

‘LIFE’ IN THE BALANCE: JUDICIAL REVIEW OF ABORTION REGULATIONS

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“Life” in the Balance: Judicial Review of Abortion Regulations

Khiara M. Bridges*

Since the Supreme Court’s decision in Roe v. Wade, scholars have been preoccupied with the test that ought to be applied to abortion regulations. Debate has swirled around the question of whether laws that burden the abortion right should be reviewed with strict scrutiny, rational basis review, or some other multi-factor or categorical test and at what point during pregnancy these tests are appropriate. Moreover, since Planned Parenthood v. Casey, in which the Court replaced Roe’s trimester framework with the undue burden standard, commentators have questioned the propriety of this new test. This Article argues that the most important change from Roe to the present has not been the test that the Court has used to determine the constitutionality of abortion regulations, but rather the Court’s departure from the position that Roe took with regard to the moral status of the fetus. The Court in Roe either remained agnostic on the question of the fetus’s moral status (the tack that the majority proclaimed to take) or decided that the fetus was not an entity of moral value (the tack that some commentators proclaim was actually taken). In stark contrast, the present Court, as demonstrated by its opinion in Gonzales v. Carhart, appears to have decided that the fetus is a morally consequential entity — a “life.” Accordingly, this Article has four goals. First, it aims to elaborate the notion of “life” — conceptualized as a powerful socio-cultural idea that is not properly understood as equivalent to biological life, insofar as “life” has moral consequence and the protection and veneration of it is a moral imperative. Second, it aims to

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demonstrate that the undue burden standard is a balancing test, requiring courts to weigh governmental interests against individual liberties. Third, it aims to use the example of the undue burden standard to demonstrate the general problem with balancing tests in constitutional law and the need for a developed theory of governmental interests. Fourth and finally, it aims to show that the effectiveness of any balancing test designed to protect abortion rights — whether it is strict scrutiny, rational basis review, or the undue burden standard — depends on the elements that the Court plugs into the test. When the Court plugs “life” into a balancing test — that is, when the Court weighs the state’s interest in protecting fetal “life” against the woman’s liberty interest in obtaining an abortion — the test is guaranteed to protect the abortion right ineffectively.

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INTRODUCTION

Since the Supreme Court’s decision in *Roe v. Wade*,¹ which famously held that a woman enjoyed a fundamental right to terminate a pregnancy, many scholars have been preoccupied with the test that ought to be applied to abortion regulations. Debate has swirled around the question of whether restrictions on abortion should be reviewed with strict scrutiny, intermediate scrutiny, rational basis review, or some other multi-factor or categorical test and, moreover, at what point in pregnancy these tests are appropriate. Further, since *Planned Parenthood v. Casey*,² in which the Court replaced *Roe*’s trimester framework with the undue burden standard, commentators have questioned the propriety of this new test for determining the constitutionality of abortion regulations. These critics queried whether the standard is or ought to be a form of intermediate scrutiny, noted transformations in its application from case to case, argued that it has operated as nothing more than a rational basis review, and articulated methodologies for its use.

This Article contends that the most important change from *Roe* to the present has not been the test that the Court has used when reviewing abortion regulations, but rather the Court’s departure from the position that *Roe* took with regard to the moral status of the fetus. The Court in *Roe* either remained agnostic on the question of the fetus’s moral status (the tack that the majority proclaimed to take) or decided that the fetus was not an entity of moral value (the tack that some commentators proclaim was actually taken). At present, and as revealed by the Court’s decision in *Gonzales v. Carhart* (“*Carhart II*”),³ the Court appears to have decided that the fetus is a morally consequential entity of the highest degree — a “life.”⁴

“Life,” as used in this Article, is a powerful socio-cultural notion that is not properly recognized as synonymous with prosaic biological

¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

² *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 873-74 (1992).

³ *See Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 157 (2007).

⁴ This Article uses quotation marks around “life” when the term is used to signify the “life” that has moral, theological, or spiritual significance. Quotation marks are not used when the term is being used to signify the relatively morally neutral capacity that all living biological organisms possess. The important distinctions between these two types of life are discussed *infra* Part I.B.

life insofar as “life” has the profoundest of moral consequences. This Article argues that judicial treatment of the fetus as a “life” will defeat a woman’s interest in terminating a pregnancy under *all* balancing tests, including strict scrutiny. Essentially, the effectiveness of any balancing test — whether it is strict scrutiny, intermediate scrutiny, rational basis review, or the undue burden standard — depends on the elements that the Court plugs into the test. When the Court plugs “life” into the test and weighs the state’s interest in protecting fetal “life” against the woman’s liberty interest in obtaining an abortion, the test is guaranteed to be an ineffective protection of the abortion right.

The analysis proceeds in four parts. Part I gives a brief history of the Court’s articulation of the trimester framework in *Roe*, its replacement with the undue burden standard in *Casey*, and the wealth of attention scholars have given to the question of what test is most appropriate for adjudicating the constitutionality of abortion regulations. This Part then explores the Court’s use of the undue burden standard over its twenty-year tenure. It argues that the test has transformed over the years. While the Court has always used the standard to identify and strike down those regulations that operate as “substantial obstacles” in a woman’s path to an abortion, the test changed insofar as the standard now takes into account notions of fetal “life.” That is, *Casey* is not properly understood as having accepted the proposition that the fetus is a “life”; indeed, *Casey* rejected the opportunity to do so. Moreover, that rejection was reflected in the way that the Court used the undue burden standard, as the test was used to strike down the spousal notification provision of the Pennsylvania law at issue. Essentially, the Court held that the woman’s interest in obtaining an abortion outweighed the state’s interest in protecting the fetus — a holding that would be impossible if the fetus were conceptualized as a “life.” However, the Court’s most recent use of the undue burden standard in *Carhart II*, upholding a federal statute that proscribes a particular method of performing second and third trimester abortions, demonstrates a remarkable departure from *Roe*’s and *Casey*’s refusal to accept that proposition of fetal “life.” The vocabulary and the imagery that the Court uses when speaking of the fetus, as well as the reasoning deployed in arriving at the conclusion that the proscription of the abortion method at issue did not impose an undue burden on the abortion right, makes it fairly obvious that the Court proceeded from the assumption that the fetus is a morally-significant, profound, vulnerable “life.”

Part II investigates what kind of constitutional test the undue burden standard has demonstrated itself to be. Although some scholars argue that the undue burden standard is not a balancing test,

but rather an effects test wherein the reviewing court quantifies the burden that a regulation places on the right, this Part concludes otherwise. It understands the test as one that calls for a court to balance the woman’s right to terminate a pregnancy against the state’s interest in protecting the fetus. When, in any given instance, the state’s interest in protecting the fetus outweighs the woman’s right to terminate her pregnancy, an undue burden will not be found and the regulation will be upheld. Alternatively, when the woman’s right to terminate her pregnancy is found to outweigh the state’s interest in protecting fetal life in a given instance, an undue burden will be found and the regulation will be struck down as unconstitutional.

Having established the undue burden standard as a balancing test, Part III next turns to the general problem of balancing tests — that is, tests that are designed to balance individual rights and liberties against governmental interests. This Part explores the questions that have vexed scholars for decades: on what universal scale of values may governmental interests be weighed against individual rights and liberties? How may the Court arrive at the determination that a proffered governmental interest is or is not sufficiently weighty to defeat an individual right? This Part explores this issue in the context of scholarship criticizing the absence of a theory concerning what ought to constitute a compelling governmental interest sufficient to survive strict scrutiny. This Part puts the discussion about this lack of theory in conversation with the advent of fetal “life” and the protection thereof as state interests. This Part concludes that the protection of fetal “life” as a state interest underscores the need for a developed theory of governmental interests, compelling or otherwise.

Part IV argues that when the protection of fetal “life” is a state interest against which any individual right or liberty is weighed, it most assuredly will be deemed weightier than that against which it is balanced. *Essentially, fetal “life” confounds all balancing tests, from the undue burden standard to strict scrutiny.* “Life,” as culturally constructed, is such a weighty proposition — endowed, as it is, with spiritual and theological significance — that it necessarily outweighs any individual right. This Part contends that, for this reason and others, “life” must be extracted from the analysis. A brief conclusion follows.

I. ABORTION JURISPRUDENCE AND FETAL “LIFE”

A. *A Bit of Background: From Roe to Casey*

In 1973, the Court announced what was to be one of its most controversial, beloved, reviled, celebrated, and denounced decisions — *Roe v. Wade*.⁵ Justice Blackmun wrote the majority opinion, which held that the Due Process Clause of the Fourteenth Amendment was properly interpreted to provide women with a fundamental right to terminate a pregnancy,⁶ thus requiring courts to use strict scrutiny when reviewing regulations that restricted abortion.⁷ However, the state’s dual interests in protecting a woman’s health and protecting the prenatal life that she sustains were in tension with the abortion right.⁸ Thus, *Roe* erected a structure for determining when during a woman’s pregnancy those competing state interests become compelling and could legitimately prevail over the woman’s fundamental right.⁹ This was the trimester framework:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.

⁵ *Roe*, 410 U.S. at 153.

⁶ *Id.* (arguing that “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” supported the right to privacy, which encompassed a woman’s decision whether to undergo an abortion).

⁷ Although the Court never uses the phrase “strict scrutiny” when describing the level of scrutiny reviewing courts should use when evaluating abortion regulations, the Court calls the abortion right, and the right to privacy under which it is found, “fundamental” and asserts that it can be abridged only by “compelling” state interests — hallmarks of strict judicial scrutiny. *Id.* at 155; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 943-44 (3d ed. 2009) (explaining that the government cannot infringe on “fundamental rights . . . unless strict scrutiny is met; that is, the government’s action must be necessary to achieve a compelling purpose”).

⁸ See *Roe*, 410 U.S. at 155 (arguing that the abortion right “is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant”).

⁹ The Court argued that the state’s interest in protecting women’s health becomes compelling after the first trimester, when abortion entails more medical risks than enduring labor and childbirth. See *id.* at 163. Further, the Court argued that the state’s interest in protecting fetal life becomes compelling at the point of fetal viability, which occurred at the tail end of the second trimester, “because the fetus then presumably has the capability of meaningful life outside the mother’s womb.” *Id.* For a discussion of criticism about this particular announcement, see *infra* Part III.B.1.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.¹⁰

Roe's nineteen-year tenure as the law of the land was far from quiet. While the decision had its fair share of supporters, it was also vigorously critiqued. The loudest criticism from the academy was concerned with the question of whether the Constitution actually supported a fundamental right to an abortion.¹¹ Related to this was the question of what level of review was appropriate for laws that regulated abortion.¹² Disagreement about the answers to these questions was as passionate as people's feelings about abortion.

