "tolerate violations of the right to life."[92] This view, however, apparently would approve of abor-

92. *See, e.g.*, C. RICE, NO EXCEPTION: A PRO-LIFE IMPERATIVE 73-106 (1990). At other points, Professor Rice, from Notre Dame University Law School, argues that his point is not the morality of incremental legislation but that it is "counterproductive" or "self-defeating." *Id.* at 85, 87. This shifts the ground from morality to prudence. I address prudence throughout this article.

It is incorrect to say that the "no exception" approach has not been "tried". *Id.* at 86, 87. Immediately following the Supreme Court's January, 1973 decision in *Roe v. Wade*, Rhode Island passed a law declaring that an unborn child was a "person" from "conception" and prohibited abortion except to "preserve" the "life" of the mother. This law was summarily invalidated by the courts as unconstitutional *on its face.* The Supreme Court refused to hear an appeal. *See* Doe v. Israel, 358 F. Supp. 1193 (D.R.I.),

tion legislation with exceptions if the legislation does not "admit in principle the liceity of abortion" or "tolerate violations of the right to life" and "if the alternative is legislation which jeopardizes those rights even more seriously."[93]

> Support for such legislation is permissible, however, only if the legislator decides there is at that time no reasonable hope of enacting legislation which would protect equally all unborn children; a legislator in this position should make it clear that the legislation for which he or she is willing to vote is not adequate and should work to make possible the eventual enactment of more just legislation.[94]

As this reasoning indicates, the morality of such legislation depends on its particular language and its particular context. The morality of an act often depends on the context in which it is being considered.[95] The material issue, then, is the extent of the countervailing forces (political or constitutional) and the timely and accurate perception of the effectiveness of those forces.[96]

This criticism does not take into consideration constitutional constraints that are imposed—not by lack of will or lack of political ingenuity—but by the U.S. Supreme Court. The Court in *Webster* implied that some substantive prohibitions might pass constitutional muster, but it has *not* clearly indicated

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aff'd, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). A law providing no exception would certainly meet the same fate.

93. C. RICE, *supra* note 92, at 81 (quoting June 1, 1990 statement of Bishop John J. Myers of Peoria, Illinois).

94. *Id.*

95. Is it permissible for me to punch someone in the face? If the person merely opposes a speech I make, the morality of the act would be questioned. But if the person is attempting to assassinate the President, my act might be lauded as heroic. As Lincoln said about policy,

> The true rule, in determining to embrace, or reject any thing, is not whether it have [sic] *any* evil in it; but whether it have more of evil, than of good. There are few things *wholly* evil, or *wholly* good. Almost every thing, especially of governmental policy, is an inseparable compound of the two; so that our best judgment of the preponderance between them is continually demanded.

A. Lincoln, Speech on Internal Improvements (June 20, 1848), in ABRAHAM LINCOLN, *supra* note 34, at 192.

96. "There is a difference, however, between the pro-life advocate who fights the good fight, is beaten down and then, under protest, takes what he can get and the one who himself takes the initiative in promoting laws that allow abortion." C. RICE, *supra* note 92, at 85. This is, again, an argument of prudence and practical wisdom. But how and when a prolife legislator is "beaten down" depends on the particular state. In New York, California, or Oregon, that might be apparent before the legislative session even opens.

that the passage of comprehensive protection of the unborn will survive judicial review. Until such an indication is forthcoming by the Court, legislation providing comprehensive protection for the unborn child risks both reaffirmation of *Roe v. Wade* and the resulting cost in time and resources. Thus, the current constitutional constraints—which apply throughout the country—may reasonably be said to deprive a legislator of any "reasonable hope of enacting legislation which would equally protect all unborn children. . . ."[97] The political constraints, on the other hand, should be considered on a state-by-state basis.

The difference between those who demand "all or nothing" and those who strive for "all or something" is one of philosophy or theology.[98] The former approach does not attempt to successfully contend with and overcome countervailing political and constitutional constraints; it attempts to ignore or overleap them. The "all or nothing" philosophy seems to flow from a belief that it is enough to be a prophet and to *know* the good without being an actor or achieving any positive results; the "all or something" philosophy harkens back to Aristotle's point that the end of the study of politics "is not knowledge but action."[99] The abortion question is necessarily a moral question, but stopping abortion in America is a question of politics in the broadest sense. Philosophy and theology are concerned with universals, but politics is concerned with action, and action is concerned with particulars.[100] It is not enough to "insist" that the killing of unborn children be stopped.[101] "Insisting" is to act as the prophet. "Insisting" alone will not affect the incredible number of abortions performed in the United States. On the other hand, to attempt to incorporate that philosophy into law is to act, to engage in politics. While "insisting" does not require contending with countervailing forces, political action requires such deliberative contention. Practical wisdom, which is concerned with ac-

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97. *Cf. id.* at 81.

