

THE CONCEPT OF UNENUMERATED RIGHTS

Unenumerated Rights: Whether and How *Roe* Should be Overruled

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Judge Posner and I have been asked to debate the subject of unenumerated rights. I am at a disadvantage, because I think that the distinction between enumerated and unenumerated constitutional rights, a distinction presupposed by our assignment, is bogus. I shall explain why, but it would be unfair to end my contribution to the expected debate with that explanation. The topic “unenumerated rights” on a conference menu leads the audience to expect some discussion of abortion, the most violently debated constitutional issue of our era. So I shall try to explain how that constitutional issue should be resolved once the distinction between enumerated and unenumerated rights is safely shut up with other legal concepts dishonorably discharged for bad philosophy.

I. THE REAL BILL OF RIGHTS

We are celebrating the Bill of Rights, which we take to include the Civil War Amendments. I begin by asking you, in your imagination, to *read* that part of the Constitution. Some parts of the

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Bill of Rights are very concrete, like the Third Amendment's prohibition against quartering troops in peacetime. Others are of medium abstraction, like the First Amendment's guarantees of freedom of speech, press, and religion. But key clauses are drafted in the most abstract possible terms of political morality. The Fourteenth Amendment, for example, commands "equal" protection of the laws, and also commands that neither life nor liberty nor property be taken without "due" process of law. That language might, in some contexts, seem wholly concerned with procedure—in no way restricting the laws government might enact and enforce, but only stipulating how it must enact and enforce whatever laws it does adopt. Legal history has rejected that narrow interpretation, however, and once we understand the constitutional provisions to be substantive as well as procedural, their scope is breathtaking. For then the Bill of Rights orders nothing less than that government treat everyone subject to its dominion with equal concern and respect, and that it not infringe their most basic freedoms, those liberties essential, as one prominent jurist put it, to the very idea of "ordered liberty."¹

II. THE NATURAL READING OF THE BILL OF RIGHTS

On its most natural reading, then, the Bill of Rights sets out a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction. Taken together, these principles define a political ideal: they construct the constitutional skeleton of a society of citizens both equal and free. Notice three features of that striking architecture. First, this system of principle is comprehensive, because it commands both equal concern and basic liberty. In our political culture these are the two major sources of claims of individual right. It therefore seems unlikely that anyone who believes that free and equal citizens would be guaranteed a particular individual right will not also think that our Constitution already contains that right, unless constitutional history has decisively rejected it. That is an important fact about constitutional adjudication and argument, to which I shall return.

Second, since liberty and equality overlap in large part, each of the two major abstract articles of the Bill of Rights is *itself* comprehensive in that same way. Particular constitutional rights that follow from the best interpretation of the Equal Protection Clause, for example, will very likely also follow from the best interpreta-

¹ Justice Cardozo in *Palko v Connecticut*, 302 US 319, 325 (1937).

tion of the Due Process Clause. So (as Justice Stevens reminded us in the address which opened this conference)² the Supreme Court had no difficulty in finding that, although the Equal Protection Clause does not apply to the District of Columbia, racial school segregation in the District was nevertheless unconstitutional under the Due Process Clause of the Fifth Amendment, which does apply to it. Indeed, it is very likely that, even if there had been no First Amendment, American courts would long ago have found the freedoms of speech, press, and religion in the Fifth and Fourteenth Amendments' guarantees of basic liberty.

Third, the Bill of Rights therefore seems to give judges almost incredible power. Our legal culture insists that judges—and finally the justices of the Supreme Court—have the last word about the proper interpretation of the Constitution. Since the great clauses command simply that government show equal concern and respect for the basic liberties—without specifying in further detail what that means and requires—it falls to judges to declare what equal concern really does require and what the basic liberties really are. But that means that judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement. It means that the rest of us must accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special. That seems unfair, even frightening. Many people think that judges with that kind of power will impose liberal convictions on less-liberal majorities. But they are equally likely to impose conservative convictions on less-conservative majorities, as the Supreme Court did in *Lochner*, and is now doing again in, for example, its affirmative action decisions. The resentment most people feel about unelected judges having that kind of power is bipartisan.

III. CONSTITUTIONAL REVISIONISM

In any case, many academic constitutional theorists have for a long time thought that their main job is to demonstrate to themselves, the legal profession, and the public at large that the Constitution does not mean what it says—that it does not, properly understood, actually assign that extraordinary and apparently unfair power to judges. The revisionist strategy is a simple one. It denies

² Justice John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U Chi L Rev 13, 20 (1992).

that the Bill of Rights has the structure I said was its natural interpretation. It aims to picture it differently, not as defining the skeleton of an overall conception of justice, but as only an antique list of the particular demands that a relatively few people long ago happened to think important. It hopes to turn the Bill of Rights from a constitutional charter into a document with the texture and tone of an insurance policy or a standard form commercial lease.

In one way this collective revisionist effort has been remarkably successful. It has achieved the Orwellian triumph, the political huckster's dream, of painting its opponents with its own shames and vices. It has persuaded almost everyone that turning the Constitution into an out-of-date list is really *protecting* that document, and that those who stubbornly read the Constitution to mean what it says are the actual inventors and usurpers. Even judges who accept the broad responsibility the Constitution imposes on them still adopt the misleading names their revisionist opponents assign them. They call themselves "activists," or "non-interpretivists," or champions of "unenumerated rights," who wish to go "outside" the "four corners" of the Constitution to decide cases on a "natural law" basis.

In that important political way, the massive effort to revise and narrow the Bill of Rights has been successful. But in every substantive way, it has failed—not because it has constructed coherent alternative interpretations with unattractive consequences, but because it has failed to construct any coherent alternative interpretations at all.

Part of the revisionist effort has not even attempted an alternative *interpretation*. I refer to what I call the "external" revisionist strategy, which does not propose an account of what the Constitution itself actually means, but rewrites it to make it more congenial to what the revisionists consider the best theory of democracy. In its rewritten version, the Constitution leaves as much power to government as is possible, consistent with genuine majority rule and with what the text of the Constitution uncontroversially forbids. Learned Hand held a version of this theory,³ and John Hart Ely has provided its most elaborate form.⁴ The external revisionist strategy plainly begs the question. "Democracy" is itself the name of an abstraction: there are many different conceptions of democracy, and political philosophers debate which is the most

³ See, for example, Learned Hand, *The Bill of Rights* (Harvard, 1958).

⁴ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard, 1980).

attractive. The American conception of democracy is whatever form of government the Constitution, according to the best interpretation of that document, establishes. So it begs the question to hold that the Constitution should be amended to bring it closer to some supposedly purer form of democracy.⁵

For the most part, however, the revisionists have indeed tried to disguise their revisionism as only "better" interpretations of the actual Constitution. They argue that the natural interpretation I described—that the Constitution guarantees the rights required by the best conceptions of the political ideals of equal concern and basic liberty—is not in fact the most accurate interpretation. They say that that natural interpretation neglects some crucial *semantic* fact, some property of language or communication or linguistic interpretation which, once we grasp it, shows us that the abstract language of the great clauses does not mean what it seems to mean. Constitutional scholars have ransacked the cupboard of linguistic philosophy to find semantic constraints of that character and power. They found in that cupboard, for example, the important idea that what philosophers call the "speaker's meaning" of an utterance may differ from the meaning an audience would likely assign the utterance if it were ignorant of any special information about the speaker.

Some constitutional lawyers try to transform that point into a so-called "framers' intention" theory of constitutional interpretation. They argue that the great constitutional clauses should be understood, not to declare abstract moral requirements, as they do if read acontextually, but in the supposedly different and much less expansive sense which some presumed set of "framers" supposedly "intended."

That suggestion is self-destructive, however, as Robert Bork's unsuccessful attempt to defend it (largely by abandoning it) in his recent book shows.⁶ We must take care to make a distinction on which the philosophical idea of speaker's meaning crucially depends: the distinction between what someone means to say and what he hopes or expects or believes will be the consequence for the law of his saying it. Many of the framers undoubtedly had dif-

⁵ See Ronald Dworkin, *A Matter of Principle* ch 2 (Harvard, 1985); Ronald Dworkin, *Law's Empire* ch 10 (Harvard, 1986); and Ronald Dworkin, *Equality, Democracy and the Constitution: We the People in Court*, 28 *Alberta L Rev* 324 (1990).

⁶ See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990) (especially chapters 7, 8, and 13). See also Ronald Dworkin, *Bork's Jurisprudence*, 57 *U Chi L Rev* 657, 663-74 (1990), for my review of Bork's book.

ferent beliefs from mine about what equality or due process requires, just as my beliefs about that differ from yours. They thought that their abstract commands about equality and due process had different legal implications for concrete cases from the implications you or I think those abstract commands have. But it does not follow that they meant to *say* anything different from what you or I would mean to say if we used the same words they did. We would normally use those words to say, not that government is forbidden to act contrary to the speakers' own conceptions of equality and justice, but that it is forbidden to act contrary to the soundest conception of those virtues. All the evidence (and common sense) suggests that that is what they meant to say as well: they meant to use abstract words in their normal abstract sense. If so, then strict attention to speakers' meaning only reinforces the broad judicial responsibility that the revisionists hope to curtail.

IV. ENUMERATED AND UNENUMERATED RIGHTS

The distinction I am supposed to be discussing, between enumerated and unenumerated rights, is only another misunderstood semantic device. Constitutional lawyers use "unenumerated rights" as a collective name for a particular set of recognized or controversial constitutional rights, including the right of travel; the right of association; and the right to privacy from which the right to an abortion, if there is such a right, derives. They regard this classification as marking an important structural distinction, as the terms "enumerated" and "unenumerated" obviously suggest. If the Bill of Rights only enumerates *some* of the rights necessary to a society of equal concern and basic liberty, and leaves other such rights unmentioned, then judges arguably have only the power to enforce the rights actually enumerated.

Some lawyers accept the distinction, but deny the inference about judicial power. They say that judges *do* have the power to enforce unenumerated rights, and claim that the Court has often done so in the past. But lawyers who argue in this way have conceded a very great deal to their opponents who deny that judges should have this kind of power. Their opponents are then able to say that judges have no *authority* to add to the enumerated. If we allow judges to roam at will beyond the "four corners" of the Constitution, they add, we abandon all hope of limiting judicial power. That is the argument made by Justice White in *Bowers v Hardwick*, for example, to explain why the Court should not recognize a

right of homosexual sodomy.⁷ He said that judge-made constitutional law was particularly suspect when it had “little or no cognizable roots in the language or design of the Constitution”;⁸ and he presumably had in mind the putative right of abortion, as well as that of homosexual sodomy.

So the distinction between enumerated and unenumerated rights is widely understood to pose an important constitutional issue: the question whether and when courts have authority to enforce rights not actually enumerated in the Constitution as genuine constitutional rights. I find the question unintelligible, however, as I said at the outset, because the presumed distinction makes no sense. The distinction between what is on some list and what is not is of course genuine and often very important. An ordinance might declare, for example, that it is forbidden to take guns, knives, or explosives in hand luggage on an airplane. Suppose airport officials interpreted that ordinance to exclude canisters of tear gas as well, on the ground that the general structure of the ordinance, and the obvious intention behind it, prohibits all weapons that might be taken aboard and used in hijacks or terrorism. We would be right to say that gas was not on the list of what was banned, and that it is a legitimate question whether officials are entitled to add “unenumerated” weapons to the list. But the distinction between officials excluding pistols, switch-blades and hand-grenades on the one hand, and tear gas on the other, depends upon a semantic assumption: that tear gas falls within what philosophers call the *reference* of neither “guns” nor “knives” nor “explosives.”

No comparable assumption can explain the supposed distinction between enumerated and unenumerated constitutional rights. The Bill of Rights, as I said, consists of broad and abstract principles of political morality, which together encompass, in exceptionally abstract form, all the dimensions of political morality that in our political culture can ground an individual constitutional right. The key issue in applying these abstract principles to particular political controversies is not one of reference but of *interpretation*, which is very different.

Consider the following three constitutional arguments, each of which is very controversial. The first argues that the Equal Protection Clause creates a right of equal concern and respect, from which it follows that women have a right against gender-based discriminations unless such discriminations are required by important

⁷ 478 US 186 (1986).

⁸ *Id.* at 193-94.

state interests. The second argues that the First Amendment grants a right of symbolic protest, from which it follows that individuals have a right to burn the American flag. The third argues that the Due Process Clause protects the basic freedoms central to the very concept of "ordered liberty," including the right of privacy, from which it follows that women have a constitutional right to abortion. By convention, the first two are arguments (good or bad) for enumerated rights: each claims that some right—the right against gender discrimination or the right to burn the flag—is an instance of some more general right set out, in suitably abstract form, in the text of the Constitution. The third argument, on the other hand, is thought to be different and more suspect, because it is thought to be an argument for an unenumerated right. The right it claims—the right to an abortion—is thought to bear a more tenuous or distant relationship to the language of the Constitution. It is said to be at best implied by, rather than stated in, that language.