Moreover, *Roe* was constantly tested by state legislatures. Indeed, the Court heard several cases that sought to challenge, limit, or overrule the decision.¹³ However, it was not until *Casey* that *Roe* and

¹⁰ *Roe*, 410 U.S. at 164-65.

¹¹ See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973) ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure.").

¹² See, e.g., *id.* at 928 (disputing that abortion regulations require something more than a "baseline requirement of 'rationality'").

¹³ See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 522 (1989) (upholding a Missouri law prohibiting abortions from being performed in public facilities, prohibiting public employees from providing information regarding abortion, and increasing the cost of abortion by requiring viability testing of fetuses that are twenty weeks gestational age and older); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 764, 766 (1986) (striking down regulations requiring "informed consent" as well as the filing of reports regarding abortions conducted in the state that were to be made publicly available); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 435, 450 (1983) (invalidating "informed consent," waiting period, and hospitalization requirements); *Harris v. McRae*, 448 U.S. 297, 326-27 (1980) (upholding the Hyde Amendment, which prohibits the use of federal Medicaid funds for even "medically necessary" abortions — excepting abortions sought subsequent to incest or rape); *Bellotti v. Baird*, 443 U.S. 622, 640-41, 643-44 (1979) (upholding a regulation requiring unmarried, pregnant minors to obtain parental consent to their abortions or, alternatively, to demonstrate to a court during a

its trimester framework were officially laid to rest.¹⁴ While *Casey* reaffirmed *Roe*'s "essential holding,"¹⁵ it rejected *Roe*'s trimester framework and replaced it with a new analytic for evaluating the constitutionality of abortion regulations — the undue burden standard.¹⁶ The undue burden standard requires reviewing courts to determine whether a regulation places a "substantial obstacle" in a woman's path to an abortion prior to the viability of her fetus.¹⁷ Post-viability abortions remain subject to proscription provided that exceptions are made for abortions necessary to save the life or health of the woman.¹⁸ The standard represented a plurality of the Court's dissatisfaction with states' inability under the trimester framework to protect the fetal life sustained by the woman.¹⁹ The standard was

judicial bypass procedure that they are either mature enough to make the decision on their own or that abortion is in their best interests); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (upholding a Connecticut statute prohibiting the use of Medicaid funds for nontherapeutic abortions and finding that the prohibition, which effectively precluded the most indigent women from exercising their abortion rights, was consistent with the Court's decision in *Roe v. Wade*); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 54 (1976) (striking down regulations requiring spousal consent for married women's abortions and prohibiting saline amniocentesis, which was the most widely used method of performing second trimester abortions at the time).

¹⁴ Part of the reason why the Court professed to uphold the "essential holding" of *Roe* was precisely because *Roe*'s reign as law of the land had been far from quiet, and "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 867 (1992).

¹⁵ *Id.* at 846.

¹⁶ *Id.* at 876. A finding that a regulation is an "undue burden" on the abortion right simply means that the law unconstitutionally places a "substantial obstacle" in the woman's path to an abortion. *Id.* at 877. Unfortunately, the decision offered very little guidance to lower courts as to how they ought to arrive at the conclusion that a law does or does not amount to a "substantial obstacle." See Gillian K. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2027 (1994) (noting *Casey*'s "failure to provide a systematic methodology by which to apply" the undue burden standard); Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 323 (2006) (noting that the plurality "stumbled in its efforts to adequately clarify the contours of the undue burden standard").

¹⁷ *Casey*, 505 U.S. at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.").

¹⁸ *Id.* at 846 (confirming the necessity of a life and health exception for post-viability abortions). However, the principle that abortion regulations must contain exceptions to protect women's health is weakened by *Carhart II*, which upheld the federal PBA despite its lack of a health exception. See discussion *infra* Part I.B.4.

¹⁹ *Casey*, 505 U.S. at 873 (finding that "a necessary reconciliation of the liberty of

designed to enable states to demonstrate respect for fetal life — and encourage women to demonstrate this respect by carrying the fetus to term — at all stages of a woman’s pregnancy.²⁰

Casey and the undue burden standard’s tenure as the law of the land, like *Roe* and the trimester framework, drew forth much controversy and criticism.²¹ Moreover, while much disapproval comes from the political right,²² a fair share of disapproval comes from the political left, who are critical of the impotence that the undue burden standard has demonstrated as protection of a woman’s right to terminate a pregnancy.²³ Indeed, the only abortion regulation that the Court has used the undue burden standard to strike down was the spousal notification provision at issue in *Casey*.²⁴

Although the undue burden standard, when first articulated, was never a particularly tough defender of the abortion right (by design or

the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life”).

²⁰ See *id.* (noting that “the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child”).

²¹ See Wharton et al., *supra* note 16, at 320-21 (noting that the *Casey* has been challenged quite vigorously and that “[i]n the first four months of 2006 alone, legislators in fourteen states proposed measures to ban virtually all abortion procedures, and the South Dakota legislature passed, but voters rejected, the nation’s first post-*Casey* abortion ban”).

²² See, e.g., Stenberg v. Carhart (*Carhart I*), 530 U.S. 914, 954-56 (2003) (Scalia, J., dissenting) (arguing that what qualifies as an “undue burden” “is a value judgment” that “can not be demonstrated true or false by factual inquiry or legal reasoning,” and concluding, twice, that “*Casey* must be overruled”); *Casey*, 505 U.S. at 985-87 (Scalia, J., dissenting) (arguing that the undue burden standard is “unprincipled in origin,” “hopelessly unworkable in practice,” and “ultimately standardless”).

²³ See, e.g., Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women’s Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 291 (2010) (arguing that the undue burden test “has fostered extensive encroachments on women’s personal privacy” and that *Casey* “opened the door to physical, familial, and spiritual invasions of women’s privacy that serve little purpose but public shaming and humiliation”); Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 471 (2009) (arguing that the “undue burden standard has proven to be far less protective of abortion rights than the *Roe* standard”).

²⁴ In fairness, the Court did use the undue burden standard to strike down a Nebraska “partial-birth” abortion ban that was quite similar to the federal version of the ban at issue in *Carhart II*. See *Carhart I*, 530 U.S. at 945-46 (finding the Nebraska statute unconstitutional). However, *Carhart II* arguably represents the overruling of *Carhart I sub silentio*. If so, it remains true that the only abortion regulation that the Court has used the undue burden standard to strike down is the spousal notification provision at issue in *Casey*.

by happenstance²⁵), it is woefully anemic in its present incarnation. Specifically, the Court has built notions of fetal “life” into the standard. The next subpart explores this concept of fetal “life” and explains how it differs from biological life. This Part goes on to trace the Court’s conceptualization of the fetus’s moral status in *Roe*, *Casey*, and *Stenberg v. Carhart* [“*Carhart I*”]. Part I concludes by demonstrating that the Court in *Carhart II* conceptualized the fetus as a representation of “life” and incorporated that understanding of the fetus’s moral status into the undue burden standard — a striking departure from the Court’s earlier understanding of the fetus and the standard.

B. On “Life”

When a person asserts that abortion is wrong because the fetus is “a life,” the “life” referenced needs no definition: upon hearing the signifier, the hearer knows that what is being signified is distinct from biological life and dutifully conjures up notions of a precious, sacred²⁶ entity that must be revered, respected, and protected.²⁷ “Life” is that to which esteemed philosopher and legal academic Ronald Dworkin refers when he writes: “[H]uman life has an intrinsic, innate value, that human life is sacred just in itself; and that the sacred nature of a human life begins when its biological life begins, even before the

²⁵ Linda Wharton, Susan Frietsche, and Kathryn Kolbert, who represented the plaintiff-reproductive health providers in *Casey*, have argued that the undue burden standard was actually intended to be a tough defender of the abortion right; however, its misapplication by lower courts has rendered it frail. See Wharton et al., *supra* note 16, at 319, 323 (arguing that the standard was meant to offer “meaningful protection” of the abortion right and claiming that the plurality’s “passionate discussion of the benefits that reproductive liberty had bestowed upon generations of women and their prospects for full equality” buttress the notion that the plurality intended that the standard provide substantial defense of the right); *id.* at 255 (arguing that lower courts “have not been faithful to *Casey*’s promise”).

²⁶ This Article insists that “life” ought to be understood as a secular concept, although its origins may be in religion — analogous to the way that the assertion that the fetus is a morally consequential entity ought to be understood as a secular assertion, although many religions share the same view. See discussion *infra* note 188.

²⁷ Borgmann has helpfully distinguished “thin” and “thick” conceptions of life. See Caitlin E. Borgmann, *The Meaning of Life: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 557-58 (2009). She defines the “thin” conception of life as referencing “the fact that a blastocyst, or embryo, or fetus, is a human organism that is in the process of developing into a full person.” *Id.* at 592. Counterpoised to this is the “thick” conception of life — a life that “carries a moral urgency and legitimacy.” *Id.* at 597. Borgmann’s “thick” life corresponds to the “life” to which this Article refers.

creature whose life it is has movement or sensation or interests or rights of its own."²⁸ "Life" is that to which people refer when they describe life as a "supreme value"; it is that which is invoked when people note the "sanctity of life," the "dignity of life," the "inherent value" of life, the "intrinsic goodness" of life, "the intrinsic worth" of life, the "infinite value" of life, and the "inviolability of life."²⁹

Yet, "life" acquires its power because it has no precise definition.³⁰ It is an abstraction without content; it means *everything* that those who evoke it desire because it denotes nothing with precision.³¹ As explained by historian Barbara Duden, "*Life* itself is not an amoeba word, since it does not have any application as a technical term in scientific discourse. Unlike *zygote* and *fetus*, it does not stem from the language of a disciplinary thought collective. . . . [T]he semantic trap into which the use of 'a life' leads is not due primarily to its ambiguity but to its vapidness."³²

Any thorough account of "life" must mention its vulnerability. "Life" is easily undervalued, frequently misrecognized, and cavalierly destroyed; accordingly, it is in need of constant protection.³³ Indeed,

²⁸ RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 11 (1993).

²⁹ GEOFFREY G. DRUTCHAS, *IS LIFE SACRED?* 3 (1998).

³⁰ Many have attempted to define "life" with precision, however. See, e.g., Stephen C. Hicks, *The Right to Life in Law: The Embryo and Fetus, the Body and Soul, the Family and Society*, 19 FLA. ST. U. L. REV. 805, 826 (1992) (arguing that if "[life] cannot refer to the species and does not refer to living beings, or to living a life, then it may refer to God, the soul, or the spirit").