98. Professor Rice contends that he does not advocate an "all or nothing" approach, but, given the past and current constitutional constraints, that is what he proposes, in effect, on the state level. C. RICE, *supra* note 92, at 91ff. There is no indication of support on the U.S. Supreme Court for abortion prohibitions which contain no exceptions, even for the life of the mother. Such legislation has no reasonable prospect at this time except for being bottled up in the courts and eventual invalidation.

99. ARISTOTLE, *supra* note 12, at 6.

100. *Id.* at 157.

101. *See* C. RICE, *supra* note 92, at 78.

tion, is necessary for political wisdom. As soon as one attempts to act, practical wisdom immediately comes into play.

Because *Roe v. Wade* is still the law of the land, legislation to stop abortion must contend with that decision and its progeny. Stopping abortion at the local level requires more than the introduction or passage of legislation; it requires successful defense and enforcement of that legislation, which in turn is subject to certain political and constitutional constraints. A badly drafted law may be locked up in the courts for years and may finally be declared unconstitutional, never to be enforced, failing to produce the overruling of *Roe*, and with potential litigation costs of hundreds of thousands of dollars.[102] That is the practical constraint of *Roe*. While *Roe* is still the law, legislation which attempts to prohibit some, but not all, abortions merely recognizes the reality—without accepting the legitimacy—of countervailing constitutional power exercised by the Supreme Court and obeyed by state and county prosecutors in every state. While we may contend that use of that power is illegitimate, we must concede its practical effect; in fact, its practical effect is what we seek to eliminate. Recognizing countervailing power by taking action that seeks to undermine that power does not admit in principle the liceity of abortion.[103] A more accurate view of such incremental legislation is that it contends with and challenges the countervailing powers that be. Context is important. With abortion on demand being the law of the land under *Roe v. Wade*, statutory prohibitions which do not provide comprehen-

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102. *See e.g.*, Charles v. Carey, 579 F. Supp. 377 (N.D. Ill. 1983), *aff'd in part, rev'd in part sub. nom.*, Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), *appeal dismissed sub. nom.*, Diamond v. Charles, 476 U.S. 54 (1986); Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988), *cert. denied sub. nom.*, Diamond v. Charles, 109 S. Ct. 3214 (1989). *See also* Keith v. Daley, Case No. 84-5602 (N.D.Ill. Sept. 28, 1984) (temporary restraining order (TRO) extended by agreement until further order of the court; six-year TRO continuing); Zbaraz v. Hartigan, 584 F. Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by equally divided Court, sub. nom.*, Hartigan v. Zbaraz, 108 S. Ct. 479 (1987) (per curiam) (on remand); Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985) *appeal pending*, No. 85-2335, 9th Cir., argued March 13, 1986, supplemental briefs requested of the parties, Feb. 22, 1991; Barnes v. Mississippi, No. 86-0458 (S.D. Miss. July 2, 1986) (TRO entered against parental consent bill) (case still in trial court as of April, 1991).

103. Even under this view, it is acceptable "material cooperation" if a legislator "votes for legislation permitting some abortions in order to prevent the enactment of legislation permitting even more." C. RICE, *supra* note 92, at 82. It would seem that a law permitting some abortions passed to limit the current climate of abortion on demand from conception to birth would be analogous to a law permitting some abortions in order to prevent the enactment of legislation permitting more.

sive protection do not "encourage" or "facilitate" abortion, they attempt to retract the current abortion license.

This understanding of statesmanship and of constitutional constraints prompted prolife legislators to first enact the following preamble to the Illinois abortion law in 1975:

> It is the intention of the General Assembly . . . to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmance of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and the Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.[104]

A preamble like Illinois' is as important for legislative drafting after *Webster* as it was before. Such a preamble demonstrates that incremental legislation need not necessarily "tolerate" or "promote" abortion. Indeed, if such legislation is introduced and passed under the current law of abortion on demand from conception to birth, it will diminish the scope of the abortion license. Such a preamble makes it clear that the current law "is not adequate" and that, if current constitutional constraints are lifted, the sponsors will "work to make possible the eventual enactment of more just legislation."[105]

Moreover, the contention that prohibiting abortion with any exceptions necessarily implies approval of those exceptions goes too far. If logically extended, this argument would make unacceptable any abortion legislation that does not prohibit all abor-

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104. ILL. REV. STAT. ch. 38, para. 81-21 (1989).