But the distinction cannot be sustained. Each of the three arguments is interpretive in a way that excludes the kind of semantic constraints the distinction assumes. No one thinks that it follows just from the meaning of the words "freedom of speech" either that people are free to burn flags, or that they are not. No one thinks it follows just from the meaning of the words "equal protection" that laws excluding women from certain jobs are unconstitutional, or that they are not. In neither case does the result follow from the meanings of words in the way it follows from the meaning of "gun" that it refers to pistols but not to canisters of gas. Nor are the three arguments different in how they are interpretive. Each conclusion (if sound) follows, not from some historical hope or belief or intention of a "framer," but because the political principle that supports that conclusion best accounts for the general structure and history of constitutional law. Someone who thinks that this manner of constitutional argument is inappropriate—who thinks, for example, that framers' expectations should play a more decisive role than this view of constitutional argument allows—will have that reservation about all three arguments, not distinctly about the third. If he thinks that the third argument is wrong, because he abhors, for example, the idea of substantive due process, then he will reject it, but because it is wrong, not because the right it claims would be an unenumerated one.

In his reply to my remarks, Judge Posner constructs a Socratic dialogue in which the straight man is brought to see that "speech" in the First Amendment includes flag burning, though Posner con-

cedes that the argument might have gone the other way.⁹ He does not construct a parallel dialogue in which another dupe is made to agree that gender is a suspect category under the Equal Protection Clause, though it is easy to see how that second dialogue might go. And it would be equally easy to construct a third dialogue ending with a straight man's startled recognition that abortion is, after all, a basic liberty protected by the Due Process Clause. Posner does suggest that this argument might take us "further" from the text. But the metaphor of distance is wholly opaque in this context: it means or suggests nothing. Posner cannot mean, for example, that a right to abortion is further away from the Constitution's language than a right against gender-discrimination is, in the sense that "tear gas" is further from the meaning of "gun" than "pistol" is. "Pistol" is closer because "gun" refers to a pistol and does not refer to tear gas. But since neither a right to abortion nor a right against gender-discrimination follow from the meanings of textual words, neither can be closer to or further from the text than the other in that sense.

It is sometimes said that the Constitution does not "mention" a right of travel, or of association, or of privacy, as if that fact explained why these rights are usefully classified as unenumerated. But the Constitution does not "mention" flag burning or gender discrimination either. The right to burn a flag and the right against gender-discrimination are supported by the best interpretation of a more general or abstract right that is "mentioned." It is true that the phrase "right to privacy" is itself more abstract than the phrase "right to burn a flag as protest," and that the former phrase therefore figures more in the conversation and writing of constitutional scholars than the latter. But these facts reflect accidents (or highly contingent features) of usage. Scholars have found it useful to develop a name of middling abstraction—the right of privacy—to describe a stage in the derivation of particular concrete rights from the even more abstract rights named in the constitutional text. But it hardly follows that those concrete rights—including the right to abortion—are more remote from their textual beginnings than are concrete rights—such as the right to burn a flag—that are derived by arguments that do not employ names for rights of middling abstraction. Constitutional lawyers might well have adopted the middling terms "right of symbolic protest" or "right of gender equality" in the way they have

⁹ Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U Chi L Rev 433, 437-38 (1992).

adopted "right of privacy." It is hardly a deep fact of constitutional structure that they have not.

I must be clear. I am not arguing that the Supreme Court should enforce unenumerated as well as enumerated constitutional rights, any more than I meant to argue, in my remarks about speaker's meaning, that the Court is right to ignore or modify what the framers said. I mean that the distinction between enumerated and unenumerated rights, as it is commonly used in constitutional theory, makes no sense, because it confuses reference with interpretation.

I should say—to complete this exercise in provocation—that I take much the same view of a variety of other distinctions popular among constitutional lawyers, including those Posner discusses in his reply. He distinguishes between what he calls a "top-down" and a "bottom-up" method of legal reasoning, and also between a "clause-by-clause" and a "holistic" approach. He apparently regards the second of these distinctions as more important than the first. Though he says he agrees with me that "there isn't much to bottom-up reasoning,"¹⁰ he thinks that I am wrong to criticize Bork's "clause-by-clause" approach,¹¹ and also that I would do better to make my own arguments about abortion more explicitly "holistic."¹²

Neither of the two distinctions makes any sense, however. We cannot understand a particular precedent, for example, except by construing that decision as part of a more general enterprise, and any such constructive interpretation must, as I argued at length in *Law's Empire*, engage the kind of theoretical hypothesis characteristic of what Posner calls top-down reasoning.¹³ So bottom-up reasoning is automatically top-down reasoning as well. The same point also erodes the distinction between clause-by-clause and holistic constitutional interpretation. Legal interpretation is *inherently* holistic, even when the apparent target of interpretation is a

¹⁰ *Id.* at 435.

¹¹ *Id.* at 439-40. Posner objects to my claim that Bork has no coherent constitutional philosophy, that Bork has theories of particular clauses, but not of the Constitution as a whole. But Bork does not, as Posner says he does, distrust general theory. On the contrary, Bork claims a perfectly general, comprehensive, constitutional theory. He claims that all of the Constitution, not just particular clauses, are exhausted by the intentions of the Framers, and he argues for that global theory by appealing to a single, global theory of democracy and a single, global account of what law, by its very nature, is like. Bork does not have a coherent constitutional philosophy, as I argued in *Bork's Jurisprudence*, 57 U Chi L Rev 657 (cited in note 6). But that is not because he does not claim one.

¹² Posner, 59 U Chi L Rev at 444-45 (cited in note 9).

¹³ Dworkin, *Law's Empire* (cited in note 5). See particularly *id.* at 65-68.

single sentence or even a single clause rather than a document. Any interpreter must accept interpretive constraints—assumptions about what makes one interpretation better than another—and any plausible set of constraints includes a requirement of coherence. An interpretation of the Bill of Rights which claims that a moral principle embedded in one clause is actually rejected by another is an example not of pragmatist flexibility, but of hypocrisy.

V. LAW'S INTEGRITY

Where do we stand? The most natural interpretation of the Bill of Rights seems, as I said, to give judges great and frightening power. It is understandable that constitutional lawyers and teachers should strive to tame the Bill of Rights, to read it in a less frightening way, to change it from a systematic abstract conception of justice to a list of discrete clauses related to one another through pedigree rather than principle. These efforts fail, however, and are bound to fail, because the text and history of the Bill of Rights will not accept that transformation. They are bound to fail, moreover, in a paradoxical and disastrous way. Because the semantic distinctions on which the efforts are based have no sense as they are used, they are powerless themselves to define any particular set of constitutional rights. As the recent history of the Court amply demonstrates, a judge who claims to rely on speaker's meaning, "enumeration," or a preference for clause-by-clause interpretation must actually choose which constitutional rights to enforce on grounds that have nothing to do with these semantic devices, but which are hidden from view by his appeal to them. The search for limits on judicial power ends by allowing judges the undisciplined power of the arbitrary.

Posner's reply acknowledges that fact, with typical candor. He says that the semantic devices beloved of conservative lawyers "could end up with a document that gave answers only to questions that no one was asking any longer,"¹⁴ and that judges who say they are constrained by those useless devices will necessarily decide according to their own "personal values,"¹⁵—according, he says, to what makes them "puke."¹⁶ His own personal values en-

¹⁴ Posner, 59 *U Chi L Rev* at 446 (cited in note 9).

¹⁵ *Id* at 449.

¹⁶ *Id* at 447. Posner takes this phrase—which gives new meaning to the old realist thesis that the law is only what the judge had for breakfast—from Holmes. I should say that though I understand Posner's hagiographic admiration for that jurist, I do not share it. Holmes wrote like a dream. His personal conversion from the view that the First Amend-

dorse "stretching" the Due Process Clause to yield *Griswold*, and, if I read correctly between the lines, *Roe v Wade* as well. But he knows that other judges have stronger stomachs about society dictating sexual morality: their puke tests will flunk affirmative action programs instead.¹⁷ The idea that the Constitution cannot mean what it says ends in the unwelcome conclusion that it means nothing at all.

What is to be done? We can finally, after the 200 years we celebrate in this symposium, grow up and begin to take our actual Constitution seriously, as those many nations now hoping to imitate us have already done. We can accept that our Constitution commands, as a matter of fundamental law, that our judges do their best collectively to construct, re-inspect and revise, generation by generation, the skeleton of liberal equal concern that the great clauses, in their majestic abstraction, demand. We will then abandon the pointless search for mechanical or semantic constraints, and seek genuine constraints in the only place where they can actually be found: in good argument. We will accept that honest lawyers and judges and scholars will inevitably disagree, sometimes profoundly, about what equal concern requires, and about which rights are central and which only peripheral to liberty.

We will then acknowledge, in the political process of nomination and confirmation of federal judges, what is already evident to anyone who looks: that constitutional adjudicators cannot be neutral about these great questions, and that the Senate must decline to confirm nominees whose convictions are too idiosyncratic, or who refuse honestly to disclose what their convictions are. The second stage of the Thomas confirmation hearings was, as most people now agree, physically revolting. But the first stage was intellectually revolting, because candidate and senators conspired to pretend that philosophy had nothing to do with judging, that a nominee who said he had abandoned convictions the way a runner sheds clothing was fit for the office he sought.¹⁸

ment must be limited to a Blackstonian condemnation of prior restraint to the radically different view that it must be understood as a much more abstract and general principle, was an epochal event in American constitutional history. But most of his gorgeous epigrams were the vivid skins of only very lazy thoughts, and his philosophical pretensions, almost entirely in service of an unsophisticated, deeply cynical form of skepticism, were embarrassing—as I believe the metaphysical observations Posner includes in his own new collection of Holmes's writings demonstrate. See Richard A. Posner, *Introduction*, in Richard A. Posner, ed. *The Essential Holmes* xvii-xx (Chicago, 1992).

¹⁷ I discuss Posner's own recommendations in note 22.

¹⁸ Ronald Dworkin, *Justice for Clarence Thomas*, NY Rev Books 41 (Nov 7, 1991).

The constitutional process of nomination and confirmation is an important part of the system of checks through which the actual Constitution disciplines the striking judicial power it declares. The main engines of discipline are intellectual rather than political, however, and the academic branch of the profession has a responsibility to protect that intellectual discipline, which is now threatened from several directions. Of course, we cannot find a formula which will guarantee that judges will all reach the same answer in complex or novel or crucial constitutional cases. No formula can protect us from a *Lochner*, which Posner tells us stinks, or from a *Bowers*. The stench of those cases does not lie in any jurisdictional vice or judicial overreaching. After a near century of treating *Lochner* as a whipping-boy, no one has produced a sound mechanical test that it fails. The vice of bad decisions is bad argument and bad conviction; all we can do about those bad decisions is to point out how and where the arguments are bad. Nor should we waste any more time on the silly indulgence of American legal academic life: the philosophically juvenile claim that, since no such formula exists, no one conception of constitutional equality and liberty is any better than another, and adjudication is only power or visceral response.¹⁹ We must insist, instead, on a principle of genuine power: the idea, instinct in the concept of law itself, that whatever their views of justice and fairness, judges must also accept an independent and superior constraint of *integrity*.²⁰

Integrity in law has several dimensions. First, it insists that judicial decision be a matter of principle, not compromise or strategy or political accommodation. That apparent banality is often ignored: The Supreme Court's present position on the politically sensitive issue of affirmative action, for example, cannot be justified on any coherent set of principles, however conservative or unappealing.²¹ Second, integrity holds vertically: a judge who claims a particular right of liberty as fundamental must show that his claim is consistent with the bulk of precedent, and with the

¹⁹ See Ronald Dworkin, *Pragmatism, Right Answers and True Banality*, in Michael Brint, ed, *Pragmatism and Law* (forthcoming 1992). See Posner, 59 U Chi L Rev at 447 (cited in note 9).

²⁰ I discuss integrity at considerable length in *Law's Empire* at ch 7 (cited in note 5).

²¹ I believe that Professor Fried unwittingly demonstrated this incoherence in defending the position in his recent book. See Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* (Simon & Schuster, 1991), and my review of this book in Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, NY Rev Books 23 (Jul 18, 1991). See also Fried's letter to the editor and my letter in reply, in NY Rev Books 65 (Aug 15, 1991).

main structures of our constitutional arrangement. Third, integrity holds horizontally: a judge who adopts a principle must give full weight to that principle in other cases he decides or endorses.