³¹ Carol Sanger has done illuminating work tracing the popularization of "life" within cultural discourse. See generally Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 802 (2006) (observing the work that the administration of George W. Bush accomplished in disseminating notions of "life" through its campaign to create a "culture of life" in the United States).

³² BARBARA DUDEN, *DISEMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN* 75 (1993); cf. Borgmann, *supra* note 27, at 599 (noting the "vague" nature of the signifier "life" and describing it as a "code word"); *id.* at 586 (describing "life" as "slippery"). The "slipperiness" of life, as a word, is quite substantial. Thus, when Bristol Palin titles her autobiography *Not Afraid of Life*, it is unclear whether she means that she is not afraid of life in the sense of the series of frequently unexpected events that occur to a person from birth to death. Alternatively, she may mean that she is not afraid of life in the sense of "life" — the object of her unplanned pregnancy that she carried to term while still a teenager and while her mother was the running mate of Senator John McCain during his 2008 Presidential bid: "When the doctor laid Tripp in my arms, I knew this baby was not a mistake. Having sex outside of marriage was the mistake. But this baby? He was — and is — a blessing." BRISTOL PALIN, *NOT AFRAID OF LIFE: MY JOURNEY SO FAR* 153 (2011).

³³ See, e.g., 151 CONG. REC. S878-02, S880 (daily ed. Feb. 2, 2005) (statement of President George W. Bush) ("Because a society is measured by how it treats the weak

part of the reason why “life” cannot be spoken about dispassionately is because the protection of it — the work of convincing, or compelling, others to defer to it — frequently means that the “liberty” of those who do not recognize or believe in “life” is constrained.³⁴ The contest over abortion is frequently fought on this terrain.

Finally, it is important to note that “life” is distinct from “person”; one may believe that the fetus is not a “person” in the constitutional sense, yet remain convinced that a fetus is a “life” bearing the weightiest of moral statuses.³⁵ Due to the profound vulnerability of the fetus, the gravity of its moral status as a non-“person,” a “life,” may be thought to exceed the gravity of the moral status of the not always vulnerable “person.” Indeed, *Roe* maintained the distinction between fetal personhood and fetal moral status, arguing that the fetus is not a “person” within the meaning of the Constitution, while shortly thereafter arguing that it need not decide the difficult question of when “life” begins.³⁶

The next sections trace the Court’s understanding of the fetus’s moral consequence in *Roe*, *Casey*, *Carhart I*, and *Carhart II*. The discussion should demonstrate that, while the Court did not apprehend the fetus as a “life” in the first three cases, *Carhart II* represents a dramatic departure from this precedent. Justice Kennedy’s majority opinion reveals the Court’s unapologetic acceptance of fetal “life.” Moreover, *Carhart II*’s apparent and unmistakable appreciation of the fetus as “life” has profound consequences for the undue burden standard, an argument that Part II begins to make.

1. The Fetus in *Roe*

The Court in *Roe* went to great lengths to remain agnostic on the question of the fetus’s moral status. While it definitively answered the

and vulnerable, we must strive to build a culture of life.”); George W. Bush, U.S. President, Remarks at the Dedication of the Pope John Paul II Cultural Center, (Mar. 22, 2001), in 1 PUB. PAPERS 284 (“In the culture of life, we must make room for the stranger. We must comfort the sick. We must care for the aged. We must welcome the immigrant. We must teach our children to be gentle with one another. *We must defend in love the innocent child waiting to be born.*”) (emphasis added).

³⁴ Jennifer M. Miller, *Understanding Fetal Pain: How Changed Circumstances Demand a Legal Response*, 40 CUMB. L. REV. 463, 494 (2006) (“If we recognize a fetus as a ‘life,’ then the privacy right of the mother is eliminated from the equation, and the fetus is worthy of protection.”).

³⁵ *Id.* (noting that “a fetus, therefore, might not be a person in a formalistic sense, but it is still a human being”).

³⁶ *Roe v. Wade*, 410 U.S. 113, 159 (1973) (noting that the Court does not need to address the question of where life begins).

question (in the negative) of whether the fetus was a “person” under the United States Constitution,³⁷ it did not similarly answer the question of whether the fetus is a moral entity deserving of some manner of deference. The Court professed not to answer this question, attempting to create an abortion jurisprudence around an agnosticism as to the fetus’s moral status.³⁸

Roe owes much of its length to the Court’s history of thought concerning the fetus³⁹ — a history that leads the Court to conclude that the fetus’s moral status has been, since time immemorial, the subject of much debate and disagreement. In the face of thousands of years marked by the failure of a moral consensus concerning the fetus to develop, the Court refuses to ensconce one particular version of fetal moral ontology into American constitutional law. The corollary to this refusal is the Court forbidding individual states from ensconcing one version into state law.⁴⁰ Hence, we arrive at the Court’s eloquent attestation of agnosticism: “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”⁴¹

However, some argue that the Court in *Roe* protested too much about its desire not to answer the question about the fetus’s moral status. These scholars contend that it did just that in prohibiting states from proscribing abortion prior to fetal viability. For example, Michael Sandel argues that, despite *Roe*’s protestations that it was being neutral with respect to the fetus’s moral status, it implicitly decided that the fetus was not an entity of moral consequence when it interpreted the Constitution to provide for a right to an abortion.⁴² He contends that,

³⁷ *Id.* at 158 (stating that the Court is persuaded that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”).

³⁸ For a critique of the professed agnosticism of *Roe* and the more general position that the constitutionality of abortion can be adjudicated without determining the moral status of the fetus, see Borgmann, *supra* note 27, at 555-56 (concluding that the moral question of the fetus must be answered in order to permit abortion).

³⁹ *Roe*, 410 U.S. at 130-47 (discussing the wide divergence of thinking about the fetus throughout history and noting the absence of a moral consensus in the U.S. on the issue at the time of the decision).

⁴⁰ *Id.* at 162 (“[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”).

⁴¹ *Id.* at 159.

⁴² See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 532 (1989) (arguing that the Court did not

just as one has tacitly decided that the slave is not a “person” in the constitutional sense when one permits slavery, analogously, one tacitly decides that the fetus is not a morally-consequential entity when one permits abortion.⁴³ He concludes by stating the following: “That the Court’s decision in *Roe* presupposes a particular answer to the question it purports to bracket is no argument against its decision, only an argument against its claim to have bracketed the controversial question of when life begins. It does not replace Texas’s theory of life with a neutral stance, but with a different theory of its own.”⁴⁴

If Sandel and likeminded scholars⁴⁵ are correct and *Roe* held, albeit implicitly, that the fetus is not a morally consequential entity, then *Carhart II* represents the most dramatic of departures from this holding. This shift occurs because *Carhart II* not only holds (again, implicitly) that the fetus is a morally consequential entity, but also regards the fetus as a morally consequential entity of the highest degree — a “life.”

2. The Fetus in *Casey*

Casey represents the dissatisfaction that a plurality of the Court had with the trimester framework and the way that it functioned to prohibit the state from “show[ing] its concern for the life of the unborn”⁴⁶ in the earlier stages of a woman’s pregnancy. Indeed, *Casey* is much more sympathetic than *Roe* to state legislators who believe in

“bracket” the question of when life begins, but rather implicitly answered that it did not begin prior to viability).

⁴³ See *id.* (making this analogy).

⁴⁴ *Id.*

⁴⁵ See, e.g., DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS 14 (2008) (“When life begins and when it ends must necessarily be decided as a matter of constitutional interpretation, because basic guarantees depend on it However much the Court might want to avoid the question, or appear not to have to answer it, the definition of life, at least at the margins, is a subject necessarily inherent in the meaning of certain constitutional guarantees.”); John T. Noonan, *Posner’s Problematics*, 111 HARV. L. REV. 1768, 1772 n.24 (1998) (arguing that the Court’s “professed agnosticism as to when life begins . . . is not a morally neutral position; it is a rejection of a fundamental postulate of the law the decision holds unconstitutional”); see also Borgmann, *supra* note 27, at 556 (“By purporting to leave the question for each individual to decide, the Court has not dodged the question but rather has effectively rejected a belief in fetal personhood, for if an embryo or fetus is a person, abortions must be prohibited, and women who obtain abortions are as culpable as the doctors who perform them.”). It is important to note that Borgmann conflates fetal personhood and the moral status of the fetus. In contrast, this Article distinguishes the two concepts. See discussion *supra* Part I.B.

⁴⁶ *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 869 (1992).

the moral consequence of the fetus and believe abortion to be a moral wrong that ought to be avoided at all costs. While *Roe* silenced those legislators and tied their hands during the first two trimesters, *Casey* made explicit provision for them to speak to the woman and attempt to convince her that the decision that she endeavored to effect was a grave error.

Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. The Constitution does not forbid a State or city . . . from expressing a preference for normal childbirth. . . . [This is] the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.⁴⁷

While *Casey* is sympathetic to legislatures that subscribe to notions of the moral consequence of the fetus, and even to fetal “life,” the Court itself does not appear to be committed to those same ideas. The language that the Court uses when speaking about the fetus is far from evocative or passionate⁴⁸ — much unlike the Court’s language in *Carhart II*.⁴⁹ Similarly, *Casey* uses no suggestive images — again, much unlike the Court in *Carhart II*. The *Casey* Court appears to give respectful deference to those who may be passionate about the fetus and the “life” that it is believed to embody, while refusing to indicate whether or not it shares those beliefs.⁵⁰ The Court presents itself as a

⁴⁷ *Id.* at 872-73 (citations omitted).

⁴⁸ Arguably, the most intense language used in the opinion concerns the vulnerability of the Court’s legitimacy should it not honor *stare decisis* in the case before it. *See id.* (“A willing breach of [the promise to remain steadfast] would be nothing less than a breach of faith”); *id.* at 868 (“Like the character of an individual, the legitimacy of the Court must be earned over time The Court’s concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.”).

⁴⁹ *See* discussion *infra* Part I.B.4.

⁵⁰ *See Casey*, 505 U.S. at 852 (stating that abortion is “an act fraught with consequences for others,” including “society[,] which must confront the knowledge that these procedures exist, procedures some deem short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted”).

neutral arbiter called upon to broker a peace between warring factions, declining to say whose side it thinks should win.⁵¹

One criticism that could be levied at this stage in the argument is to observe that the Court in *Casey* used the newly established undue burden standard to uphold four out of five provisions of the Pennsylvania regulation under review. Does this holding not evidence a Court that has accepted the fetus as a “life” and, consequently, is partial to protecting it? This question must be answered in the negative. The Court in *Casey*, undoubtedly, is partial to allowing opponents of a woman’s decision to terminate her pregnancy the opportunity to present their views. However, this permission is not granted because the Court necessarily subscribes to those views and wields the undue burden standard as a tool for vindicating them.