105. *Cf.* C. RICE, *supra* note 92, at 81.

tion. Thus, under this argument, sex selection legislation would imply approval of abortion as long as the child's sex is not the reason for the abortion; parental notice would imply approval of abortion as long as notice is given; informed consent legislation would imply approval as long as information is given; public funding bans would imply approval as long as no public funds are used; statistical reporting legislation implies approval as long as certain statistics are recorded. This reasoning, however, ignores the most compelling political and constitutional fact: these types of legislation have been proposed and passed by state legislatures for seventeen years within an environment in which the U.S. Supreme Court, in effect, has said, "This far you shall go and no further." Proposed legislation that recognizes Supreme Court constraints on a legislature's power to prohibit abortion does not imply approval of those Supreme Court constraints.[106] Until *Webster*, the Supreme Court was politically and morally responsible for the inability of the states to enact more protective legislation for women and the unborn. After *Webster*, the responsibility may still be assigned to the Supreme Court, at least until the Court issues clearer guidelines that enable the states to enact more protective legislation.

Consequently, given the existing constitutional constraints, prudence and statesmanship dictate an incremental or gradualist approach to abortion legislation, much like Lincoln's solicitation for the border states in the early years of the Civil War. A compromise of the *means* to achieve the principle, not a compromise of principle, is needed. It is not necessarily inconsistent to combine absolute moral rhetoric in defense of the unborn with the pursuit of principled, gradualist policies that take account of both political and constitutional constraints. The task of statesmanship, as Jaffa has described it, is "to know what is good or right, to know how much of that good is attainable, and to act to secure that much good but not to abandon the attainable good by grasping for more."[107]

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106. " '[W]hat is done from unavoidable necessity . . . cannot be the object either of blame or moral approbation.' " H. ARKES, *supra* note 21, at 32 (quoting Thomas Reid). "It is of course generally recognized that actions done under constraint . . . are involuntary. An act is done under constraint when the initiative or source of motion comes from without." ARISTOTLE, *supra* note 12, at 52. I would suggest that the "initiative" or "source of motion" in instigating the current legal climate of abortion on demand comes from the Supreme Court.

107. H. JAFFA, *supra* note 12, at 371.

D. Hindering the Efforts of Future Statesmen

Would the pursuit of gradualist legislation that recognizes constitutional and political constraints "bottom out" the Prolife Movement or create political loopholes for designing politicians to hide behind, or prevent future statesmen from achieving more comprehensive protection for the unborn child?[108] These are valid concerns. However, during the seventeen years following *Roe v. Wade*, the Prolife Movement has, for strategic reasons, passed incremental legislation that attempts to carve out certain aspects of abortion for regulation without prohibiting all abortions. This produced the litigation that chipped away at *Roe v. Wade* in *Akron v. Akron Center for Reproductive Health*,[109] *Planned Parenthood v. Ashcroft*,[110] and *Thornburgh v. American College of Obstetricians and Gynecologists*.[111] These decisions culminated in the *Webster* decision, in which a new major-

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108. Again, an analogy to the moral reasoning that anti-slavery statesmen undertook in the mid-19th century is appropriate. As Hadley Arkes points out, the creation of the American Constitution in 1787 required some compromises on slavery.

> During the nineteenth century, Whig statesmen of the North could bite their lips and preserve their faithfulness to the constitutional bargain: They could accept their obligation to support, through the laws, the return of fugitive slaves, as the only practical means of preserving a political order that promised to put slavery, as Lincoln said, in the course of ultimate extinction. In his first inaugural address, Lincoln reflected precisely on the sense of prudence that preserved these arrangements.
>
> > One section of our country believes slavery is right, and ought to be extended, while the other believes it is wrong, and ought not to be extended. This is the only substantial dispute. The fugitive slave clause of the Constitution, and the law for the suppression of the foreign slave trade, are each as well enforced, perhaps, as any law can ever be in a community where the moral sense of the people imperfectly supports the law itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This, I think, cannot be perfectly cured; and it would be worse in both cases after the separation of the sections, than before. The foreign slave trade, now imperfectly suppressed, would be ultimately revived without restriction, in one section; while fugitive slaves, now only partially surrendered, would not be surrendered at all, by the other.
>
> . . . .
>
> The continued faithfulness to that commitment was an exercise of prudence at the highest level: the compromise could be justified only because it promised the best means of advancing the cause in principle and putting slavery in the course of extinction.