Of course, not even the most scrupulous attention to integrity, by all our judges in all our courts, will produce uniform judicial decisions, or guarantee decisions you approve of, or protect you from those you hate. Nothing can do that. The point of integrity is principle, not uniformity: We are governed not by a list but by an ideal, and controversy is therefore at the heart of our story. We are envied for our constitutional adventure, and increasingly imitated, throughout the democratic world: in Delhi and Strasbourg and Ottawa, even, perhaps, in the Palace of Westminster, and perhaps tomorrow or the day after, in Moscow and Johannesburg. In all those places people seem ready to accept the risk and high promise of government by ideal, a form of government we created in the document we celebrate. We have never fully trusted that form of government. But unless we abandon it altogether, which we will not do, we should stop pretending that it is not the form of government we have. The energy of our best academic lawyers would be better spent in making, testing, and evaluating different conceptions of liberal equality, to see which conception best fits our own history and practice. They should try to guide and constrain our judges by criticism, argument, and example. That is the only way to honor our great constitutional creation, to help it prosper.²²

²² Posner describes my account of integrity-based constitutional reasoning as "holistic" and "top-down." He says it is "too ambitious, too risky, too contentious." Posner, 59 U Chi L Rev at 446 (cited in note 9). He says that when judges are called upon to interpret the great abstract moral clauses of the Constitution they should react as their "conscience" demands: they should cite the abstract moral language of these clauses to strike down only what they instinctively find "terribly unjust." Id at 447. He would not require a judge to provide much, if anything, by way of a principled explanation of how or why he believes a law unjust, or to aim at consistency of principle even himself, from one day to the next, let alone with decisions other judges have made on other days. His views, as always, are striking and powerful. But how can he think that advice less "risky," or less likely to produce "contentious" decisions, than the more familiar advice that judges should at least do their best, as their time and talent allows, to discipline their initial reactions by accepting those responsibilities?

Is Posner right, at least, that his proposals are less "ambitious" because less "holistic?" He says judges should declare statutes unconstitutional, on moral grounds, only when there is a "compelling practical case" for doing so. Id at 447. The word "practical" is a familiar obscuring device in pragmatist philosophy: it is meant somehow to suggest, with no further argument, that moral decisions can be based not on "reason" but on more hard-headed sounding "experience" in the shape of obvious social needs. But Posner's extended discussion of *Griswold* shows that Connecticut's ban on contraceptives was not impractical but unjust. That will be true in almost every case in which a Posnerian judge's "can't helps" are in play: his decision will engage his moral convictions, not his practical good sense. Posner

VI. ABORTION: WHAT IS THE ARGUMENT ABOUT?

In the discussion of abortion that I promised, I shall try to illustrate the role that integrity should play in legal argument. I begin by briefly summarizing claims about the constitutional status of that issue that I have argued elsewhere,²³ and will argue in much more detail in a book about abortion and euthanasia now in manuscript.²⁴ A woman, I assume, has a constitutionally protected right to control the use of her own body. (I shall later consider the constitutional source of that right.) Therefore a pregnant woman has a right to an abortion unless her state's government has some legitimate and important reason for prohibiting it. Many people think governments do have such a reason, and would have no difficulty in saying what it is.

A state must make abortion a crime, they say, in order to protect human life. That is indeed what many state officials have said, in preambles to regulatory statutes, in legal briefs and in political rhetoric. That is, moreover, what the Supreme Court justices who dissented in *Roe v Wade*, or who later announced their view that it is wrong, say a state's reason for forbidding abortion is. And even justices and lawyers who support that decision say something similar. In his opinion for the Court in *Roe v Wade*, Blackmun recognized that a state had an interest in protecting what he called "fetal life."²⁵ He said that a state's interest in protecting life did not

insists, however, that his moral convictions are discrete "instincts," not the product of some comprehensive theory of the entire Constitution. But the distinction is mysterious in this context, because any judge's opinions about whether a ban on contraception is profoundly unjust, or maximum-hours legislation deeply unfair, or affirmative action an insult to the very idea of equal citizenship, will reflect and be drawn from much more general opinions and attitudes that will also fix his reactions to other legislation he tests "viscerally" against other clauses, at least if he is acting in moral good faith on any of these occasions. If any judge's immediate reaction really was one off—if it really was just a response to one set of facts with no implications for others—it would not be a response of *conscience* at all, but only a whim or a tic.

So Posner's contrast between clause-by-clause and holistic adjudication seems wildly overdrawn. He uses the reason-passion vocabulary of eighteenth-century philosophical psychology. But he has in mind, not an epistemological distinction between different mental faculties judges might use, but a contrast between two views of judicial responsibility. He rejects integrity, which insists that judges do the best they can to exhibit a principled basis for their decisions, in favor of a different standard that encourages them to keep that basis dark. I do not claim, in the discussion of abortion that follows, that integrity produces only one plausible view, or that it can end controversy. But I shall claim, at several points, that integrity rules out some accommodations that politics or weariness or even laziness might recommend, accommodations I fear Posner's unbuttoned license would guarantee.

²³ See Ronald Dworkin, *The Great Abortion Case*, NY Rev Books 49 (Jun 29, 1989).

²⁴ This book, to be published by Alfred Knopf in 1993, is not yet titled.

²⁵ 410 US 113, 163 (1973).

give it a compelling reason for prohibiting abortion until the third trimester, but he conceded that it did have that interest throughout pregnancy.²⁶ The premise on which so many people rely is, however, dangerously ambiguous, because there are two very different aims or purposes a state might have, each of which might be described as protecting human life. A good part of the confusion that surrounds both the legal and the moral argument about abortion is the result of ignoring that ambiguity. Consider the difference between two kinds of reasons a government might have for prohibiting murder within its territory. First, government has a responsibility to protect the rights and interests of its citizens, and chief among these, for most people, is an interest in staying alive and a right not to be killed. I shall call this a derivative reason for prohibiting murder, because it presupposes and derives from individual rights and interests. Government sometimes claims, second, a very different kind of reason for prohibiting murder. It sometimes claims a responsibility not just to protect the interests and rights of its citizens, but to protect human life as an objective or intrinsic good, a value in itself, quite apart from its value to the person whose life it is or to anyone else. I shall call this responsibility a detached one, because it is independent of, rather than a derivative of, particular people's rights and interests.

If government does have a detached responsibility to protect the objective, intrinsic value of life, then its laws against murder serve both its derivative and detached responsibility at once. They protect the rights and interests of particular victims, and they also recognize and respect the intrinsic value of human life. In some cases, however, the two supposed responsibilities might conflict: when someone wishes to kill himself because he is in terrible pain that doctors cannot relieve, for example, or when relatives wish to terminate the mechanical life support of someone who is permanently unconscious. In such cases, suicide or terminating life support might be in the best interests of the person whose life ends, as he or his relatives think it is. These acts nevertheless seem wrong to many people, because they think that any deliberate killing, or ever allowing someone to die who might be kept alive longer, is an insult to the intrinsic value of human life. It makes a great difference, in such cases, whether a government's legitimate reasons for protecting human life are limited to its derivative concern, or whether they include a detached concern as well. If the latter, then

²⁶ *Id.* at 162-64.

government is entitled to forbid people^e from ending their lives, even when they rightly think they would be better off dead.

We have identified two different claims a state that proposes to forbid abortion in order to protect human life might be making: a derivative claim and a detached claim. The derivative claim presupposes that a fetus already has rights and interests. The detached claim does not, though it does presuppose that the intrinsic value of human life is already at stake in a fetus's life. You will notice that I did not describe either of these claims as claims about when human life begins, or about whether a fetus is a "person," because those runic phrases perpetuate rather than dissolve the ambiguity I described.

Though scientists disagree about exactly when the life of any animal begins, it seems undeniable that in the ordinary case a fetus is a single living creature by the time it has become implanted in a womb, and that it is human in the sense that it is a member of the animal species *homo sapiens*. It is, in that sense, a human organism whose life has begun. It does not follow that it also has rights and interests of the kind that government might have a derivative responsibility to protect. Nor that it already embodies the intrinsic value of a human life that a government might claim a detached responsibility to guard. But when people say that a fetus is already a living human being, they often mean to make either or both of these further claims.

"Person" is an even more ambiguous term. We sometimes use it just as a description (in which use it is more or less synonymous with human being) and sometimes as a term of moral classification, to suggest that the creatures so described have a special moral standing or importance that marks them out from other species. So someone who said that a just-conceived fetus is already a person might simply mean that it is a member of the human—rather than some other animal—species. Or he might mean, not just that a fetus is alive and human, but that it already has that special kind of moral importance. But even the latter claim is ambiguous in the way I described. It might mean that a fetus is already a creature with the interests and moral rights we take persons, as distinct from other creatures, to have. Or it might mean that a fetus is already a creature whose life has the intrinsic moral significance the life of any person has. So the clarity of the public debate is not improved by the prominence of the questions "Is a fetus a person?" or "When does human life begin?" We do better to avoid that language so far as we can. I suggest that we consider, instead,

whether states can justify anti-abortion legislation on one of the two grounds—derivative or detached—that I described.

Most people think that the great constitutional debate about abortion in America is obviously and entirely about a state's derivative grounds. They think the argument is about whether a fetus is a person in the sense in which that means having a right to life. That is why one side claims, and the other denies, that abortion is murder. (Some might add that the detached ground I described is too mysterious or metaphysical even to make sense, let alone to provide a plausible ground for anti-abortion legislation.) Not just the political argument, but the legal and academic discussion as well, seems to assume that view of the controversy. Lawyers and philosophers discuss whether a fetus is a person with rights. They speculate about whether abortion is morally permissible even if a fetus does have a right to life. But they almost all assume that if it does not, then there is no moral objection even to consider.

In the following two sections I shall assess the constitutional argument understood in that familiar and popular way. I shall interpret the claim that states have a responsibility to protect life to mean that they have a derivative responsibility to protect the right to life of a fetus. I shall argue, however, that if we do understand the dispute that way, then the constitutional argument is a relatively simple one. On that basis, *Roe* was not only correct but obviously correct, and its many critics are obviously wrong. I conclude that the constitutional debate about abortion is actually *not* about whether a fetus has rights and interests. It must be understood, if at all, as about the different claim I just conceded some people may find mysterious: that a state can legitimately claim a detached responsibility to protect the intrinsic value of human life.

VII. IS A FETUS A CONSTITUTIONAL PERSON?

The national Constitution defines what we might call the constitutional population. It stipulates who has constitutional rights that government must respect and enforce, and therefore whose rights government must take into account in curtailing or limiting the scope of other people's constitutional rights in cases of conflict. States would of course have a derivative reason for forbidding abortion if the Constitution designated a fetus as a constitutional person, that is, as a creature with constitutional rights competitive with those of a pregnant woman. Our analysis must therefore begin with a crucial threshold question. Is a fetus a constitutional person? In *Roe v Wade*, the Supreme Court answered that question in the only way it could: in the negative. If a fetus is a constitutional

person, then states not only *may* forbid abortion but, at least in some circumstances, *must* do so. No justice or prominent politician has even advanced that claim.

It is true, as a number of legal scholars have pointed out, that the law does not generally require people to make any sacrifice at all to save the life of another person who needs their aid. A person ordinarily has no legal duty to save a stranger from drowning even if he can do so at no risk to himself and with minimal effort.²⁷ But abortion normally requires a physical attack on a fetus, not just a failure to come to its aid. And in any case parents are invariably made an exception to the general doctrine. Parents have a legal duty to care for their children; if a fetus is a person from conception, a state would discriminate between infants and fetuses without any justification if it allowed abortion but did not permit killing infants or abandoning them in circumstances when they would inevitably die.²⁸ The physical and emotional and economic burdens of pregnancy are intense, but so are the parallel burdens of parenthood.

We may safely assume, then, that the national Constitution does not declare a fetus to be a constitutional person whose rights may be competitive with the constitutional rights of a pregnant woman. Does this leave a state free to decide that a fetus shall have that status within its borders? If so, then *Roe v Wade* could safely be reversed without the politically impossible implication that states were required to prohibit abortion. The Supreme Court could then say that while some states have chosen to declare fe-

²⁷ These scholars argue that for that reason anti-abortion laws are unconstitutional even if a fetus is considered a person, and they would certainly reject my much stronger claim that in that event many laws permitting abortion would be unconstitutional. The legal arguments rely on a famous and influential article about the morality of abortion by Judith Jarvis Thomson: *A Defense of Abortion*, 1 *Phil & Pub Aff* 47 (1971). The legal arguments applying Thomson's views to constitutional law are best and most persuasively presented in Donald H. Regan, *Rewriting Roe v. Wade*, 77 *Mich L Rev* 1569 (1979). Thomson does not argue that every pregnant woman has a right to an abortion, even if a fetus is a person, but only that some do, and she recognizes that a woman who voluntarily risks pregnancy may not have such a right. In any case, her arguments assume that a pregnant woman has no more moral obligations to a fetus she is carrying, even if that fetus is a person with rights and therefore her son or daughter, than anyone has to a stranger—to a famous violinist a woman might find herself connected to for nine months because he needs the use of her kidneys for that period in order to live, for example.

²⁸ In the article cited in the preceding note, Regan questions the analogy between abortion and infanticide on the ground that parents have the option of arranging an adoption for their child. Regan, 77 *Mich L Rev* at 1597 (cited in note 27). But that is not inevitably true: minority infants, in particular, may not be able to find adoptive homes, and their parents are not permitted to kill them, or abandon them in circumstances that will inevitably lead to their death, whenever they can in fact make no alternative arrangement.

tuses persons within their jurisdiction, other states need not make the same decision.