The provisions of the Pennsylvania law that were held to be constitutional and that arguably evidenced a Court convinced of fetal “life” are the parental consent requirements for minors⁵² and the general informed consent requirements obliging women to hear specific information (regarding the adoption alternative, the availability of public assistance for indigent mothers, fathers’ child support responsibilities, and the availability of state-authored published materials describing the fetus).⁵³ The parental consent provision required that unemancipated minors obtain the consent of a parent or guardian or, alternatively, demonstrate to a court pursuant to a judicial bypass procedure that either she is mature enough to make the abortion decision on her own or that the abortion is in her best interests.⁵⁴ It is true that a Court subscribing to the fetus as “life” might uphold a parental consent requirement such as this, understanding it as another useful obstacle to put in the path to an abortion — an obstacle that may function as an absolute barrier to abortion — and, in so doing, save the “life” of the fetus. But, the Court

⁵¹ Indeed, the Court expressly describes itself as a peacemaker. *See id.* at 867 (describing the task at hand as interpreting the Constitution in such a way as to bring “the contending sides of a national controversy to end their national division”).

⁵² *Id.* at 899-900.

⁵³ *Id.* at 881. The other sections of the Pennsylvania law that were upheld in *Casey* were a recordkeeping and reporting requirement (excepting a provision that was inconsistent with the Court’s invalidation of the spousal notification requirement) as well as a definition of those events that qualified as a “medical emergency,” thereby making inapplicable the provisions requiring general informed consent and parental consent. *Id.* at 880, 901. The fifth provision of the Pennsylvania law at issue, the spousal notification requirement, was struck down as an undue burden on the abortion right. *Id.* at 898.

⁵⁴ *Id.* at 899.

in *Casey* does not understand the requirement in this way (at least not ostensibly so). Again, the Court’s discussion of the provision’s constitutionality is notably devoid of a vocabulary demonstrating a reverence and awe of the “life” that might be saved subsequent to a minor’s consultation with an adult. Although it does nod to the “values and moral or religious principles”⁵⁵ of the minor’s family, it simply looks to precedent and finds the Pennsylvania regulation consistent with it.⁵⁶

Similarly, it is true that a Court subscribing to the fetus as “life” might uphold the general informed consent requirements found constitutional in *Casey*, understanding them as an obstacle that may function to save the “life” of the fetus. But, again, this is not how the Court talks about the Pennsylvania regulation. Instead, the discussion of the law is consistent with a Court that feels that those convinced of fetal “life” were illegitimately and unfairly silenced under the *Roe* framework and is now committed to allowing them an opportunity to speak — even if their speech is designed to convince a woman to continue her pregnancy.⁵⁷ Like the disinterested mediator that it takes itself to be, the Court does not show its cards on how it, if asked, would answer the question of the fetus’s moral status.

This discussion does not argue that the Court’s disinterest translates into a willingness to allow the state convinced of fetal “life” to say *anything* to the woman. The Court notes that the materials that Pennsylvania produced relate to abortion’s “consequences to the fetus”⁵⁸; it notes that the materials, which explore “fetal development,”

⁵⁵ *Id.* at 900.

⁵⁶ *Id.* at 899. Much scholarship has focused on the negative effects occasioned by parental involvement statutes — specifically the requirement that pregnant minors seek permission to obtain an abortion from a court if they cannot obtain permission from their parents. See, e.g., Khiara M. Bridges, *An Anthropological Meditation on Ex Parte Anonymous: A Judicial Bypass Procedure for a Minor’s Abortion*, 94 CALIF. L. REV. 215, 241-42 (2006) (arguing that judges assigned the task to grant or deny a judicial waiver of parental consent requirements inevitably incorporate cultural assumptions about gender, pregnancy, age, and emotion into their “readings” of a petitioning minor’s testimony — an incorporation that has detrimental consequences for minors whose subjective experiences are inconsistent with those cultural assumptions); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 418 (2009) (“[B]ypass hearings serve less to evaluate the quality of a young woman’s decision than to punish her for making it. The hearings provide an opportunity to inflict a kind of legal harm — harm by process — on young women seeking to abort.”).

⁵⁷ *Casey*, 505 U.S. at 883 (noting that the information that the state gives women via the informed consent process may express the state’s “preference for childbirth over abortion”).

⁵⁸ *Id.* at 882.

are “truthful and not misleading”⁵⁹ and are designed to force the woman to consider the “effect on the fetus.”⁶⁰ Notably, the materials upheld say nothing explicit about the state’s views on the fetus’s moral status. The information that Pennsylvania sought to give to women might have caused some women to forego abortion because they became convinced that the physical capacities possessed by their fetus made it more like an infant than not, thereby making their abortion more like infanticide than not. However, the information that Pennsylvania sought to give women did not endeavor to accomplish this same aim by expressly arguing that the fetus is a “life” and that abortion is the immoral extermination of this “life.” Given *Casey*’s description of the materials that it held to be constitutional, and given its explicit directive that the materials be “truthful and nonmisleading” in order to pass constitutional muster, it is far from obvious that the *Casey* Court would reach the same conclusion about materials explicitly avowing that the fetus is a “life.”⁶¹ That is, *Casey* offered an

⁵⁹ *Id.* at 882-83.

⁶⁰ *Id.* at 883; *see also id.* at 882 (overruling the holdings in *Akron I* and *Thornburgh* because they found a “constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure . . . and the ‘probable gestational age’ of the fetus”).

⁶¹ This is to argue that *Casey* says nothing about the constitutionality of the “new” brand of informed consent to abortion statutes that attempt to dissuade women from their decision to terminate their pregnancies by presenting as fact specific arguments about the fetus’s moral status. *See, e.g.*, N.D. CENT. CODE § 14-02.1-02 (2010) (requiring that women be told as part of the informed consent process that their abortion will “terminate the life of a whole, separate, unique, living human being”); S.D. CODIFIED LAWS § 34-23A-10.1 (2010) (same). These laws are problematic because of the moral coercion they attempt to accomplish under the guise of respecting women’s autonomy as rational decisionmakers. *See* Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 27 (2008) (noting the “inappropriate emotional influence” that the “new” informed consent statutes can have); *cf.* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 1010-11 (2009) (“[T]he mandatory morals lecture discredits a woman’s ability to make adult decisions by assuming she has not adequately thought through the moral repercussions and cannot do so without state intervention. In other words, the insult to agency is not that the state will succeed in changing the woman’s mind, but the very fact that it tries.”). There is a serious question as to whether the information given qualifies as “truthful and nonmisleading.” *See* Blumenthal, *supra*, at 27 (noting that the information given under the “new” informed consent statute might be misleading because they take “advantage of emotional influence to bias an individual’s decision away from the decision that would be made in a non-emotional, fully informed state”); Corbin, *supra*, at 1008-11 (arguing that the information states attempt to give women under the “new” informed consent statutes is frequently “misleading, if not inaccurate”).

undue burden standard that would give those certain of fetal “life” an opportunity to speak, not an opportunity to make moral arguments. However, it may be unlikely that a Court convinced of fetal “life” would prohibit states from attempting to convince pregnant women that they carry “life” and ought not to terminate it.

The Court also upheld the Pennsylvania informed consent regulation’s requirement of a twenty-four hour waiting period.⁶² Again, *Casey*’s discussion of the provision hardly evidences a Court committed to protecting fetal “life.” The Court concedes that the waiting period may have the effect of “protecting the life of the unborn” by dissuading women from undergoing abortion.⁶³ But, this protection is a consequence of the woman having had time to reflect on the physical capacities that her fetus possesses, the possibility of giving the infant up for adoption, her eligibility for state assistance for indigent mothers if she carried the pregnancy to term, and the child support obligations that her fetus-cum-infant’s father has to provide⁶⁴ — not because the waiting period makes extremely difficult or downright impossible a woman’s attempt to effectuate her decision to abort. The Court, blissfully unaware that it is writing the plurality’s class privilege into constitutional law, goes to some length to deny that the waiting period would have the practical effect of making abortion substantially more difficult for *anybody*.⁶⁵ This is not a Court motivated by a moral imperative to save fetal “life”; this is a Court that is blind to the fact that there is “another world out there”⁶⁶ in which

⁶² *Casey*, 505 U.S. at 887.

⁶³ *Id.* at 885.

⁶⁴ *Id.* (noting that the waiting period allows the woman’s decision to be more “informed and deliberate” as a “period of reflection” will follow the woman’s receipt of information encouraging her to carry the pregnancy to term).

⁶⁵ *Id.* at 886-87 (disagreeing with the district court’s finding that the waiting period must be struck down because it will be “particularly burdensome” on some groups of women, noting that “[a] particular burden is not of necessity a substantial obstacle,” and denying that the waiting period is a substantial obstacle for even those women who experience it as “particularly burdensome”). Of course, the district court did not know that the magic words that would signal unconstitutionality were “substantial obstacle,” as it handed down its findings on the effect that the waiting period would have on indigent women well before the Court would make a finding of a “substantial obstacle” synonymous with unconstitutionality.

⁶⁶ *Harris v. McRae*, 448 U.S. 297, 348-49 (1980) (Blackmun, J., dissenting) (writing that the Court’s refusal to strike down the Hyde Amendment shows that “there truly is another world out there, the existence of which the Court . . . either chooses to ignore or fears to recognize”) (quotations omitted).

the increase in costs occasioned by a twenty-four hour waiting period are experienced not as “slight,”⁶⁷ but rather as tragic.

The most telling evidence that the Court in *Casey* does not wield the undue burden standard as a tool for effecting a moral imperative to save fetal “life” at all costs is the fact that *Casey* struck down Pennsylvania’s spousal notification provision, a provision that the Court notes might have saved fetal “life” at the expense of the autonomy of women in abusive relationships with their male partners.⁶⁸ If the undue burden standard is a balancing test, which this Article argues in Part II, then the Court found that the abortion right of the woman involved in a relationship marred by domestic violence outweighed the state’s interest in protecting prenatal life. This result is impossible if the prenatal life is taken to be “life” since “life,” by virtue of its profundity and vulnerability, functions to outweigh anything against which it is balanced.

The Court in *Casey*, like the Court in *Roe*, did not conceptualize the fetus as “life.” This judicial appreciation of the fetus continues in *Carhart I*, but it is abandoned quite dramatically in *Carhart II*. The discussion of *Carhart I* below should bring into greater relief just how much of a departure *Carhart II* is from the Court’s pre-2007 jurisprudence of fetal life.