H. ARKES, *supra* note 21, at 40-41 (citations omitted).

109. 462 U.S. 416 (1983).

110. 462 U.S. 476 (1983).

111. 476 U.S. 747 (1986).

ity on the Court emerged. Evidently, an incremental effort has not "bottomed out" the Prolife Movement.

There is also a political answer to the concern that an incremental approach might hinder the Movement. It is critical to distinguish between compromises of principle and compromises of means to achieve the establishment of principle. Again, an examination of Lincoln's actions is educational. It is worthwhile to compare Lincoln's response to the Crittenden Compromise during the secession winter of 1860-1861 with the Emancipation Proclamation, signed in 1865. Under the Crittenden Compromise (named after Senator John J. Crittenden of Kentucky), which was proposed to avert war, all territory north of the Missouri Compromise line (the southern boundary of Missouri and extension of that line to the Pacific Ocean) would be free forever, while all territory south of that line would be slave forever; also, Congress would be prohibited from interfering with slavery in the slave states or in the District of Columbia. This compromise was supported by Stephen Douglas, among many other prominent political figures, and by thousands of Americans who signed petitions of support.[112] But Lincoln repudiated it in a December 11, 1860 letter to Republican Representative William Kellogg:

> Entertain no proposition for a compromise in regard to the *extension* of slavery. The instant you do, they have us under again; all our labor is lost, and sooner or later must be done over. Douglas is sure to be again trying to bring in his "Pop[ular] Sov[ereignty]." Have none of it. The tug has to come & better now than later.[113]

Likewise, in a letter to Republican John Defrees a week later, Lincoln wrote, "I am sorry any republican inclines to dally with Pop. Sov. of any sort. It acknowledges that slavery has equal rights with liberty, and surrenders all we have contended for."[114] The Crittendon Compromise represented a compromise of principle that Lincoln would not accept.[115]

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112. A. NEVINS, *supra* note 15, at 401-02.

113. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 26, at 150.

114. *Id.* at 155.

115. Again, the "compromises" over slavery necessary to create the Constitution of 1787 are analogous. "[T]he inability of the Founders then and there to secure the rights of all men whom they believed possessed unalienable rights did not in the least mean that they believed that the only people possessed of such rights were those whose rights were to be immediately secured." H. JAFFA, *supra* note 12, at 315.

In contrast, Lincoln issued the Emancipation Proclamation as a gradualist step required because of "military necessity." It is questionable whether Lincoln had either the power or authority to issue the Proclamation for any other reason. When Lincoln finally decided to propose the Proclamation, he is said to have declared to his cabinet,

> As you know, I have said, more than once, if I could preserve the Union by freeing all of the slaves everywhere, I would do so. If I could preserve the Union by freeing none of the slaves, I would do so. If I could preserve the Union by freeing some of the slaves but not others, I would do so. Well, I have not the political power to do the first. I have not the inclination nor the need to do the second. So I shall now do the third, as a military necessity.[116]

Still, for strategic reasons, Lincoln framed the Proclamation in such a way that it freed slaves in other parts of the country, but not in the Union. Abolitionists consequently criticized the Proclamation as "inconsistent." Revisionist historians and detractors, like Richard Hofstadter, have suggested that the Proclamation "had all the moral grandeur of a bill of lading. . . . Beyond its propaganda value the Proclamation added nothing to what Congress had already done in the Confiscation Act."[117] But Hofstadter conceded that "for all its limitations, the Emancipation Proclamation probably made genuine emancipation inevitable."[118] Lincoln understood the Crittenden Compromise to be a compromise of principle, while the Emancipation Proclamation was a declaration of principle whose full effect could not yet be politically achieved.

If, as is likely in 1991, a comprehensive protection of women and unborn children is impossible at this time in most states, the Prolife Movement must avoid an "all or nothing absolutism in framing the immediate public policy question," as George Weigel has recently argued.[119] The current state of public opinion indicates, at least, that there is "no publicly actionable consensus on the absolute proscription of abortion, and the chances

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116. G. VIDAL, *supra* note 15, at 339. *See also* R. SEWELL, *supra* note 15, at 168.

117. R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 169 (1973).

118. *Id.* at 170.