There is no doubt that a state can protect the life of a fetus in a variety of ways. A state can make it murder for a third-party intentionally to kill a fetus, as Illinois has done, for example, or "feticide" for anyone willfully to kill a quickened fetus by an injury that would be murder if it resulted in the death of the mother, as Georgia has. These laws violate no constitutional rights, because no one has a constitutional right to injure with impunity.²⁹ Laws designed to protect fetuses may be drafted in language declaring or suggesting that a fetus is a person, or that human life begins at conception. The Illinois abortion statute begins, for example, by declaring that a fetus is a person from the moment of conception.³⁰ There can be no constitutional objection to such language, so long as the law does not purport to curtail constitutional rights. The Illinois statute makes plain, for example, that it does not intend to challenge or modify *Roe v Wade* so long as that decision remains in force.³¹

So qualified, a declaration that a fetus is a person raises no more constitutional difficulties than states raise when they declare, as every state has, that corporations are legal persons and enjoy many of the rights real people do, including the right to own property and the right to sue. States declare that corporations are persons as a shorthand way of describing a complex network of rights and duties that it would be impossible to describe in any other way, not as a means of curtailing or diminishing constitutional rights that real people would otherwise have.

The suggestion that states are free to declare a fetus a person, and thereby justify outlawing abortion, is a very different matter, however. That suggestion assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by

²⁹ It is a separate question whether a state would violate the Eighth Amendment if it punished feticide with the death penalty. Though Illinois does use the death penalty, the statute making the killing of a fetus murder rules out that penalty for that crime. Homicide of an Unborn Child, Ill Rev Stat ch 38, ¶ 9-1.2(d) (1989).

³⁰ Abortion Law of 1975, id at ch 38, ¶ 81-21(1).

³¹ Id.

unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.

If a state could not only create corporations as legal persons, but endow each of those corporations with a vote, it could impair the constitutional right of ordinary people to vote, because the corporations' votes would dilute theirs. If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill. If a state could declare the higher apes to be persons whose rights were competitive with the constitutional rights of others, it could prohibit its citizens from taking life-saving medicines first tested on those animals. Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.

I am uncertain how far Posner disagrees with that conclusion. He says that states can indeed create new persons. But he adds that it remains an open question how far they can treat these new persons' interests as if they were the interests of real people. This leaves mysterious what he thinks creating a new person amounts to. Perhaps he means only to agree with me that though a state can create persons for a variety of purposes, it cannot thereby acquire a power to abridge constitutional rights that it would not otherwise have had.

That position would be consistent with the examples he offers. He says, for example, that states can create property and liberty in ways that affect people's procedural rights under the Due Process Clause.³² These are not, however, powers to decrease constitutional rights by adding competing rights-holders to the constitutional scheme. They are powers to create new rights under state law that, once created, satisfy standing conditions for constitutional protection without decreasing the constitutional rights of others. He also says that states can decide whether "death means brain death" or "a stopped heart"³³ and that it follows that they can "decide when life begins."³⁴ A state can certainly decide when life begins and

³² Posner, 59 *U Chi L Rev* at 444 (cited in note 9).

³³ *Id.*

³⁴ *Id.*

ends for any number of reasons, as I said a moment ago. It can fix the moment of death for purposes of the law of inheritance, for example, just as it can declare that life begins before birth in order to allow people to inherit through a fetus. But it cannot change constitutional rights by its decisions about when life begins or death happens. It cannot escape its constitutional responsibilities to death-row prisoners by declaring them already dead, or improve its congressional representation by declaring deceased citizens still alive for that purpose. I cannot think of any significant constitutional rights that would be curtailed by treating someone as dead when his brain was dead, however. So none of Posner's examples suggest that he really accepts the position I reject.

Nor, I dare say, do many of even the strongest opponents of *Roe v Wade* really accept it, because it is inconsistent with other views they hold. Chief Justice Rehnquist, who dissented in that case, had "little doubt" that a state could not constitutionally forbid an abortion that was necessary to save a pregnant woman's life.³⁵ Of course, if a state could declare a fetus a constitutional person, it could prohibit abortion even when the pregnancy threatens the mother's life, just as it normally forbids killing one innocent person to save the life of another.

VIII. DO FETUSES HAVE INTERESTS?

Consider this argument, however. "Even if a fetus is not a constitutional person, and states have no power to make it one, a state can nevertheless legislate to protect a fetus's interests, just as it can legislate to protect the interests of dogs, who are not constitutional persons either." States can protect the interests of non-persons. But it is extremely doubtful whether a state can appeal to such interests to justify a significant abridgement of an important constitutional right, such as a pregnant woman's right to control her own body. It can do that only in deference to the rights of other constitutional persons, or for some other "compelling" reason.

But it is important to see that this argument fails for another reason as well: a fetus has no interests before the third trimester. Not everything that can be destroyed has an interest in not being destroyed. Smashing a beautiful sculpture would be a terrible insult to the intrinsic value that great works of art embody, and also very much against the interests of people who take pleasure in see-

³⁵ 410 US at 173 (Rehnquist dissenting).

ing or studying it. But a sculpture has no interests of its own; a savage act of vandalism is not unfair to *it*. Nor is it enough, for something to have interests, that it be alive and in the process of developing into something more mature. It is not against the interests of a baby carrot that it be picked early and brought to table as a delicacy. Nor even that it is something that will naturally develop into something different or more marvelous. A butterfly is much more beautiful than a caterpillar; but it is not better for the caterpillar to become one. Nor is it enough, for something to have interests, even that it is something *en route* to becoming a human being. Imagine that, just as Dr. Frankenstein reached for the lever that would bring life to the assemblage of body parts on the table before him, someone appalled at the experiment smashed the apparatus. That act, whatever we think of it, would not have been harmful to the assemblage, or against its interests, or unfair to it.

These examples suggest that nothing has interests unless it has or has had some form of consciousness—some mental as well as physical life.³⁶ Creatures that can feel pain of course have an interest in avoiding it. It is very much against the interests of animals to subject them to pain, in trapping them or experimenting on them, for example. Causing a fetus pain would be against its interests too. But a fetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed before then. Even conservative scientists deny that a fetal brain is sufficiently developed to feel pain until approximately the twenty-sixth week.³⁷

³⁶ Catholic doctrine, it is true, now holds that a fetus is endowed with an eternal soul at conception, and has interests for that reason. (Earlier in its history the Church held that God ensouled a fetus at some point after conception: at forty days for a male and eighty for a female, and that abortion before that point, though wrong because it violated the intrinsic value of God's creation, was not murder. Laurence H. Tribe, *Abortion: The Clash of Absolutes* 31 (Norton, 1990).) That argument offers a counter-example to my claim that nothing can have interests without a brain, though not to my more general claim that nothing can have interests without some form of consciousness, because I assume that a soul, which can suffer, is itself a special form of consciousness. If someone accepts this argument, then he does have a reason for insisting that a fetus (or more accurately the soul it contains) has an interest in continuing to live. But states are not entitled to act on reasons of theological dogma.

³⁷ See Clifford Grobstein, *Science and the Unborn: Choosing Human Futures* 130 (Basic, 1988):

To provide a safe margin against intrusion into possible primitive sentience, the cortical maturation beginning at about thirty weeks is a reasonable landmark until more precise information becomes available.

Therefore, since we should use extreme caution in respecting and protecting possible sentience, a provisional boundary at about twenty-six weeks should provide safety against reasonable concerns. This time is coincident with the present definition of viability

Of course many things that are against people's interests cause them no physical pain. Someone acts against my interests when he chooses someone else for a job I want, or sues me, or smashes into my car, or writes a bad review of my work, or brings out a better mousetrap and prices it lower than mine, even when these things cause me no physical pain, and, indeed, even when I am unaware that they have happened. In these cases my interests are in play not because of my capacity to feel pain but because of a different and more complex set of capacities: to enjoy or fail to enjoy, to form affections and emotions, to hope and expect, to suffer disappointment and frustration. I do not know when these capacities begin to develop, in primitive or trace or shadowy form, in animals including humans. Infants may have them in at least primitive form, and therefore so may late-stage fetuses, whose brains have been fully formed. But of course such capacities are not possible before sentience, and therefore, on conservative estimates, not before the twenty-sixth week.

We must beware the familiar but fallacious argument that abortion must be against the interests of a fetus, because it would have been against the interests of almost anyone now alive to have been aborted. Once a creature develops interests, then it becomes true, in retrospect, that certain events would have been against those interests if they had happened in the past. It obviously does not follow that these events were therefore against interests someone had *when* they happened. Suppose we assume that it was good for me that my father was not sent on a long business trip the night before my parents conceived me, rather than, as in fact happened, two days later. It does not follow that it would have been bad for anyone, in the same way, had he left on the earlier date. There never would have been anyone for whom it could have been bad.

Of course, when a fetus is aborted, there is something for whom someone might think this bad, a candidate, as it were. But the fetus's existence makes no difference to the logical point. If the fact that I would not now exist had my father left early does not entail that there was some creature for whom it would have been bad if he had, as it plainly does not, then the fact that I would not exist if I had been aborted doesn't entail that either. Whether abortion is against the interests of a fetus must depend on whether the fetus itself has interests, not on whether interests will develop if no abortion takes place.

This distinction may help explain what some observers have found puzzling. Many people who believe that abortion is morally

permissible nevertheless think it wrong for pregnant women to smoke or drink or otherwise to behave in ways injurious to a child they intend to bear. Critics say that this combination of views is contradictory: since killing something is worse than injuring it, it cannot be wrong to smoke and yet not wrong to abort. But if a woman smokes during pregnancy, someone will later exist whose interests will have been seriously damaged by her behavior. If she aborts, no one will exist against whose interests that will ever have been.

IX. THE REAL ISSUE IN *ROE V WADE*

An important conclusion follows from my argument so far: If the only issue at stake in the constitutional debate was whether states could treat a fetus as a person whose rights are competitive with those of a pregnant woman, then *Roe v Wade* would plainly be right. But that is not the only issue at stake, and (though this is widely misunderstood) that is not even the central issue in the underlying national debate about the *morality* of abortion. Most people, it is true, say that both the moral and the legal debate turns on some question about the moral personality, or rights, or interests of a fetus. They say that it turns, for example, on whether a fetus is a metaphysical or moral person, or whether a fetus has interests of its own, or how its interests should rank in importance with those of a pregnant woman, or some other question of that sort. In fact, however, most people's actual views about the morality of abortion in different circumstances make no sense if we try to understand these views as flowing from a set of consistent answers they give to questions about fetal personhood or rights or interests.

Most people think, for example, that abortion is always morally problematic, and must never be undertaken except for very good reason, but that it is nevertheless sometimes justified. Some think it justified only to save the life of the mother. Other overlapping but non-identical groups think it justified in other circumstances as well: to protect the mother from non-life threatening physical impairment, for example, or in cases of rape and incest, or in cases of serious fetal deformity. Some people who think abortion always morally problematic also think it justified when childbirth would severely cripple a mother's chances for a successful life herself. Many people also think that a pregnant woman should be free to decide about abortion for herself, even when she chooses abortion in circumstances in which they believe it morally impermissible. None of these complex positions flows from a consistent an-

swer to the question whether a fetus is a moral person, or how its interests compare in importance to other people's interests.

Most people's views about abortion can only be understood as responses to a very different set of issues. They assume that human life is *intrinsically* valuable, and worthy of a kind of awe, just because it is human life. They think that once a human life begins, it is a very bad thing—a kind of sacrilege—that it end prematurely, particularly through someone's deliberate act. That assumption does not presuppose that the creature whose life is in question is a person with rights or interests, because it does not suppose that death is bad *for* the creature whose life ends. On the contrary, the assumption explains why some people think suicide morally wrong even in circumstances in which they believe suicide would be best for the person who dies. Most people take a parallel view about the destruction of other things they treat as sacrosanct, which plainly involve no moral personhood: works of art, for example, and particular animal species. Our attitude toward the destruction of human life has the same structure, though it is, understandably, much more intense.

Though most people accept that human life is sacrosanct, and must be respected as such, the American community is divided about what that respect actually requires in the kinds of circumstances I just described: rape, incest, fetal deformity, and cases in which motherhood would have a serious and detrimental impact on the potential mother's own life. Some Americans think that respect for life forbids abortion in some or all of these circumstances; others think that respect for life recommends and even requires abortion in some or all of them.³⁸ As I argue in the forthcoming book I mentioned, these differences reflect profound differences in people's views about the relative importance of divine, natural and human contributions to the overall intrinsic value of a human life. They also reflect, as Kristin Luker has argued, different convictions about the appropriate lives for women to lead in our society.³⁹ The public is deeply divided about these matters. It is divided, however, not into two bitterly opposed groups—one of which affirms and the other of which denies that a fetus is a person—but in a much more complex way, because judgments about whether abortion dishonors or respects the intrinsic value of life in different circumstances involve a large variety of separate issues.