3. The Fetus in *Carhart I*

In *Carhart I*, the Court was called upon to determine the constitutionality of a Nebraska statute that criminalized the dilation and extraction abortion procedure, or D&X.⁶⁹ The Court struck down the regulation because it lacked a health exception and because the language of the law could also be read to proscribe the most commonly-used method of performing second and third trimester abortions (dilation and evacuation, or standard D&E).⁷⁰

Justice Breyer’s majority opinion is consistent with *Casey*’s directive that the Court ought to be a dispassionate arbiter — the broker of a

⁶⁷ *Casey*, 505 U.S. at 901.

⁶⁸ *Id.* at 888-95 (citing the lower courts, amici briefs, and other studies demonstrating that the spousal notification provision would prevent women in violent relationships with their husbands from obtaining the abortion they desire).

⁶⁹ *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 914 (2003). During the D&X procedure, which is interchangeable with the intact dilation and extraction procedure (“intact D&E”), the physician removes the fetus largely intact from the uterus. *Id.* at 927-28. The D&X is to be counterpoised to the standard D&E procedure, during which the physician dismembers the fetus as it is removed from the uterus. *Id.* at 924-26.

⁷⁰ *Id.* at 930.

compromise — in the nation’s war between those who support abortion rights and those who abhor them.⁷¹ The opinion begins with a conciliatory overture, giving voice to the standpoints of both sides of the abortion debate: “Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity [and] depriv[e] them of equal liberty. . . .”⁷² Like *Casey*, the Court takes itself to be the institution that must strike the compromise between these (seemingly) fundamentally incompatible worldviews. It declares that it only strikes down the law after it has “tak[en] account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution’s guarantees of fundamental liberty.”⁷³

Like *Casey*, the Court appears sympathetic to those who believe in fetal “life.”⁷⁴ However, consistent with *Casey*, and as expected of a Court that takes itself to be a mediator between two sides engaged in a pitched war, it does not itself appear to be committed to those same ideas.⁷⁵ Nor does it appear to be committed to a position that denies that the fetus, which the Court refers to as “potential human life,”⁷⁶ has any moral consequence. In fact, the Court appears ambivalent about the fetus’s moral status, vacillating between conceptualizing the fetus as morally analogous to an infant on the one hand and morally analogous to any living, biological organism on the other. Indeed, in the same section that describes the fetus as being composed of “friable tissue” that is not “easily broken” and must be subject to

⁷¹ In his dissent, Justice Scalia seems to rejoice in the seemingly apparent fact that *Casey* and the undue burden standard have been unable to broker a truce between both sides of the abortion debate. See *id.* at 955-56 (Scalia, J., dissenting) (noting, because he was “in an I-told-you-so mood,” his previous prediction in his dissent in *Casey* that the decision would be unable to be an effective compromise).

⁷² *Id.* at 920 (majority opinion).

⁷³ *Id.* at 920-21.

⁷⁴ It notes, for example, that its description of the procedure at issue in the case may be “clinically cold or callous to some, perhaps horrifying to others.” *Id.* at 923.

⁷⁵ And in that lack of commitment to fetal “life,” the Court may be accused of disbelieving the existence of fetal “life.” Such a result is expected when the conflict is constructed as a Manichean one within which there is no middle ground.

⁷⁶ *Carhart I*, 530 U.S. at 923; see also *id.* at 930 (referring to the “potentiality of human life”).

“dismemberment or other destructive procedures,” the fetus is also described as moving through, not the “vagina,” but the “birth canal.”⁷⁷

The majority’s hesitant treatment of the fetus stands in relatively stark contrast to the way that other Justices would describe it. Consider Justice Scalia, who appears committed to the fetus’s *intense* moral consequence. In his dissent, Scalia refers to the fetus as “half-born posterity,”⁷⁸ the procedure at issue as a “live-birth abortion” that would “destroy[] the child,”⁷⁹ and the law that would proscribe the procedure as “humane” and “anti-barbarian.”⁸⁰ Yet, Scalia’s commitment to the fetus is more extensively (and dramatically) articulated by Justice Kennedy. Indeed, Kennedy plainly formulates the abortion debate and the views that may be held about the fetus as Manichean, and he interprets *Casey* as allowing states to do what is “right”: “States may take sides in the abortion debate and come down on the side of life, even life in the unborn.”⁸¹ For Kennedy, the life that the fetus embodies possesses a “sanctity”⁸²; indeed, it has an “intrinsic value” that many “decent and civilized people” recognize.⁸³ Although there are those who will be “insensitive, even disdainful,”⁸⁴ to it, the fetus is nevertheless entitled to “dignity and respect.”⁸⁵ Which is to say, in Kennedy’s opinion, the fetus is clearly a “life” — profound, sacred, vulnerable, and desperately in need of protection. In *Carhart II*, Justice Kennedy convinces four other Justices to agree with him and his conceptualization of “life,” as he writes the majority opinion in that discourse-changing decision.

4. “Life” in *Carhart II*

As noted above, *Carhart II* upheld the federal Partial Birth Abortion Ban Act (“PBA”), which criminalized the D&X (or intact D&E) technique of performing second- and third-trimester abortions.⁸⁶ The Court upheld the statute, despite its lack of a health exception⁸⁷ (and

⁷⁷ *Id.* at 925.

⁷⁸ *Id.* at 953 (Scalia, J., dissenting).

⁷⁹ *Id.* at 954.

⁸⁰ *Id.*

⁸¹ *Id.* at 961 (Kennedy, J., dissenting).

⁸² *Id.* at 965.

⁸³ *Id.* at 979.

⁸⁴ *Id.* at 961.

⁸⁵ *Id.* at 963.

⁸⁶ For an explanation of the procedure and its relationship to standard D&E, see *supra* note 69.

⁸⁷ See *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 162-63 (2007) (upholding

despite the fact that the Court had struck down just four years earlier a similar bill in *Carhart I*), on the theory that it furthered the government’s interest in “protecting the life of the fetus that may become a child”⁸⁸ — a legitimate governmental pursuit per *Casey*’s explicit directive.⁸⁹

Had the ban functioned to substantially constrain a woman’s ability to terminate her pregnancy during her second trimester (prior to fetal viability) or terminate a pregnancy that threatened her life or health⁹⁰ during her third trimester (after the fetus reached viability), the Court, consistent with *Casey*, would have had to strike down the ban as an undue burden on a woman’s right to an abortion. However, because of the availability of other methods of abortion — that is, because women would be able to obtain an abortion despite the ban — the Court found that a ban on the D&X procedure did not function to constrain substantially a woman’s ability to obtain an abortion during those stages of her pregnancy.⁹¹ Accordingly, the federal PBA does not

the ban despite the lack of a health exception based on the fact that Congress found that there was disagreement among physicians as to whether an intact D&E was ever safer than standard D&E). Moreover, “[m]edical uncertainty does not foreclose the exercise of legislative power.” *Id.* at 164.

⁸⁸ *Id.* at 146 (emphasis added); *cf. id.* at 145 (noting that the government has a “legitimate and substantial interest in preserving and promoting fetal life”).

⁸⁹ *Carhart II* has been roundly denounced among proponents of the abortion right. See Laura J. Tepich, *Gonzales v. Carhart: The Partial Termination of the Right to Choose*, 63 U. MIAMI L. REV. 339, 382 (2008) (“This new standard becomes even more troubling . . . when one realizes how far it strays from the precedent established in *Casey* While claiming to use the undue-burden standard in *Carhart*, Justice Kennedy in fact employs rational-basis review”); see, e.g., Cynthia D. Lockett, *The Beginning of the End: The Diminished Abortion Right Following Carhart and Planned Parenthood*, 11 J. GENDER RACE & JUST. 337, 337-38 (2008) (suggesting that *Carhart* will lead to the reversal of *Roe v. Wade*); Martha K. Plante, “Protecting” Women’s Health: How *Gonzales v. Carhart* Endangers Women’s Health and Women’s Equal Right to Personhood Under the Constitution, 16 AM. U. J. GENDER SOC. POL’Y & L. 389, 389 (2007) (arguing that “*Carhart* diminishes the rights extended in *Roe v. Wade* so significantly that it suggests a de facto overruling of *Roe* is imminent”); Sonia M. Suter, *The “Repugnance” Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1569 (2008) (arguing that *Carhart* represents “an attempt to strengthen the Court’s weighting of the state’s interest in potential human life, which may one day uphold a ban of previable abortions”).

⁹⁰ Whether the ban will function to threaten a woman’s health is subject to much debate within the medical community — a dissension that persuaded the majority to uphold the ban in spite of its lack of a health exception. See *supra* note 87.

⁹¹ See *Carhart II*, 550 U.S. at 182 (Ginsburg, J., dissenting) (noting that the availability of other abortion methods saves the ban from unconstitutionality). The most obvious alternative method is the standard D&E; however, other alternative

“protect” fetal life if “protection” means *preventing* abortions, a fact that the dissent notes.⁹²

So, either the undue burden standard does not require the courts to inquire into whether a regulation actually accomplishes the goal of “protecting” fetal life (by preventing abortion), or the Court does not take “protection” of fetal life to mean the “prevention” of abortion. The opinion suggests the latter: Congress appeared to be concerned with the intangible, cultural effects of the intact D&E procedure. Congress argued — and the Court accepted — that the D&X procedure would “coarsen” society, creating a culture within which the most brutal degradations of human life are tolerated.⁹³ The fear was that D&X procedure would normalize brutality. As such, the protection of fetal life under *Carhart II* may be accomplished entirely discursively — by making, or remaking, culture.⁹⁴

In this way, *Carhart II*'s suggestion that the government's interest in protecting fetal life may be achieved by entirely discursive work represents a departure from previous understandings of how this interest may be achieved. *Casey* suggests that fetal life is protected *when abortion is prevented*. Accordingly, the principal aim of the government pursuing this interest is not to create a society wherein human life in all of its various stages of development is respected. Instead, the principal aim of the government pursuing this interest is to prevent women from terminating their pregnancies. Consider

methods are hysterotomy, by which the fetus is removed from the uterus via cesarean section, and hysterectomy, by which the entire uterus is removed from the woman. *Id.* at 140 (majority opinion).

⁹² *Id.* at 181 (Ginsburg, J., dissenting) (“[T]he Act scarcely furthers that interest [in protecting the life of the fetus that may become a child]: The law saves not a single fetus from destruction”); see also *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 930 (2003) (“The Nebraska law, of course, does not directly further an interest ‘in the potentiality of human life’ by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion.”) (emphasis in original).

⁹³ See *Carhart II*, 550 U.S. at 157 (“Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.”) (quoting Congressional Findings).