119. G. WEIGEL, CATHOLICISM AND THE RENEWAL OF AMERICAN DEMOCRACY 134 (1989).

for developing one seem slim."[120] As Weigel contends, "firmness of principle is not *necessarily* jeopardized by a measure of pragmatism in public policy practice."[121] First, "a situation in which there are 50,000 abortions per year in this country is morally preferable to a situation in which there are 1.5 million unborn children terminated every twelve months."[122] Second, a climate in which the sanctity of human life is protected to such a degree that only 50,000 unborn children lose their lives annually will provide a stronger context—compared to the current climate of abortion on demand throughout pregnancy—in which to address and fight the remaining abortions that occur. This is because in the current climate of 1991, the proposition that abortion should be limited to conditions of rape and incest (let alone life of the mother only) strikes a very sharp and discordant contrast with a large portion of the public, many of whom have only known abortion on demand. An America in which abortion is allowed only for the "hard cases" may *not* be an America in which the sanctity of human life is fully respected in the law; nevertheless it will be a much different America, one in which the sanctity of human life has been restored to a degree which differs favorably from the current practice of abortion on demand throughout pregnancy. Shed of its superconstitutional protection, abortion policy will be open to public scrutiny. The inadequate "counseling" that women receive, an accurate understanding of abortion morbidity and mortality, and the substandard practices of certain clinics that have been insulated from public scrutiny by judicial invalidation of state regulations will all be open to public examination. Abortions in the hard cases will then be the issue, and the merits of the reasons for such abortions will then be squarely addressed. In other words, by narrowing the continuum from abortion on demand to abortion for the hard cases, the argument over potential grounds for subordinating the sanctity of an unborn child's life to the mother's rights also becomes much narrower.

Admittedly, the reasoning that incremental victories provide an increasingly better environment in which to combat the remaining instances of legal abortion conflicts with the assumption of many that supporting laws which reduce the instances of

120. *Id.*
121. *Id.* (emphasis in original).
122. *Id.*

abortion to the "hard cases" will "bottom out" the advance of the Movement. This assumption, essentially, is a restatement of the principle of the statesman that he will not do anything to hinder future actors from "more perfectly attaining his goal when altered conditions bring more of that goal within the range of possibility." This assumption carries substantial weight, because it is based on a substantial portion of public opinion that has shifted since *Roe v. Wade* and appeals to strong, visceral prejudices of the community. But the objection is weakened by the simple fact that regulation of the "hard cases" is quite possibly beyond constitutional boundaries until the Supreme Court further undermines *Roe v. Wade* and provides clearer guidance for legislators.

There are also clear political benefits from pursuing an incremental legislation approach. Small legislative victories in the next few years will be exceedingly important merely for showing that the Prolife Movement is winning at all. Butting heads against a constitutional wall in the pursuit of absolute principle, when such pursuit is not politically achievable, can be counterproductive. Incremental legislative victories will defy the media message that there is a "pro-choice majority." The winning of legislative battles will encourage prolife legislators to continue with their efforts. Incremental legislative victories also will be more persuasive in educating the Supreme Court than transient public opinion polls. Legislative losses, on the other hand, may convince some justices that *Roe* is supported by popular opinion and that the "turmoil" created by reversal is not justified in light of popular support. It would not be prudent to approach the Court from a position of weakness caused by a string of legislative defeats.

Some will undoubtedly worry about the seeming "inconsistency" of accepting laws allowing abortion for rape and incest if the goal is the comprehensive protection of the unborn child. In this regard, it is good to remember the comments of Winston Churchill on the "consistency" of the statesman:

> [A] Statesman in contact with the moving current of events and anxious to keep the ship on an even keel and steer a steady course may lean all his weight now on one side and now on the other. His arguments in each case when contrasted can be shown to be not only very different in character, but contradictory in spirit and opposite in direction: yet his object will throughout have remained the same. His resolves, his wishes,

> his outlook may have been unchanged; his methods may be verbally irreconcilable. We cannot call this inconsistency. The only way a man can remain consistent amid changing circumstances is to change with them while preserving the same dominating purpose.[123]

IV. Conclusion

During 1991 and beyond, the Prolife Movement will face challenges that are different from, but perhaps no greater than, those faced successfully before. In our democratic republic, the ultimate resolution of the abortion problem will be determined by public opinion and the education which affects that opinion. Once *Roe v. Wade* is overturned and removed as an obstacle to the democratic process, public opinion will directly shape the political constraints on the restoration of the sanctity of human life in American law and culture. Rhetorical eloquence, clarity, and conviction are ever more needed. But that rhetoric must be coupled with strategic prudence. They are inextricably intertwined, not mutually contradictory. Both are essential for success.

123. H. Jaffa, *supra* note 12, at 46 (citing W. Churchill, Thoughts and Adventures 39 (1932)).