³⁸ *McRae v Califano*, 491 F Supp 630, 727-28 (E D NY), rev'd as *Harris v McRae*, 448 US 297 (1980).

³⁹ Kristin Luker, *Abortion and the Politics of Motherhood* ch 8 (California, 1984).

So what I take to be the uncontroversial propositions that a fetus is not a constitutional person, and that a state may not enlarge the category of constitutional persons, do not, after all, entail that *Roe v Wade* was right. Neither paintings nor animal species nor future human beings are constitutional persons. But no one doubts that government can treat art and culture as having intrinsic value, or that government can and should act to protect the environment, endangered animal species, and the quality of life of future generations of people. The majority in a community can levy taxes that will be used to support museums. It can forbid people to destroy their own buildings if it deems these to be of historical or architectural value. It can prohibit building or manufacturing that threatens endangered species or that will injure future generations. Why should a majority not have the power to enforce a much more passionate conviction—that abortion is a desecration of the inherent value that attaches to every human life?

So the most difficult constitutional issue in the abortion controversy is whether states can legitimately claim a detached interest in protecting the intrinsic value, or sanctity, of human life. Does our Constitution allow states to decide not only what rights and interests people have and how these should be enforced and protected, but also whether human life is inherently valuable, why it is so, and how that inherent value should be respected? We cannot dispose of that question in the quick way some liberals might prefer: we cannot say that an individual woman's decision whether or not to have an abortion affects only herself (or only herself and the fetus's father) and that it is therefore none of the community's business which decision she makes. Individual decisions inevitably affect shared collective values. Part of the sense of the sacred is a sense of taboo, a shared sense of horror at desecration, and it is surely harder to maintain a sense of taboo about abortion in a community in which others not only reject the taboo but violate it openly, especially if they receive official financial or moral support. It is plainly more difficult for a parent to raise his or her children to share the conviction that abortion is always a desecration in such a community than in one in which abortion is branded a crime.

The constitutional question I describe therefore lies at the intersection of two sometimes competing traditions, both of which are part of America's political heritage. The first is the tradition of religious and personal freedom. The second is a tradition that assigns government responsibility for guarding the public moral space in which all must live. A good part of constitutional law con-

sists in reconciling these two ideas. What is the appropriate balance in the case of abortion?

X. GOVERNMENT'S LEGITIMATE CONCERNS

One idea deployed in both the majority and dissenting opinions in *Roe* might have seemed mysterious: that a state has an interest in "protecting human life." I have now assigned a particular sense to that idea. A community has an interest in protecting the sanctity of life—in protecting the community's sense that human life in any form has enormous intrinsic value—by requiring its members to acknowledge that intrinsic value in their individual decisions. But that statement is ambiguous. It might describe either of two goals, and the distinction between them is extremely important. The first is the goal of responsibility. A state might aim that its citizens treat decisions about abortion as matters of moral importance, that they recognize that fundamental intrinsic values are at stake in their decision, and that they decide reflectively, not out of immediate convenience but out of examined conviction. The second is the goal of conformity. A state might aim that all its citizens obey rules and practices that the majority believes best capture and respect the sanctity of life, that they abort only in circumstances, if any, in which the majority thinks abortion is appropriate or at least permissible.

These goals of responsibility and conformity are not only different; they are antagonistic. If we aim at responsibility, we must leave citizens free, in the end, to decide as they think right, because that is what moral responsibility entails. If, on the other hand, we aim at conformity, we deny citizens that decision. We demand that they act in a way that might be contrary to their own moral convictions, and we discourage rather than encourage them to develop their own sense of when and why life is sacred.

The traditional assumption that states have a derivative interest in preventing abortion, which I have rejected, submerges the distinction between the two goals. If a fetus is a person, then of course the state's dominant goal must be to protect that person, just as it protects all other people. The state must therefore subordinate any interest it has in developing its citizens' sense of moral responsibility to its interest that they reach, or at least act on, a particular moral conclusion: that killing people is wrong.

But when we shift the state's interest, as we have, to its interest in protecting a particular intrinsic value, then the contrast and opposition between the two goals moves into the foreground. The sanctity of life is, as I said, a highly contestable value. What it

requires in particular cases is controversial: when a fetus is deformed, for example, or when having a child would seriously depress a woman's chance to make something valuable of her own life. Does a state protect a contestable value best by encouraging people to accept the value *as* contestable, with the understanding that they are responsible for deciding for themselves what it means? Or does the state protect that value best by itself deciding, through the political process, which interpretation is the right one, and then forcing everyone to conform? The goal of responsibility justifies the first choice; the goal of conformity the second. A state cannot pursue both goals at the same time.

I can think of no reason, grounded in a plausible conception of either equal concern or basic liberty, why government should not aim that its citizens treat decisions about human life and death as matters of serious moral importance. The benefits of such a policy are evident and pervasive. So in my view the Constitution allows states to pursue the goal of responsibility; but only in ways that respect the distinction between that goal and the antagonistic goal of wholly or partly coercing a final decision. May a state require a woman contemplating abortion to wait twenty-four hours before the operation? May it require that she receive information explaining the gravity of a decision to abort? May it require a pregnant teen-age woman to consult with her parents, or with some other adult? Or a married woman to inform her husband if she can locate him? Must the government provide funds for abortion if, and on the same terms as, it provides funds for the costs of childbirth for those too poor to bear those costs themselves? Constitutional lawyers have tended to discuss these issues as if they were all governed by *Roe*, as they would be if the only pertinent issue were whether a fetus is a person. If that were the only issue, and if *Roe* is right that a fetus is not a constitutional person, then on what ground could a state require women contemplating abortion to wait, or to discuss the question with an adult? On what ground could Congress aid women who wanted to bear their fetuses but not those who wanted to abort?

Much of the media discussion about how far the Supreme Court has amended *Roe* in its recent decisions presupposes that questions about responsibility and questions about conformity are tied together in that way. That explains why the Court's decision

in *Webster*⁴⁰ was widely viewed as in itself altering *Roe*,⁴¹ why the New York Times said that the Third Circuit's recent *Casey* decision upholding a comprehensive Pennsylvania regulatory statute assumed that *Roe* would soon be overturned,⁴² and why so many commentators expect the Supreme Court, which has agreed to review the Third Circuit decision, to use that opportunity further to narrow *Roe* or perhaps to overrule it altogether, even though the Court requested parties only to brief issues the Third Circuit had actually addressed.⁴³

Many of these commentators say that *Roe* gave women a fundamental right to abortion, which states need a compelling reason to curtail, and that *Webster* undermined *Roe*, and *Casey* will undermine it further, by allowing states to curtail the right without such a reason. But when we understand *Roe* as I suggest, this analysis becomes too crude. The fundamental right *Roe* upheld is a right against conformity. It is a right that states not prohibit abortion before the third trimester, either directly or through undue burdens on a woman's choice to abort. *Roe* itself did not grant a right, fundamental or otherwise, that states not encourage responsibility in the decision a woman makes or that states not display a collective view of which decision is most appropriate.

It is a further question, certainly, whether a particular regulation—say, a mandatory waiting period or mandatory notification or consultation—makes abortion much more expensive or dangerous or difficult to secure, and so does unduly burden the right against conformity.⁴⁴ And of course I agree that it would be naive to read the Court's recent decisions as carrying no threat to *Roe* at all. The past statements of at least four justices, and the likely views of the two newest appointees, are threatening indeed. But we do no favor to the crucial right *Roe* recognized by insisting that

⁴⁰ *Webster v Reproductive Health Services*, 492 US 490 (1989).

⁴¹ Professor Tribe, for example, says that “[i]f constitutional law is as constitutional law does, then after *Webster*, *Roe* is not what it once was.” Tribe, *Abortion* at 24 (cited in note 36).

⁴² See Michael de Courcy Hinds, *Appeals Court Upholds Limits For Abortions*, NY Times A1 (Oct 22, 1991), discussing *Planned Parenthood v Casey*, 947 F2d 682 (3d Cir 1991), cert granted in part by 60 USLW 3388 (1992), and in part by 60 USLW 3446 (1992). In fact the majority opinion in *Casey* assumed the distinction between responsibility and conformity I defend in the text, and interpreted Justice O'Connor's “undue burden” test in *Webster*, 492 US at 529-31 (O'Connor concurring), to presuppose that distinction as well.

⁴³ See, for example, Sheryl McCarthy, *Climactic Battle Is at Hand*, *Newsday* 5 (Jan 22, 1992); *Washington Brief*, Natl L J 5 (Feb 3, 1992).

⁴⁴ In *Casey*, the Third Circuit, claiming to follow Justice O'Connor, proposed that the pertinent test should be whether the regulation imposed an “undue burden” on a woman's right to have an abortion if after reflection she wished one. 947 F2d at 695-97, 706-07.

every decision pro-life groups applaud is automatically another nail in *Roe's* coffin.

The real question decided in *Roe*, and the heart of the national debate, is the question of conformity. I said that government sometimes acts properly when it coerces people in order to protect values the majority endorses: when it collects taxes to support art, or when it requires businessmen to spend money to avoid endangering a species, for example. Why (I asked) can the state not forbid abortion on the same ground: that the majority of its citizens thinks that aborting a fetus, except when the mother's own life is at stake, is an intolerable insult to the inherent value of human life?

XI. CONFORMITY AND COERCION

I begin my reply to that question by noticing three central and connected reasons why prohibiting abortion is a very different matter from conservation or aesthetic zoning or protecting endangered species. First, the impact on particular people—pregnant women—is far greater. A woman who is forced by her community to bear a child she does not want is no longer in charge of her own body. It has been taken over for purposes she does not share. That is a partial enslavement, a deprivation of liberty vastly more serious than any disadvantage citizens must bear to protect cultural treasures or to save troubled species. The partial enslavement of a forced pregnancy is, moreover, only the beginning of the price a woman denied an abortion pays. Bearing a child destroys many women's lives, because they will no longer be able to work or study or live as they believe they should, or because they will be unable to support that child. Adoption, even when available, may not reduce the injury. Many women would find it nearly intolerable to turn their child over to others to raise and love. Of course, these different kinds of injury are intensified if the pregnancy began in rape or incest, or if a child is born with grave physical or mental handicaps. Many women regard these as not simply undesirable but terrible consequences, and would do almost anything to avoid them. We must never forget that a great many abortions took place, before *Roe v Wade*, in states that prohibited abortion. These were illegal abortions, and many of them were very dangerous. If a woman desperate for an abortion defies the criminal law, she may risk her life. If she bows to it, her life might be destroyed, and her self-respect compromised.

Second, it is a matter of deep disagreement within our culture, as I said, what someone who is anxious to respect the intrinsic

value of human life should therefore do about abortion. There is no parallel disagreement in the case of the other values I mentioned. No one could plausibly claim that respect for future generations sometimes means leaving the planet uninhabitable for them or that respect for animal species sometimes means allowing their extinction. When the law requires people to make sacrifices for those values, it requires them, at most, to sacrifice for something that they do not believe to be important, but that the rest of the community does. They are not forced to act in ways that they think are not only disadvantageous to them but ethically wrong.⁴⁵ A woman who must bear a child whose life will be stunted by deformity, or a child who is doomed to an impoverished childhood and an inadequate education, or a child whose existence will cripple the woman's own life, is not merely forced to make sacrifices for values she does not share. She is forced to act not just in the absence of, but in defiance of, her own beliefs about what respect for human life means and requires.

Third, our convictions about how and why human life has intrinsic importance, from which we draw our views about abortion, are much more fundamental to our overall moral personality than the other convictions about inherent value I mentioned. They are decisive in forming our opinions about all life-and-death matters, including not only abortion but also suicide, euthanasia, the death penalty and conscientious objection to war. Their power is even greater than this suggests, moreover, because our opinions about how and why our *own* lives have intrinsic value crucially influence every major choice we make about how we should live.⁴⁶ Very few people's opinions about architectural conservation or endangered species are even nearly so foundational to the rest of their moral personality, even nearly so interwoven with the other major structural convictions of their lives.

These interconnections are most evident in the lives of people who are religious in a traditional way. The connection between their faith and their opinions about abortion is not contingent but constitutive: their convictions about abortion are shadows of more general foundational convictions about why human life itself is im-

⁴⁵ Of course, government sometimes forces people to do what they think wrong—to pay taxes that will be used to fight a war they think immoral, for example. But in such cases government justifies coercion by appealing to the rights and interests of other people, not to an intrinsic value those who are coerced believe requires the opposite decision.