⁹⁴ In his dissent in *Carhart I*, Kennedy made plain his belief that the state's interest in the protection of fetal “life” is accomplished by making culture. Responding directly to the claim that because the ban on D&X did not prevent abortion, it did not further the state's interest in protecting fetal “life,” Kennedy argued that it was sufficient that the ban merely “instructed” society on the value of “life.” See *Carhart I*, 530 U.S. at 964 (Kennedy, J., dissenting) (“By its regulation, Nebraska instructs all participants in the abortion process, including the mother, of its moral judgment that all life, including life of the unborn, is to be respected.”).

Casey’s discussion of the Pennsylvania informed consent provision⁹⁵: the Court did not uphold the regulation because of the discursive, cultural work accomplished by the information attempting to dissuade women from abortion. Rather, it upheld the regulation because the information “might cause the woman to choose childbirth over abortion”⁹⁶ — in other words, it might prevent abortion. The Court offered a similar justification for upholding the waiting period, finding that it was “a reasonable measure to implement the State’s interest in protecting the life of the unborn” insofar as it offered a period of reflection within which women could contemplate the pros and cons of undergoing an abortion.⁹⁷ Again, the Court does not uphold the waiting period because it creates a discourse or empowers an already-existing discourse within which the dignity of human life is appreciated and underscored. Instead, the Court upholds the provision, despite the burden it would impose on the most vulnerable women seeking to exercise their abortion right,⁹⁸ because it may prevent abortion. Thus, *Carhart II* represents a departure from *Casey* insofar as *Carhart II* accepts discursive, culture-building work as a proper aim of the state interested in protecting fetal life. However, this is not the largest difference between the two opinions.

Rather, the most dramatic departure between *Carhart II* and *Casey* is the conceptualization of the fetus. Indeed, one of the most blatant and unapologetic aspects about the Court’s opinion in *Carhart II* is that it takes the fetus to be an entity deserving of the most profound respect — a “life.” That the fetus is *much* more than a biological entity sustained by the woman through biological processes is suggested by: the “womb”⁹⁹ in which it resides prenatally; the “profound respect”¹⁰⁰ that states may show it; and the “profound” “anguish,” “sorrow,” “grief,” and “regret”¹⁰¹ that women feel post-abortion. It is important

⁹⁵ See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 881-87 (1992) (discussing the informed consent provisions of the Pennsylvania law).

⁹⁶ *Id.* at 883.

⁹⁷ *Id.* at 885.

⁹⁸ *Id.* at 886 (accepting the District Court’s findings that the waiting period will be “particularly burdensome” for “those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others”).

⁹⁹ *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 147 (2007) (stating that “a fetus is a living organism while within the womb, whether or not it is viable outside the womb”).

¹⁰⁰ *Id.* at 157 (arguing that “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman”).

¹⁰¹ *Id.* at 159-60 (“It is self-evident that a mother who comes to regret her choice to

to note that these are women who, but for their frequently uninformed actions,¹⁰² will develop a “bond of love” with their fetus-cum-infant that represents the apotheosis of “respect for human life.”¹⁰³

At certain points in the majority opinion, it may seem as though the Court is proceeding from a different premise about the fetus, accepting the fetus as no more and no less than a biological entity — a living organism, but hardly a “life.” Indeed, the Court occasionally describes the fetus “scientifically,” as when it notes “by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”¹⁰⁴ However, this ostensible “scientific” contemplation of the fetus is in tension with the Court’s *other* clear contemplation of the fetus: the “womb”-dwelling entity triggering “profound respect,” “profound grief,” “anguish,” and “sorrow.”¹⁰⁵ Accordingly, even when the Court indexes the unchallenged biological fact of fetal life, it *means* morally-salient fetal “life.” In so doing, the Court quite seamlessly attaches moral “life” onto biological life — performing on a smaller scale the larger cultural processes that have made the biological fact of fetal life simultaneous to the moral fact of fetal “life.”¹⁰⁶ As Duden explains, modernity has taken the fetus, an object from natural science, and invested it with moral and spiritual significance; the fetus has been invested with “life.”¹⁰⁷ This imbuelement is precisely what the majority does in *Carhart II*.

So, the question for the *Carhart II* majority is not whether constitutional protection ought to be afforded to a specific technique of ending fetal *biological* life. The question that the majority is adjudicating is whether to afford constitutional protection to a procedure that ends — intentionally and, by most accounts, brutally — a “life.” Unsurprisingly, the Court answered in the negative. It is certainly true that the Court is quite concerned with the appearance of the D&X procedure; the fact that it looks to be a “normal” childbirth

abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she did not once know . . .”).

¹⁰² See *id.* at 159 (arguing that some doctors would choose not to tell women contemplating abortion exactly what the procedure entails because of the doctors’ concern with the women’s already fragile emotional state).

¹⁰³ *Id.* (arguing that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child”).

¹⁰⁴ *Id.* at 147.

¹⁰⁵ *Id.* at 157-60.

¹⁰⁶ For a discussion of the cultural processes that have made biological life concomitant to moral life, see *supra* note 31 and accompanying text.

¹⁰⁷ DUDEN, *supra* note 32, at 21.

until the physician collapses the fetus’s skull disturbs the majority.¹⁰⁸ While the Court is appalled by the aesthetics of the procedure, it is difficult to conclude that the Court would have reached a different result even had the procedure been less aesthetically displeasing. Which is to say, within the logic of “life,” there is *no* acceptable method to end it. As such, the slippery slope constructed by *Carhart II* is not that the logic of the majority opinion supports the constitutionality of criminalizing other abortion procedures, namely the standard D&E procedure.¹⁰⁹ Instead, the slippery slope is that the Court has accepted “life” as the object of the abortion procedure, an entity that can *never* appropriately be terminated.

This Part attempted to demonstrate that *Carhart II* represents a radical departure from precedent insofar as it accepted the fetus as a “life.” The next Part begins to determine the significance that this conceptualization of the fetus has on the undue burden standard. That analysis must begin with an inquiry into what kind of test the undue burden standard has revealed itself to be.

II. THE UNDUE BURDEN STANDARD: AN EFFECTS TEST, A BALANCING TEST . . . OR BOTH?

So, what kind of test is the undue burden standard? Is it a balancing test — weighing the government’s interests against the rights of the individual — or something different entirely? Moreover, if it is a balancing test, what level of review is it? Is it an intermediate review that requires courts to determine whether a state’s important interest outweighs the individual’s liberty interest in abortion? Or is it just a glorified rational review that requires courts to determine whether a state’s legitimate interest outweighs the individual’s liberty? Scholars have arrived at different answers to these questions, in part because *Casey* did very little to explain the standard and how courts should use it. However, the least controversial description of the undue burden standard is that it is *not* strict scrutiny. *Casey* completely abandoned the rhetoric of “narrowly tailored” regulations designed to further “compelling governmental interests” — telltale signs of strict scrutiny¹¹⁰ — and replaced it with language concerning the

¹⁰⁸ *Carhart II*, 550 U.S. at 160 (contending that intact D&E “perverts a process during which life is brought into the world”) (quoting Congressional Findings).

¹⁰⁹ Cf. Ronald Turner, *Gonzales v. Carhart and the Court’s “Women’s Regret” Rationale*, 43 WAKE FOREST L. REV. 1, 41-42 (2008) (describing the standard D&E procedure as equally “brutal” and “gruesome”).

¹¹⁰ Although *Casey* abandoned the rhetoric of strict scrutiny, some scholars argue that *Casey* did not abandon the conceptualization of the abortion right as

government's "legitimate interests" (emphasis added)¹¹¹ and telling silence about the required "narrow" fit between means and ends.¹¹²

While it is easy to arrive at the conclusion that the undue burden standard is *not* strict scrutiny, it is harder to arrive at the conclusion of what exactly the standard is. There are several possibilities to the latter question.

A. *The Undue Burden Standard as Litmus Test for an Infringement of a Right?*

The undue burden test could be nothing more than an inquiry into whether a regulation has actually infringed a right. Professor Alan Brownstein has elaborated this argument. He writes that the undue burden standard obliges courts to interrogate whether a regulation actually constitutes an infringement of the individual fundamental right — an inquiry that is usually subordinated to interrogations into whether a constitutionally protected individual right/interest exists or whether a state interest justifiably infringes it.¹¹³ Brownstein

fundamental. As such, they argue that the abortion right is an anomaly within constitutional law insofar as it is a fundamental right that is not protected by strict scrutiny. *See* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 988 (1992) (Scalia, J., dissenting) (describing *Casey* as holding that "a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an 'undue burden'" and arguing that, as a result of weakening the level of review that protects fundamental rights, the plurality shows a "willingness to place all constitutional rights at risk in an effort to preserve what they deem the 'central holding in *Roe*'") (emphasis in original); *A Woman's Choice — East Side Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (describing the post-*Casey* abortion right as "fundamental"); *Manning v. Hunt*, 119 F.3d 254, 259 (4th Cir. 1997) ("Abortion is recognized as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment."); *see also* Valerie J. Pacer, *Salvaging the Undue Burden Standard — Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 313 (1995) ("The undue burden standard, however, subtly undermines the protective barrier surrounding any fundamental right. It allows the current political majority to actively interfere with its citizens' exercise of their fundamental rights, so long as such interference does not amount to an undue burden. Because it allows such interference, the undue burden standard appears irreconcilable with traditional fundamental rights protection.").

¹¹¹ *Casey*, 505 U.S. at 846 (reaffirming the proposition "that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child").

¹¹² *See Metzger, supra* note 16, at 2032 (noting that after *Casey*, a "restriction on pre-viability abortions no longer needs to be narrowly tailored to serve a compelling interest").

¹¹³ *See* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 870 (1994) (arguing that, usually, "the question of what constitutes an infringement of a right is treated as a

understands an undue burden as a determination that the regulation actually infringes the abortion right. The alternative — that the regulation is a constitutional, due burden — is a determination that the law infringes nothing.¹¹⁴

However, if the undue burden standard simply tests whether a regulation infringes the abortion right as a fundamental right, then a finding of an undue burden should not result in the regulation’s unconstitutionality, as it currently does. Instead, a finding of an undue burden-qua-infringement should result in the application of strict scrutiny and an inquiry into whether the state has a compelling interest in infringing the right.¹¹⁵ Because this is not how the undue burden standard functions, it is inaccurate to describe it as merely a test of the presence or absence of an infringement.

B. *The Undue Burden Standard as an Effects Test?*

The undue burden standard could be an effects test. As such, it would require a reviewing court to gauge a regulation’s effect on the ability of a woman to access abortion.¹¹⁶ If the court determines that the path to abortion remains substantially clear, it may arrive at the conclusion that the regulation is constitutional. Alternatively, if the court determines that the regulation has placed a substantial obstacle in the path to abortion, it must conclude that the regulation is

secondary concern,” but the undue burden standard elevates this question to a primary concern).