⁴⁶ See Ronald Dworkin, *Foundations of a Liberal Equality*, in 11 *The Tanner Lectures on Human Values* 1 (Utah, 1990).

portant, convictions at work in all aspects of their lives. A particular religion, like Catholicism, could not comprehensively change its views about abortion without becoming a significantly different faith, organized around a significantly different sense of the ground and consequences of the sacrosanct character of human life. People who are not religious in the conventional way also have general, instinctive convictions about whether, why and how any human life—their own, for example—has intrinsic value. No one can lead even a mildly reflective life without expressing such convictions. These convictions surface, for almost everyone, at exactly the same critical moments in life—in decisions about reproduction and death and war. Someone who is an atheist, because he does not believe in a personal god, nevertheless has convictions or at least instincts about the value of human life in an infinite and cold universe, and these convictions are just as pervasive, just as foundational to moral personality, as the convictions of a Catholic or a Moslem. They are convictions that have, in the words of a famous Supreme Court opinion, “a place in the life of its possessor parallel to that filled by the orthodox belief in God”⁴⁷

For that reason we may describe people’s beliefs about the inherent value of human life, beliefs deployed in their opinions about abortion, as *essentially* religious beliefs. I shall later try to defend that claim as a matter of constitutional interpretation: I shall argue that such beliefs should be deemed religious within the meaning of the First Amendment. My present point is not legal but philosophical, however. Many people, it is true, think that no belief is religious in character unless it presupposes a personal god. But many established religions—some forms of Buddhism and Hinduism, for example—include no commitment to such a supreme being. Once we set aside the idea that every religious belief presupposes a god, it is doubtful that we can discover any defining feature that all but only religious beliefs have. We must decide whether to classify a belief as religious in a less rigid way: by asking whether it is similar in content to plainly religious beliefs.⁴⁸ On that test, the belief that the value of human life transcends its value for the creature whose life it is—that human life is objectively valuable from the point of view, as it were, of the universe—is plainly a religious belief, even when it is held by people

⁴⁷ *United States v Seeger*, 380 US 163, 166 (1965).

⁴⁸ Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal L Rev 753 (1984); George Freeman III, *The Misguided Search for the Constitutional Definition of “Religion”*, 71 Georgetown L J 1519 (1983).

who do not believe in a personal deity. It is, in fact, the most fundamental purpose of traditional religions to make exactly that claim to its faithful, and to embody it in some vision or narrative that makes the belief seem intelligible and persuasive.

Religion in that way responds to the most terrifying feature of human life: that we have lives to lead, and death to face, with no evident reason to think that our living, still less how we live, makes any genuine difference at all. The existential question whether human life has any intrinsic or objective importance has been raised in many ways. People ask about the "meaning" or "point" of life, for example. However it is put, the question is foundational. It cannot be answered by pointing out that if people live in a particular recommended way—observing a particular moral code, for example, or following a particular theory of justice—this will make them, individually or collectively, safer or more prosperous, or that it will help them fulfill or realize their human nature, as understood in some particular way. The existential question is deeper, because it asks why any of that matters.

In that way beliefs about the intrinsic importance of human life are distinguished from more secular convictions about morality, fairness and justice. The latter declare how competing interests of particular people should be served or adjusted or compromised. They rarely reflect any distinctive view about why human interests have objective intrinsic importance, or even whether they do.⁴⁹ That explains why people with very different views about the meaning or point of human life can agree about justice, and why people with much the same views about that religious issue can disagree about justice dramatically. Of course many people believe that fairness and justice are important only because they think that it is objectively important how a human life goes.⁵⁰ But their particular views about what justice requires are not, for that reason, themselves views about why or in what way that is true.

Religions attempt to answer the deeper existential question by connecting individual human lives to a transcendent objective value. They declare that all human lives (or, for more parochial

⁴⁹ John Rawls, for example, distinguishes his own and other theories of justice from what he calls comprehensive religious or ethical schemes; political theories of justice, he says, presuppose no opinion about what is objectively important. In particular, they presuppose no opinion about if or why or in what way it is intrinsically important that human life continue or prosper, though of course political theories of justice are compatible with a great variety of such opinions. See John Rawls, *Justice as Fairness, Political not Metaphysical*, 14 *Phil & Pub Aff* 223 (1985).

⁵⁰ See Dworkin, *Foundations of a Liberal Equality* (cited in note 46).

religions, the lives of believers) have objective importance through some source of value outside human subjective experience: the love of a creator or a redeemer, for example, or nature believed to give objective normative importance to what it creates, or a natural order understood in some other but equally transcendental way. People who think that abortion is morally problematic, even though a fetus has no interests of its own, all accept that human life is intrinsically, objectively valuable. Some think that human life is intrinsically important because it is created by a god, others because human life is the triumph of nature's genius, and others because human life's complexity and promise is in itself awe-inspiring. Some people in each of these groups believe that because human life has intrinsic importance abortion is always, or almost always, wrong. Others in each group have reached a contrary conclusion: that abortion is sometimes necessary in order truly to respect life's inherent value.⁵¹ In each case the belief affirms the essentially religious idea that the importance of human life transcends subjective experience.

XII. THE RIGHT OF PROCREATIVE AUTONOMY

These three ways in which abortion is special, even among issues that involve claims about inherent value, suggest an interpretation of the much-discussed constitutional right of privacy. That constitutional right limits a state's power to invade personal liberty when the state acts, not to protect rights or interests of other people, but to safeguard an intrinsic value. A state may not curtail liberty, in order to protect an intrinsic value, (1) when the decisions it forbids are matters of personal commitment on essentially religious issues, (2) when the community is divided about what the best understanding of the value in question requires, and (3) when the decision has very great and disparate impact on the person whose decision is displaced.⁵²

I should say again (though by now you will be tired of the point) that the principle of privacy I just defined would not guarantee a right to abortion if a fetus were a constitutional person

⁵¹ *McRae*, 491 F Supp at 690-702. I develop this point at length in the forthcoming book I mentioned earlier.

⁵² I do not mean that no stronger constitutional right of personal autonomy can be defended as flowing from the best interpretation of the Constitution as a whole. Indeed I think a significantly stronger right can be. But I shall not defend any principle broader than the more limited one just described, because that principle is strong enough to ground a right of privacy understood to include a right to procreative autonomy.

from the moment of conception. The principle is limited to circumstances in which the state claims authority to protect some inherent value, not the rights and interests of another person. But once we accept that a fetus is not a constitutional person, and shift the ground of constitutional inquiry to the different question of whether a state may forbid abortion in order to respect the inherent value of human life, then the principle of privacy plainly does apply.

It applies because ethical decisions about procreation meet the tests the principle provides. That is why procreative decisions have been collected, through the common law method of adjudication, into a distinct principle we might call the principle of procreative autonomy. That principle, understood as an application of the more general principle of privacy, provides the best available justification for the Court's decisions about contraception, for example. In the first of these cases—*Griswold v Connecticut*⁵³—the Justices who made up the majority provided a variety of justifications for their decision. Justice Harlan said that laws forbidding married couples to use contraceptives violated the Constitution because they could only be enforced by police searching marital bedrooms, a practice that struck him as repulsive to the concept of ordered liberty.⁵⁴

This justification was inadequate even for the decision in *Griswold*—a prohibition on the purchase or sale of contraceptives could be enforced without searching marital bedrooms, just as a prohibition on the sale of drugs to or the use of drugs by married couples can be enforced without such a search. And it was plainly inadequate for the later decisions in the series. In one of these, Justice Brennan, speaking for the Court, offered a different and more general explanation. “If the right of privacy means anything,” he said, “it is the right of the *individual*, married or not, to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁵⁵

I take the principle of procreative autonomy to be an elaboration of Brennan's suggestion. It explains the sense in which individual procreative decisions are, as he said, fundamental. Many decisions, including economic decisions, for example, have serious

⁵³ 381 US 479 (1965).

⁵⁴ *Id.* at 500 (Harlan concurring) (referring to his dissent in *Poe v Ullman*, 367 US 497, 539-45 (1961)).

⁵⁵ *Eisenstadt v Baird*, 405 US 438, 453 (1972) (emphasis in original).

and disparate impact. Procreative decisions are fundamental in a different way, because the moral issues on which a procreative decision hinges are religious in the broad sense I defined. They are issues touching the ultimate point and value of human life itself. The state's power to prohibit contraception could plausibly be defended only by assuming a general power to dictate to all citizens what respect for the inherent value of human life requires: that it requires, for example, that people not make love except with the intention to procreate.

The Supreme Court, in denying the specific power to make contraception criminal, presupposed the more general principle of procreative autonomy I am defending. That is important, because almost no one believes that the contraception decisions should now be overruled. It is true that Bork had challenged *Griswold* and the later decisions in speeches and articles before his nomination.⁵⁶ But during his hearings, he hinted that *Griswold* might be defended on other grounds.⁵⁷

The law's integrity demands, as I said, that principles necessary to support an authoritative set of decisions must be accepted in other contexts as well. It might seem an appealing political compromise to apply the principle of procreative autonomy to contraception, which almost no one now thinks the states can forbid, but not to apply it to abortion, which powerful conservative constituencies violently oppose. But the point of integrity—the point of law itself—is exactly to rule out political compromises of that kind. We must be one nation of principle: our Constitution must represent conviction, not the tactical strategies of justices anxious to satisfy as many political constituencies as possible.

Integrity does not, of course, require that justices respect principles embedded in past decisions that they and others regard as *mistakes*. It permits the Court to declare, as it has several times in the past, that a particular decision or string of decisions was in error, because the principles underlying those decisions are inconsistent with more fundamental principles embedded in the Constitution's structure and history. The Court cannot declare everything in the past a mistake: that would destroy integrity under the pretext of serving it. It must exercise its power to disregard past

⁵⁶ See, for example, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 7-10 (1971).

⁵⁷ Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 100th Cong, 1st Sess 250 (Sep 16, 1987). See Ethan Bonner, *Battle for Justice* 221-22, 260 (Norton, 1989).

decisions modestly. But it must also exercise that power in good faith. It cannot ignore principles underlying past decisions it purports to approve, decisions it would ratify if asked to do so, decisions almost no one, not even rabid critics of the Court's past performance, now disapproves or regards as mistakes. The contraception cases fall into that category, and it would be both dangerous and offensive for the Court cynically to ignore the principles presupposed in those cases in any decision it now reaches about abortion.

So integrity demands general recognition of the principle of procreative autonomy, and therefore of the right of women to decide for themselves not only whether to conceive but whether to bear a child. If you remain in doubt, then consider the possibility that in some state a majority of voters will come to think that it shows *disrespect* for the sanctity of life to continue a pregnancy in some circumstances—in cases of fetal deformity, for example. If a majority has the power to impose its own views about the sanctity of life on everyone, then the state could *require* someone to abort, even if that were against her own religious or ethical convictions, at least if abortion had become physically as convenient and safe as, for example, the vaccinations and inoculations states are now recognized as having the power to require.

Of course, if a fetus were a person with a right to live, it would not follow from the fact that one state had the right to forbid abortion that another would have the right to require it. But that does follow once we recognize that the constitutional question at stake in the abortion controversy is whether a state can impose a canonical interpretation of the inherent value of life on everyone. Of course it would be intolerable for a state to require an abortion to prevent the birth of a deformed child. No one doubts, I think, that that requirement would be unconstitutional. But the reason why—because it denies a pregnant woman's right to decide for herself what the sanctity of life requires her to do about her own pregnancy—applies with exactly equal force in the other direction. A state just as seriously insults the dignity of a pregnant woman when it forces her to the opposite choice, and the fact that the choice is approved by a majority is no better justification in the one case than in the other.

XIII. TEXTUAL HOMES

My argument so far has not appealed to any particular constitutional provision. But, as I said, the general structure of the Bill of Rights is such that any moral right as fundamental as the right

of procreative autonomy is very likely to have a safe home in the Constitution's text. Indeed, we should expect to see a principle of that foundational character protected not just by one but by several constitutional provisions, because these must necessarily overlap in the way I also described.

The right of procreative autonomy follows from any competent interpretation of the Due Process Clause and of the Supreme Court's past decisions applying that clause. I have already indicated, in my discussion of the contraception cases, my grounds for that claim. I shall now argue, however, for a different and further textual basis for that right. The First Amendment prohibits government from establishing any religion, and it guarantees all citizens the free exercise of their own religion. The Fourteenth Amendment, which incorporates the First Amendment, imposes the same prohibition and the same responsibility on the states. These provisions guarantee the right of procreative autonomy. I do not mean that the First Amendment defense of that right is stronger than the Due Process Clause defense. On the contrary, the First Amendment defense is more complex and less demonstrable as a matter of precedent. I take it up because it is, as I shall try to show, a natural defense, because it illuminates an important dimension of the national debate about abortion, and because the argument for it illustrates both the power and the constraining force of the ideal of legal integrity.

Locating the abortion controversy in the First Amendment would seem natural to most people, who instinctively perceive that the abortion controversy is at bottom essentially a religious one. Some of you may fear, however, that I am trying to revive an old argument now rejected even by some of those who once subscribed to it. This argument holds that since the morality of abortion is a matter of controversy among religious groups, since it is declared immoral and sinful by some orthodox religions—conspicuously the Catholic Church—but permissible by others, the old idea of separation of church and state means that government must leave the subject of abortion alone. That would indeed be a very bad argument if states were permitted to treat a fetus as a person with rights and interests competitive with the rights of a pregnant woman. For the most important responsibility of government is to identify the differing and sometimes competing rights and interests of the people for whom it is responsible, and to decide how these rights may best be accommodated and these interests best served. Government has no reason to abdicate that responsibility just because (or when) organized religion also takes an interest in

those matters. Religious bodies and groups were among the strongest campaigners against slavery, and they have for centuries sought social justice, the eradication of suffering and disease, and a vast variety of other humanitarian goals. If the distinction between church and state barred government from also taking up those goals, the doctrine would paralyze government altogether.

But we are now assuming that the issue whether a fetus is a person with rights and interests of its own has already been decided, by secular government, in the only way that issue can be decided under our constitutional system. Now we are considering a different constitutional issue: whether states may nevertheless prohibit abortion in order to endorse a controversial view about what respect for the intrinsic value of human life requires. That is not an issue about who has rights, or how people's competing interests should be balanced and protected. If states are forbidden to prohibit conduct on the ground that it insults the intrinsic value of human life, they are not therefore disabled from pursuing their normal responsibilities. On the contrary, it is one of government's most fundamental duties, recognized throughout Western democracies since the eighteenth century, to insure that people have a right to live their lives in accordance with their own convictions about essentially religious issues. So the reasons for rejecting the bad argument I described are not arguments against my suggestion that the First Amendment forbids states to force people to conform to an official view about what the sanctity of human life requires.

We must now consider arguments for that suggestion. It is controversial how the Establishment and Free Exercise Clauses should be interpreted, and the Supreme Court's rulings on these clauses are somewhat unclear.⁵⁸ I cannot offer an extended consideration of those rulings here, and my immediate purpose is not to compose a full and detailed legal argument for the First Amendment defense, but rather to indicate the main structural lines of that defense. Any satisfactory interpretation of the Religion Clauses of the amendment must cover two issues. First, it must fill out the phrase "free exercise of religion" by explaining which features make a particular belief a religious conviction rather than a non-religious moral principle or a personal preference. Second, it must interpret "establishment" by explaining the difference between secular and religious aims of government.

⁵⁸ See Greenawalt, 72 Cal L Rev 753 (cited in note 48); Freeman, 71 Georgetown L J 1519 (cited in note 48).

Difficult cases arise when government restricts or penalizes conduct required by genuinely religious convictions, but for the secular purpose of serving and protecting other people's interests.⁵⁹ Such cases require courts to decide how far the right of free exercise prevents government from adopting policies it believes would increase the general secular welfare of the community. It is a very different matter, however, when government's only purpose is to support one side of an argument about an essentially religious issue. Legislation for that purpose which substantially impaired anyone's religious freedom would violate both of the First Amendment's Religion Clauses at once.

Of course, if a fetus were a constitutional person, with interests government is obliged and entitled to protect, then legislation outlawing abortion would fall into the first of these categories even if convictions permitting or requiring abortion are genuinely religious in character. Such legislation would plainly be constitutional: rights of free exercise would not extend to the killing of a fetus any more than they extend to human sacrifice in religious ritual. But a fetus is not a constitutional person. If people's convictions about what the inherent value of human life requires are religious convictions, therefore, any government demand for conformity would be an attempt to impose a collective religion, and the case would fall into the second category.

What makes a belief a religious one for purposes of the First Amendment? The great majority of eighteenth-century statesmen who wrote and ratified the Constitution may have assumed that every religious conviction presupposes a personal god. But, as the Supreme Court apparently decided in *United States v Seeger*, that restriction is not now acceptable as part of a constitutional definition of religion, in part because not all the major religions represented in this country presuppose such a being.⁶⁰ Once the idea of

⁵⁹ We can regard the Supreme Court's decision in *Smith v Employment Division*, 494 US 872 (1990), as an example of that kind of case, whether or not we agree with the decision.

⁶⁰ 380 US 163. The Court in that case construed a statute rather than the Constitution. But since the Court's decision contradicted the evident statutory purpose, commentators have assumed that the Court meant to imply that the statute was constitutional only if so construed.

In a recent book, which I received while this Article was in galleys, Professor Peter Wenz argues for a ground of distinction between religious and secular opinions that is different from the two possible distinctions I mention here (which he calls "epistemological"). He accepts the traditional view, that the argument over abortion is about whether a fetus is a person, but insists that the question whether an early fetus is a person is a religious one because it cannot be decided "entirely" on the basis of "methods of argumentation that are

religion is divorced from that requirement, however, courts face a difficulty in distinguishing between religious and other kinds of conviction. There are two possibilities: a conviction can be deemed religious because of its content—because it speaks to concerns identified as distinctly religious—or because it has very great subjective importance to the person who holds it, as orthodox religious convictions do for devout believers. In *Seeger*, the Court suggested that a scruple is religious if it has “a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”⁶¹ That statement, taken by itself, is ambiguous. It might mean that a conviction is religious if it answers the same questions that orthodox religion answers for a believer, which is a test of content, or that it is religious if it is embraced as fervently as orthodox religion is embraced by a devout believer, which is a test of subjective importance.

The opinion as a whole is indecisive about which of these two meanings, or which combination of them, the Court intended, and the ambiguity has damaged the development of constitutional law in this area. In any case, however, a subjective importance test is plainly inadequate, by itself, to distinguish religious from other forms of conviction, or indeed from intensely felt preferences. Even people who are religious in the orthodox way often count plainly non-religious affiliations, like patriotism, as equally or even more important. Some test of content is at least necessary, and may be sufficient.

I argued, earlier, that a belief in the objective and intrinsic importance of human life has a distinctly religious content. Convictions that endorse that objective importance play the same role, in providing an objective underpinning for concerns about human rights and interests, as orthodox religious beliefs provide for those who accept them. Several of the theologians the Court cited in *Seeger* made the same claim. The Court called the following statement from the Schema of a recent Ecumenical Council, for example, “a most significant declaration on religion”: “Men expect from the various religions answers to the riddles of the human condi-

integral to our way of life.” Peter Wenz, *Abortion Rights as Religious Freedom* 131 (Temple, 1992). I agree with the conclusion he reaches: that the abortion debate is primarily a religious one governed by the First Amendment. But his test is not acceptable, because government must make and impose decisions on a wide variety of moral issues about which people disagree profoundly, and which cannot be decided on empirical grounds or by appeal to any convictions shared by everyone or by methods that are in any other way “integral” to any collective way of life.

⁶¹ *Id.* at 165-66.

tion: What is man? What is the meaning and purpose of our lives?"⁶²

I can think of no plausible account of the content a belief must have, in order to be religious in character, that would rule out convictions about why and how human life has intrinsic objective importance, except the abandoned test that requires a religious belief to presuppose a god. It is, of course, essential that any test of religious content allow a distinction between religious beliefs, on the one hand, and non-religious political or moral convictions, on the other. I have already suggested, however, how the belief that human life has intrinsic objective importance, and other beliefs that interpret and follow directly from that belief, differ from most people's opinions about political fairness or the just distribution of economic or other resources.⁶³

We can see the distinction at work in the Supreme Court's disposition of the conscientious objector cases. In *Seeger*, the Court presumed that the Constitution would not allow exempting men whose opposition to all war was based on theistic religion but not men whose similar opposition was grounded in a non-theistic belief. In *Gillette*, on the other hand, the Court upheld Congress's refusal to grant exemption to men whose opposition to war was selective, even to those whose convictions condemning a particular war were supported by their religion.⁶⁴ Though the Court offered various practical grounds for the distinction, these were unpersuasive. The distinction can in fact be justified—if it can be justified at all—only by supposing that though a flat opposition to all war is based on a conviction that human life as such is sacred—which is a distinctly religious conviction—selective opposition is at least normally based on considerations of justice or policy, which justify killing in some cases but not others, and which are not themselves religious in content even when they are endorsed by a religious group. As the Court said,

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots in conscience and religion as well. Indeed, over the realm of pos-

⁶² See *Draft Declaration on the Church's Relations with Non-Christians*, in Council Daybook 282 (Vatican II, 3d Sess, 1965), quoted and cited in *Seeger*, 380 US at 181-82 & n 4.

⁶³ See text accompanying notes 49-51.

⁶⁴ *Gillette v United States*, 401 US 437.

sible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise.⁶⁵

So the popular sense that the abortion issue is fundamentally a religious one, and some lawyers' sense that it therefore lies outside the proper limits of state action, is at bottom sound, though for reasons somewhat more complex than is often supposed. It rests on a natural—indeed irresistible—understanding of the First Amendment: that a state has no business prescribing what people should think about the ultimate point and value of human life, about why life has intrinsic importance, and about how that value is respected or dishonored in different circumstances. In his reply, Posner objects that if my view of the scope of the Free Exercise Clause were correct, government could not forbid “an aesthete to alter the exterior of his landmark house.”⁶⁶ But he has misunderstood my view: he apparently thinks that I use a test of subjective importance to identify religious convictions. He points out, as a *reductio ad absurdum* of my argument, that “economic freedom is a religion” to a variety of libertarians,⁶⁷ suggesting that taxation, which libertarians find particularly offensive, would on my argument violate their religious freedom.

I argued, however, that convictions about the intrinsic value of human life are religious on a test of content, not subjective importance. A law forbidding people to tear down Georgian houses does not raise essentially religious issues, no matter how much some people would prefer to build post-modern pastiches instead, because that law does not presuppose any particular conception of why and how human life is sacred, or take a position on any other matter historically religious in character.⁶⁸ It is even plainer that my argument would not justify exempting Milton Friedman from tax on grounds of his free-market faith. Government collects taxes in order to serve a variety of secular interests of its citizens, not to declare or support a particular view about any essentially religious

⁶⁵ *Id.* at 455 (footnotes omitted). The Court also endorsed, as on a careful view supporting the distinction between universal and selective opposition, the government's claim that opposition to a particular war necessarily involves judgment that is “political and particular” and “based on the same political, sociological, and economic factors that the government necessarily considered” in deciding whether to wage war. *Id.* at 458 (citing government's brief).

⁶⁶ Posner, 59 U Chi L Rev at 444 (cited in note 9).

⁶⁷ *Id.* at 443.

⁶⁸ Such laws do raise other issues about intrinsic value, and in some extremely unusual circumstances might violate a more powerful form of the principle of privacy than the weak form I described and defended.

matter. It is, of course, true that some people resist paying taxes for reasons that do implicate their convictions about the intrinsic value of human life. Some people refuse to pay taxes to finance war on that basis, for example. In such cases compulsory taxation does plausibly impair the free exercise of religion. But the problem falls into the first of the two categories I distinguished, and the appropriate balancing sustains the tax, given the limited character of the infringement of free exercise and the importance of uniform taxation.

I conclude that the right to procreative autonomy, from which a right of choice about abortion flows, is well grounded in the First Amendment.⁶⁹ But it would be remarkable, as I said, if so basic a right did not figure in the best interpretation of constitutional liberty and equality as well. It would be remarkable, that is, if lawyers who accepted the right did not think it fundamental to the concept of ordered liberty, and so protected by the Due Process Clause, or part of what government's equal concern for all citizens requires, and so protected by the Equal Protection Clause. Posner is amused that different scholars who endorse a right of procreative autonomy have offered a variety of textual homes for it: he says that in my account, *Roe v Wade* "is the Wandering Jew of constitutional law."⁷⁰ But of course, as he would agree, it is hardly an embarrassment for that right that lawyers have disagreed about which clause to emphasize in their arguments for it. Some constitutional lawyers have an odd taste for constitutional neatness: they want rights mapped uniquely onto clauses with no overlap, as if redundancy were a constitutional vice. Once we understand, however, that the Bill of Rights is not a list of discrete remedies drawn up by a parsimonious draftsman, but a commitment to an ideal of just government, that taste makes no more sense than the claim that freedom of religion is not also liberty, or that the protection of freedom for everyone has nothing to do with equality.

⁶⁹ I should mention a complexity. I have been arguing that many women's decisions about abortion reflect convictions, which may well be inarticulate, about whether abortion or childbirth would best respect what they believe intrinsically valuable about human life. That is not necessarily true of all women who want abortions, however, and the free exercise claim might therefore not be available, as a matter of principle, for everyone. But states could not devise appropriate and practicable tests for discriminating among women in that way, and in any case prohibition would be the establishment of an essentially religious position, even in cases when it worked to outlaw abortion for someone whose grounds were not religious in any sense.

⁷⁰ Posner, 59 U Chi L Rev at 441 (cited in note 9).

XIV. DIGNITY AND CONCERN

I pause for a brief summary. We must abandon the traditional way of understanding the constitutional argument about abortion. It is not an argument about whether a fetus is a person. It is rather a dispute about whether and how far government may enforce an official view about the right understanding of the sanctity of human life. I described a constitutional right—the right of procreational autonomy—which denies government that power. I suggested that this right is firmly embedded in our constitutional history. It is the best available justification of the “privacy” cases, including the contraception cases. Those cases are conventionally understood as residing, by way of textual home, in the Due Process Clause of the Fourteenth Amendment. I argued that they might also rest on the Religion Clauses of the First Amendment.