¹¹⁴ See *id.* at 879-81.

¹¹⁵ This was how the undue burden standard functioned when it first appeared in abortion jurisprudence. The “undue burden” language made an early appearance in the abortion funding cases, which established the principle that the government did not infringe indigent women’s abortion rights by prohibiting the use of Medicaid funds to help pay the costs of an abortion. See *Harris v. McRae*, 448 U.S. 297, 314 (1980) (stating that *Roe* “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy”) (quoting *Maier v. Roe*, 432 U.S. 464, 473-74 (1977)); *Maier v. Roe*, 432 U.S. 464, 473-74 (1977) (same). However, “undue burden” as a standard of review did not appear in abortion jurisprudence until Justice O’Connor’s dissent in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983). In *Akron*, the finding of an “undue burden” did not mean that the regulation was unconstitutional; instead, it only meant that the court then had to review the regulation under strict scrutiny. See *id.* at 463 (“The ‘undue burden’ required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting ‘compelling state interest’ standard.”). Moreover, “undue burden” was not synonymous with “substantial obstacle,” but rather “absolute obstacle[] or severe limitation[.]” *Id.* at 463-64.

¹¹⁶ See Metzger, *supra* note 16, at 2034 (arguing that the “undue burden standard only analyzes the quantity of burdens imposed”).

unconstitutional. Notably, under this formulation of the standard, it is not a balancing test, as it does not require a court to balance the state's interest in regulating abortion (i.e., in order to protect the woman's health or to protect fetal life) against the woman's right to abortion. Instead, the court need only calculate the effect that the law will have on abortion access.

At first blush, describing the undue burden standard as an effects test seems to fly in the face of the language used in the *Casey* joint opinion, which suggested that courts must consider legislative purposes *and* effects when reviewing an abortion regulation.¹¹⁷ However, the Supreme Court and most lower courts have refused to analyze abortion regulations' purposes as separate from their effects.¹¹⁸ Moreover, the Court's opinion in *Mazurek v. Armstrong*¹¹⁹ indicated the Court's awareness of the possibility of disarticulating legislative purposes from legislative effects, as well as its skepticism about the possibility:

[E]ven assuming . . . that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right . . . could render the . . . law invalid[,] there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results . . . ; much less do we assume it when the results are harmless.¹²⁰

The pessimism of this language, coupled with the fact that the Court has yet to engage in a robust analysis of legislative purposes, suggests that the "purpose prong" of the undue burden standard has fallen by

¹¹⁷ See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 878 (1992) ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."); see also Brownstein, *supra* note 113, at 881-82 ("Any fair reading of the language of the joint opinion . . . demonstrates that the 'undue burden' standard does not simply require a reviewing court to evaluate the magnitude of the burden to determine if it is sufficiently heavy to be undue. Rather, the plurality is proposing a fluid and complex analysis in which both the purpose and the effect of the challenged law must be considered to determine if it is constitutional.").

¹¹⁸ See Wharton et al., *supra* note 16, at 377-78 ("Lower courts have tended to omit discussion of the purpose prong or to conflate it with the effects prong.").

¹¹⁹ *Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997) (per curiam); Note, *After Ayotte: The Need to Defend Abortion Rights with Renewed "Purpose"*, 119 HARV. L. REV. 2552, 2566 (2006).

¹²⁰ *Mazurek*, 520 U.S. at 972 (emphasis in original) (citation omitted).

the wayside.¹²¹ All that is left is an inquiry into effects. Accordingly, the standard may be properly described as an effects test.

But, here is the twist: even if the test only purports to require courts to interrogate the quantity of the burden imposed by a regulation — that is, its effects — this may not accurately describe the process by which a reviewing court arrives at a determination about the quantity of a burden. Differently stated, the undue burden standard could incorporate balancing into what purports to be an effects test. Although *Casey* did not explicitly charge lower courts with the task of “balancing” the state’s interests against the right, liberty, or interests of the woman,¹²² this is the most accurate description of the test. Which is to say: balancing is *implicit* in the undue burden standard insofar as a reviewing court, when deciding how much of a burden a law imposes (in other words, its effects), balances the significance of the woman’s abortion right/liberty against the state’s interest. Essentially, courts engage in intuitive balancing.

C. Balancing as a Part of Testing Effects

Professor Stephen Gottlieb’s scholarship provides an instructive place to begin laying the contours of this argument. He has argued that many constitutional tests that appear to eschew balancing actually incorporate balancing; accordingly, ostensibly non-balancing tests frequently operate as a pretext for balancing.¹²³ He argues that the Court appears to lay down a categorical rule in *Herrera v. Collins*, which held that constitutional guarantees of due process and freedom from cruel and unusual punishment did not entitle a person sentenced to death to a hearing on evidence suggesting his/her innocence when

¹²¹ Cf. *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914, 1008 n.19 (2003) (Thomas, J., dissenting) (arguing that Justice Ginsburg’s *Stenberg* concurrence “seems to suggest that even if the Nebraska statute does not impose an undue burden on women seeking abortions, the statute is unconstitutional because it has *purpose* of imposing an undue burden. . . . Justice Ginsburg’s presumption is . . . squarely inconsistent . . . with our opinion in *Mazurek v. Armstrong*.”) (emphasis in original).

¹²² The Court does speak about the need for the reviewing court to “weigh” state interests against individual interests; however, it only does this in reference to *Roe*’s requirements. See *Casey* 505 U.S. at 853 (“The extent to which the legislature of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate both in *Roe* itself and in decisions following it.”); *id.* at 871 (“The *Roe* Court recognized the State’s ‘important and legitimate interest in protecting the potentiality of human life.’ The weight to be given this state interest, not the strength of the woman’s interest, was the difficult question faced in *Roe*.”).

¹²³ Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 832 (1994) [hereinafter *Balancing Significant Interests*].

this evidence is discovered after the trial and when there was no “independent constitutional violation” in the earlier trial.¹²⁴ In the Court’s observation that “the passage of time only diminishes the reliability of criminal adjudications,”¹²⁵ Gottlieb argues that the Court here makes it clear that it is not only aware of, but is also sympathetic to, an argument about the government’s interest in the finality of convictions.¹²⁶ Gottlieb contends that the Court takes this governmental interest and implicitly balances it against the individual’s due process and Eighth Amendment rights to a hearing on new evidence.¹²⁷ The rule against post-conviction hearings on potentially exonerative evidence is the result of this intuitive balance. Essentially, in order to arrive at what looks like a categorical rule against post-conviction hearings on potentially exonerative evidence, the Court balances individual rights and governmental interests, ultimately finding that the latter outweighs the former. “The *Herrera* decision looks like a rule. But the Court’s discussion of finality made sufficiently clear its resort to balancing. . . . It wrote as if this were a categorical decision. . . . The categorization is a balancing act in masquerade.”¹²⁸

Gottlieb’s reading of *Herrera* is instructive insofar as it demonstrates that judicial determinations appearing to have nothing to do with balancing may be nonetheless a product of intuitive or implicit balances.¹²⁹ Indeed, the distinction between balancing and other adjudicative methods may be that the former articulates the values being balanced, while the latter allows those same values to go unarticulated.¹³⁰ With this difference in mind, it may obscure actual judicial processes to claim that judges merely quantify the burden that a regulation imposes in order to arrive at a decision that a law under review is or is not an undue burden on the abortion right. A more accurate description of this adjudicative process may be to state that judges intuitively balance the governmental interest that the regulation promotes against the woman’s right to/interest in

¹²⁴ See *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

¹²⁵ *Id.* at 403.

¹²⁶ Gottlieb, *Balancing Significant Interests*, *supra* note 123, at 831.

¹²⁷ *Id.*

¹²⁸ *Id.* at 831-32.

¹²⁹ Cf. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 77-80 (2001) (noting that types of constitutional tests — such as purpose tests, effects tests, balancing tests, etc. — may be combined in practice, albeit implicitly).

¹³⁰ Gottlieb, *Balancing Significant Interests*, *supra* note 123, at 836 (“[T]he difference between balancing and categorization has to do with which values are made explicit and which are left as unarticulated judgments.”).

terminating her pregnancy. If this description is correct, then there is the danger — especially subsequent to the Court’s decision in *Carhart II* — that judges will balance the state’s interest in protecting fetal “life” against the woman’s abortion right. If those are truly the elements being balanced, then it is highly likely that judges will frequently arrive at the determination that the “quantity” of the burden that a regulation imposes does not amount to an unconstitutional undue burden, as protecting “life” will invariably outweigh an individual right/liberty interest in abortion.

It is not necessary to argue that Gottlieb’s description of adjudicative processes is correct in every case. Moreover, it is unwarranted to claim that judges always and necessarily engage in balancing when arriving at all of their determinations, including the categorical and effects-based ones. However, Gottlieb’s theory does indeed accurately describe what is happening in the context of abortion.¹³¹ The Court has given legislatures express permission to consider fetal “life” when regulating. It should be unsurprising, then, that the Court (and lower courts) would consider fetal “life” and its relative weight against the woman’s right or liberty when determining whether the regulation has surpassed an unarticulated level of burdensomeness.