Posner suggests that my argument is more powerful construed holistically, that is, as an argument about what the Constitution as a whole requires. I do not, as I said, see a difference between clause-by-clause and holistic interpretations of the Bill of Rights. But I nevertheless accept the spirit of his suggestion—that it is important to notice the place the right I have been describing holds not only in the structure of the Constitution, but in our political culture more generally. Cardinal in that culture is a belief in individual human dignity: that people have the moral right—and the moral responsibility—to confront for themselves, answering to their own conscience and conviction, the most fundamental questions touching the meaning and value of their own lives. That assumption was the engine of emancipation and of racial equality, for example. The most powerful arguments against slavery before the Civil War, and for equal protection after it, were framed in the language of dignity: the cruelest aspect of slavery, for the abolitionists, both religious and secular, was its failure to recognize a slave’s right to decide issues of value for himself or herself. Indeed the most basic premise of our entire constitutional system—that our government shall be republican rather than despotic—embodies a commitment to that conception of dignity.

So the principle of procreative autonomy, in the broad sense, is a principle that any remotely plausible explanation of our entire political culture would have to recognize. It is also a principle we would want our Constitution to contain even if we were starting on a clean slate, free to make any constitution we wanted. I want to guard against an interpretation of my argument that I would disown, however. It does not suppose that people either are or should

be indifferent, either as individuals or as members of a political community, to the decisions their friends or neighbors or fellow citizens or fellow human beings make about abortion. On the contrary it recognizes several reasons why they should not be indifferent. As I have already noticed, individual choices together create a moral environment that inevitably influences what others can do. So a person's concern for his own life, and for that of his children and friends, gives him a reason for worrying about how even strangers treat the inherent value of human life. Our concern that people lead good lives is not naturally limited, moreover, nor should it be, to concern for our own lives and those of our family. We want others, even strangers, not to lead what we regard as a blighted life, ruined by a terrible act of desecration.

But the most powerful reason we have for wanting others to respect the intrinsic value of human life, in the way we think that value demands, is not our concern for our own or other people's interests at all, but just our concern for the value itself. If people did *not* think it transcendently important that human lives not be wasted by abortion, then they would not have the kind of commitment my argument assumes people do have. So of course Americans who think that almost all abortion is immoral must take a passionate interest in the issue: liberals who count such people as deranged busybodies are insensitive as well as wrong. Nevertheless, we must insist on religious tolerance in this area, as in other issues about which people once cared just as passionately and in the same way, and once thought sufficiently important to wage not just sit-ins but wars. Tolerance is a cost we must pay for our adventure in liberty. We are committed, by our Constitution, to live in a community in which no group is deemed clever or spiritual or numerous enough to decide essentially religious matters for everyone else. If we have genuine concern for the lives others lead, moreover, we will also accept that no life is a good one lived against the grain of conviction, that it does not aid someone else's life but spoils it to force values upon him he cannot accept but can only bow before out of fear or prudence.

XV. *ROE* RECONSIDERED

We must now take a fresh look at *Roe v Wade*. *Roe* did three things. First, it re-affirmed a pregnant woman's constitutional right of procreative autonomy, and declared that states do not have the power simply to forbid abortion on any terms they wish. Second, it recognized that states nevertheless do have a legitimate interest in regulating abortion. Third, it constructed a detailed regime for bal-

ancing that right and that interest: it declared, roughly, that states could not forbid abortion for any reason in the first trimester of pregnancy, that they could regulate abortion in the second trimester only out of concern for the health of the mother, and, finally, that they could outlaw abortion altogether after fetal viability, that is, after approximately the beginning of the third trimester. We must inspect those three decisions against the background of our argument so far.

Our argument confirms the first decision. The crucial issue in the constitutional abortion controversy is not whether a fetus is a person—*Roe* was plainly right in holding that a fetus is not a person within the meaning of the Constitution—but whether states have a legitimate power to dictate how their members must respect the inherent value of life. Since any competent interpretation of the Constitution must recognize a principle of procreative autonomy, states do not have the power simply to forbid abortion altogether.

Roe was also right on the second score. States do have a legitimate interest in regulating the abortion decision. It was mysterious, in *Roe* and other decisions, what that interest was. Our account identifies it as a legitimate interest in maintaining a moral environment in which decisions about life and death, including the abortion decision, are taken seriously, treated as matters of moral gravity.

It remains to consider whether *Roe* was right on the third score. Does the trimester scheme it announced allow states to pursue their legitimate interests while adequately protecting a pregnant woman's right of autonomy? That trimester scheme has been criticized as arbitrary and overly rigid, even by some lawyers who are sympathetic to the narrowest decision in *Roe*: that the Texas statute was unconstitutional. Why is the point of viability the crucial point? We might put that question in two ways. We might ask why viability should mark the earliest time at which a state is entitled to prohibit abortion. If it can prohibit abortion then, why not earlier, as a majority of citizens in some states apparently wish? Or we might ask why viability should mark the end of a woman's right to protection. If a state cannot prohibit abortion before viability, then why may it prohibit it after that point? Both questions challenge the point of viability as arbitrary though from different directions. I shall first pursue the second form of the question. What happens at viability to make the right I have been describing—the right of procreative autonomy—less powerful or effective?

Two answers to that question might figure in any defense of the *Roe v Wade* scheme. First, at about the point of viability, but not much before, fetal brain development may be sufficient to allow pain.⁷¹ So at the point of viability, but not much before, a fetus can sensibly be said to have interests of its own. That does not mean, I must emphasize, that a state is permitted to declare a fetus a person at that point. The question who is a constitutional person, with independent constitutional rights in competition with the rights of others, must be decided nationally, as I argued. But a state may nevertheless act to protect the interests even of creatures—animals, for example—who are not constitutional persons, so long as it respects constitutional rights in doing so. So at the point of viability, the state may claim a legitimate derivative interest that is independent of its detached interest in enforcing its collective conception of the sanctity of life.

Second, choosing the point of viability gives a pregnant woman, in most cases, ample opportunity to reflect upon and decide whether she believes it best and right to continue her pregnancy or to terminate it. Very few abortions are performed during the third trimester—only about .01 percent⁷²—and even fewer if we exclude emergency abortions necessary to save a mother's life, which almost no one wants to prohibit even near the end of pregnancy. It is true that a very few women—most of whom are very young women—are unaware of their pregnancy until it is nearly complete. But in almost all cases, a woman knows she is pregnant in good time to make a reflective decision before viability. That suggests that a state does not violate most women's right to choose by insisting on a decision before that point, and it also suggests an important reason why a state might properly so insist.

It is an almost universal conviction that abortion becomes progressively morally more problematic as a fetus develops towards the shape of infancy, as the difference between pregnancy and infancy becomes more a matter of location than development. That widespread conviction seems odd so long as we suppose that whether abortion is wrong depends only on whether a fetus is a person from the moment of conception. But the belief is compelling once we realize that abortion is wrong, when it is, because it

⁷¹ See Grobstein, *Science and the Unborn* at 54-55 (cited in note 37).

⁷² *Facts in Brief: Abortion in the United States* (Alan Guttmacher Institute, 1991). See also Stanley K. Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-83*, in Stanley K. Henshaw and Jennifer Van Vort, eds, *Abortion Services in the United States: Each State and Metropolitan Area, 1984-85* 23 (Alan Guttmacher Institute, 1988).

insults the sanctity of human life. The insult to that value is greater when the life destroyed is further advanced, when, as it were, the creative investment in that life is greater. Women who have a genuine opportunity to decide on abortion early in pregnancy, when the impact is much less, but who actually decide only near the end, may well be indifferent to the moral and social meaning of their act. Society has a right, if its members so decide, to protect its culture from that kind of indifference, so long as the means it chooses do not infringe the right of pregnant women to a reflective choice.

Taken together, these two answers provide, I believe, a persuasive explanation of why government is entitled to prohibit abortion, subject to certain exceptions, after the sixth month of pregnancy. But do they provide an answer to the question asked from the other direction? Why may government not prohibit abortion earlier? The first answer would not justify any much earlier date, because, as I said, the central nervous system is not sufficiently developed much before the end of twenty-six weeks of pregnancy to admit of pain.⁷³ But must that be decisive? The second answer does not depend on attributing interests to a fetus, and, by itself, seems an adequate justification of state power to prohibit abortion after a sufficiently long period. Would women not have a sufficient opportunity to exercise their right of autonomy if they were forbidden abortion after just five months? Four? Three?

Blackmun chose a point in pregnancy that he thought plainly late enough to give women a fair chance to exercise their right, in normal circumstances, and that was salient for two other reasons, each captured in the overall explanation I gave. As I said, viability seems, on the best developmental evidence, the earliest point at which a fetus might be thought to have interests of its own, and the point at which the natural development of a fetus is so far continued that deliberately waiting until after that point seems contemptuous of the inherent value of life. These three factors together indicate viability as the most appropriate point after which a state could properly assert its interests in protecting a fetus's interests, and in responsibility. Blackmun's decision should not be overruled. So important a decision should not be overruled, after nearly twenty years, unless it is clearly wrong, and his was not clearly wrong. On the contrary, the arguments for choosing viability as the key date remain impressive.

⁷³ See note 37.

But it is important to acknowledge that a different test, bringing the cut-off date forward by some period, would have been acceptable if it had afforded women enough time to exercise their right to terminate an unwanted pregnancy. Of course, the earlier the cut-off time, the more important it would be to provide realistic exceptions for reasons the mother could not reasonably have discovered earlier. Suppose that the Court had substituted for the fixed scheme of *Roe*, not another fixed scheme, but rather a constitutional standard drafted in terms of overall reasonableness, which the federal courts would enforce case-by-case. Such a standard might have provided, in effect, that any prohibition would be unconstitutional if it did not provide women a reasonable time to decide upon an abortion after discovering that they were pregnant, or after discovering medical information indicating defects in the fetus or an increased risk to the mother of pregnancy, or other facts pertinent to the impact of childbirth on their lives.

In the end, as Blackmun no doubt anticipated, the Court would have had to adopt more rigid standards that selected at least a *prima facie* point in pregnancy before which prohibition would be presumptively unconstitutional. But the Court might have developed those standards gradually, perhaps deciding, in the first instance, that any statute that forbade second-term abortions would be subject to strict scrutiny to see whether it contained the exceptions necessary to protect a woman's right to a reflective choice. That approach still would have struck down the Texas law in *Roe*. It would also strike down the equally strict laws that some states and Guam have recently adopted, each hoping to provide the lawsuit that will end *Roe*.

Would it make much practical difference if the Supreme Court now substituted such a case-by-case test for *Roe*'s rigid structure? A case-by-case test might not, in fact, much reduce legal abortion. In 1987, only ten percent of abortions took place in the second trimester,⁷⁴ and many of these were on medical or other grounds that would still be permitted in any legislation acceptable under the more flexible test I have described. If a more flexible test were adopted, publicity might bring home to more women the impor-

⁷⁴ The U.S. Bureau of the Census reports that ten percent of the 1,559,100 abortions performed in 1987 occurred at thirteen or more weeks gestational age. U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *The Statistical Abstract of the United States* 71 (111th ed 1991). Since about .01% of all abortions are performed after twenty-four weeks, see note 72 and accompanying text, it can be inferred that about 9.99% of the abortions performed in 1987 occurred in the second trimester.

tance of deciding and acting early. Medical developments in the technology of abortion might soon increase the percentage of very early abortions anyway. For instance, the abortion pill being developed in France, RU 486, which permits a safe abortion at home early in pregnancy, will allow pregnant women a more private method of abortion, if they decide and act in a timely way.⁷⁵ Of course, no statute that banned that pill would be constitutional, even under the more flexible standard.

I believe, as I said, that *Roe v Wade* should not be substantially changed. The line it draws is salient and effectively serves the legitimate state purpose of promoting a responsible attitude toward the intrinsic value of human life. But the most important line, as I said, is the line between that legitimate goal and the illegitimate goal of coercion. It will be disappointing, but not intolerable, if *Roe* is amended in some such way as I have been discussing. But it would be intolerable if *Roe* is wholly reversed, if the constitutional right of procreative autonomy is denied altogether. Some of you already think that recent appointments to the Court, and recent decisions by it, signal a dark age for the American constitutional adventure, that this symposium should have been convened as a wake, not as a celebration. I hope that your bleak judgment is premature. But it will be confirmed, spectacularly, if the Supreme Court declares that American citizens have no right to follow their own reflective convictions in the most personal, conscience-driven and religious decisions many of them will ever make.

⁷⁵ The RU 486 pill may in any case defuse the public controversy by reducing the need for abortion clinics that act as magnets for protesters, as in Wichita.