Accordingly, the undue burden standard is a balancing test — albeit an implicit one. Thus, when a reviewing court determines that a regulation does not amount to an unconstitutional undue burden, the court essentially has found that the state’s interest outweighs the individual’s right. Conversely, when a reviewing court (infrequently) determines that a regulation is an unconstitutional undue burden on

¹³¹ It is worth noting the abundance of jurists and scholars who have made this argument — that effects tests often involve balancing — in other contexts. See, e.g., *Milwaukee Brewers Baseball Club v. Dep’t. of Health & Soc. Servs.*, 387 N.W.2d 254, 282 (Wis. 1986) (Steinmetz, J., concurring in part, dissenting in part) (arguing that the majority’s “direct and immediate effect” test is, in essence, “a balancing test to determine whether the statewide benefits outweigh the effect of the legislation on local or private interests”); Charles Fried, *Types*, 14 CONST. COMMENT. 55, 57-8 (1997) (arguing that balancing is implicit in effects tests because, “as a logical matter[,] most courses of action have some tendency to contribute to a forbidden effect” and, consequently “an effects test must be cabined or qualified somehow: either by some categorical rule . . . or by a balancing test that allows the forbidden effect to be outweighed by the good that the questioned measure accomplishes”); Amit M. Schejter & Moran Yemini, “Eyes Have They, but They See Not”: *Israeli Election Laws, Freedom of Expression, and the Need for Transparent Speech*, 14 COMM. L. & POL’Y 411, 444 (2009) (“At the end of the day, the dominant effect test was not much more than an *ad hoc* balancing test”); Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 701-04 (1968) (showing how there is balancing involved in classic establishment clause cases despite the fact that the test is focused on the purpose or effect of a law).

the abortion right, the court essentially has found that the individual's right/liberty outweighs the state's interest.¹³²

This is precisely what one court observed about an undue burden standard that arises in a context unconnected to abortion. In *Medina v. Pacheco*, the court was asked to review a jury instruction in order to determine whether it had focused the jury on the relevant inquiry.¹³³ The jury was instructed that it should decide whether the state's removal of the appellant's children from their home "constituted an undue burden on the Plaintiffs' right to intimate familial relations."¹³⁴ The court noted that the instruction's "undue burden" language comes from case law, in which courts determine whether a plaintiff's familial association rights have been violated by applying "a balancing test weighing the state's interests in protecting children against the family member's interests in his or her familial right of association. . . . Examining the parties' interests in light of the facts of the case, we weigh those interests to determine whether the state official's conduct constitutes an 'undue burden' on the family member's rights."¹³⁵ Fascinatingly, the appellants argued that the "undue burden" language did not adequately instruct the jury about the necessity of balancing competing interests:

¹³² When courts engage in balancing, they may balance the whole right against the whole state interest. However, courts generally are given more structure for the balancing. For example, a test may require that courts balance the magnitude of the infringement on the right against the state's specific gain. *See, e.g., Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) ("Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."); *cf. Kent Greenawalt, Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47, 64 (2010) ("Although 'substantial burden' and 'compelling interest-least restrictive means' are cast as independent measures, courts inevitably do a kind of balance, considering the government's interest in conjunction with the degree of burden."). Accordingly, with respect to the undue burden standard, one could argue that when an undue burden is not found, a court has determined that the state's specific gain (that is, the extent to which fetal "life" is protected) outweighs the burden on the woman's right to access abortion. Alternatively, when an undue burden is found, a court has determined that the burden on the woman's right to abortion outweighs the state's specific gain. Because of the weightiness of "life," it may be that whenever the state manages to protect fetal "life" — no matter how microscopic the protection — it will be found to outweigh the burden on the woman's right to abortion. Hence, the failure of courts to find undue burdens on the abortion right.

¹³³ *Medina v. Pacheco*, No. 97-2013, 1998 U.S. App. LEXIS 22533, at *4 (10th Cir. Sept. 14, 1998).

¹³⁴ *Id.* at *10.

¹³⁵ *Id.* at *11 (citation omitted).

They suggest the “undue burden” test eliminates any sense of balancing — that it led the jury to focus on whether the officers’ actions were intrusive without also considering the Medinas’ equally important protected family interest. Without an explicit reference to the counterbalancing interest, they argue, the instruction failed to give the jury any frame of reference for determining exactly what might be “undue.” . . . [W]e must disagree with the Medinas. *The word “undue” connotes the balancing test required because it only has meaning in the context of weighing one thing against another.* One cannot determine if some action was due or undue without considering the circumstances. . . . Because the competing interests at stake were fairly obvious — the instruction establishes the Medinas had a right to intimate familial association entitled to constitutional protection — and the word “undue” requires a balancing analysis, we do not have substantial doubt whether this instruction led the jury to conduct the required balancing test.¹³⁶

Similarly, in *P.J. v. Utah*, a district court explicitly observed that the “undue burden test” does not merely require a reviewing court to quantify the burden imposed by an action in order to determine whether it is undue. Instead, it requires a reviewing court to “balance the plaintiff’s right to familial association against the relevant interests of the state, considering the ‘severity of the alleged infringement, the need for the defendant’s conduct, and any possible alternatives.’”¹³⁷

Indeed, balancing is implicit in the undue burden standard. The next Part considers the implications of this.

III. MAKING UP STUFF: INDIVIDUAL RIGHTS, GOVERNMENTAL INTERESTS, AND THE SCALE THAT BALANCES THEM

Constitutional law scholar T. Alexander Aleinikoff has offered a highly influential meditation on the nature, and problem, of balancing tests within constitutional law.¹³⁸ He distinguishes the Court’s present

¹³⁶ *Id.* at *12-13 (emphasis added).

¹³⁷ *P.J. v. Utah*, No. 2:05-CV-739 TS, 2008 U.S. Dist. LEXIS 72334, at *51 (C.D. Utah Sept. 22, 2008) (citations omitted), *aff’d in part, rev’d in part sub nom.* *P.J. v. Wagner*, 603 F.3d 1182 (10th Cir. 2010).

¹³⁸ See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (asserting that while a “balancing operation” may be an inevitable part of any legal system, there are extreme dangers in a balancing approach that is overly simplistic).

inclination to submit most constitutional contests to balancing from an earlier time when Justices resolved contests with a more categorical approach.¹³⁹ During this bygone era, Justices took the task before them as determining the *kind* of interests that were in competition, not the relative weight of the interests.¹⁴⁰ The disposition of the case was determined by the Court's characterization of the event that was the subject of the dispute.¹⁴¹ He writes, "Marshall did not hold for the Bank in *McCulloch v. Maryland* because the burden of the state's tax outweighed the state's interest in taxation. Webster's argument in *Gibbons v. Ogden* was not persuasive because he demonstrated that the interest of the national government outweighed the interests of the states in regulating interstate commerce."¹⁴² Instead of balancing the contending interests, the Court declared categorical rules: "The power to tax was the power to destroy; states could exercise police power but could not regulate commerce"¹⁴³

Aleinikoff argues that constitutional law in the age of balancing is quite different from the earlier period of adjudication by categorization. Moreover, his point is to argue that balancing is quite deficient for a variety of reasons.¹⁴⁴ He observes that balancing provides a pretense of scientific objectivity to the act of judging¹⁴⁵ — an act which is frequently, if not always, a profoundly subjective enterprise. Judges, like scientists, appear to place interests on an objective scale. Decisions are to be taken as merely announcements of the results of the procedure.¹⁴⁶ However, the patina of scientific objectivity is illusory; subjectivity remains the engine of constitutional decision-making. Further, Aleinikoff contends that the language of science may alienate us from what are, ultimately, intensely

¹³⁹ *Id.* at 949.

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 945.

¹⁴² *Id.* at 949.

¹⁴³ *Id.*

¹⁴⁴ There are many defenders of balancing, however. Gottlieb is one, arguing that "balancing is an *inherent* aspect of any form of functional jurisprudence." Stephen E. Gottlieb, *Introduction: Overriding Public Values*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 1-5 (Stephen E. Gottlieb, ed., 1993) [hereinafter *Public Values*] (emphasis added). *But see* Aleinikoff, *supra* note 138, at 1001-03 (stating that "balancing is not inevitable" and maintaining that "[a]lthough balancing has spread through constitutional law, many constitutional cases are decided each Term in non-balancing ways").

¹⁴⁵ *See* Aleinikoff, *supra* note 138, at 992-93 (noting that balancing only appears to be a 'scientific' method of adjudication).

¹⁴⁶ *See id.* at 993 (making this argument).

philosophical questions about what kind of society we want to be and to create.¹⁴⁷ Moreover, balancing is deficient because of the danger that, should the Court allow balancing to continue its slow infiltration into all corners of constitutional law, constitutional theory will lose its distinctiveness. It will become no more than and no different from argumentation over what is better social policy.¹⁴⁸ However, Aleinikoff’s most trenchant critique of balancing as a constitutional adjudicatory method concerns the “problem of evaluation and comparison”¹⁴⁹ of competing interests. The next section explores this dilemma.

A. The “Problem” of Governmental Interests

Most scholars have turned their critical attention to the “problem” of rights. Their concern has largely been whether the Court has correctly or incorrectly concluded that the Constitution supports (or fails to support) a particular individual substantive right.¹⁵⁰ However, a smaller contingent has adjusted their focus to the question of governmental interests.¹⁵¹ These scholars, with a special interest in the “compelling” variety of state interests, have historicized the concept,¹⁵² criticized the language of “compelling state interests,”¹⁵³ queried how long the language and analytic might be used within constitutional

¹⁴⁷ See *id.* (making this argument).

¹⁴⁸ See *id.* at 992 (making this argument).

¹⁴⁹ *Id.* at 972.

¹⁵⁰ See, e.g., Ely, *supra* note 11, at 943 (concluding that the Court incorrectly concluded that the Constitution supports a right to abortion).

¹⁵¹ Gottlieb has observed that calling them “governmental interests” is a misnomer, as the interests of a *government* suggest “graft, corruption, honoraria, high salaries, and burgeoning bureaucracies” See Gottlieb, *Public Values*, *supra* note 144, at 7. He argues that a better term may be “compelling public purposes,” which suggests that the government is acting on behalf of the people. See *id.*

¹⁵² See, e.g., Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 ALB. L. REV. 549, 549-50 (1991-1992) [hereinafter *Constitutional Discourse*] (noting that the notion of a “compelling state interest” has its predecessor in the doctrine of “necessity,” which the Founders conceptualized as enabling the needs of the community to trump and constrain the exercise of individual needs).

¹⁵³ See, e.g., Sanford Levinson, *Tiers of Scrutiny — From Strict Through Rational Bases — and the Future of Interests: Commentary on Fiss and Linde*, 55 ALB. L. REV. 745, 748 (1991-1992) (“The Court, however, invented the mumbo jumbo of compelling state interests, so we have these conferences on compelling state interests because that is the way they talk — not because it makes particularly good sense to talk that way.”).

law,¹⁵⁴ and noted tensions in the way that the Court has used the concept.¹⁵⁵

In truth, inquiries about the legitimacy of rights and the legitimacy of governmental interests might be related, as individual rights and governmental interests may be conceptually interdependent.¹⁵⁶ Not infrequently, individual rights are defined with specific relation to and in express consideration of government power.¹⁵⁷ Indeed, rights have often arisen because of worries about governmental power: “[A]nxiety about abuse of power generates rights.”¹⁵⁸ State power is that which traces the borders of the individual right and delimits its reach — not, as frequently imagined, another individual right.¹⁵⁹

As it concerns this Article, this scholarship has generated especially interesting insights about the absence of a theory of governmental interests in constitutional law.¹⁶⁰ While the test is clear — individual

¹⁵⁴ See, e.g., Hans A. Linde, *Shell Game of Interest Scrutiny: Who Must Know What, When, and How*, 55 ALB. L. REV. 725, 733 (1991–1992) (predicting that the language of governmental interests would pass out of the constitutional vocabulary upon the retirement of Justices Brennan and Marshall).

¹⁵⁵ See *id.* (arguing that when an interest that is deemed “compelling” in one state is not pursued in another state, the notion that the interest is “compelling” for any jurisdiction is undermined); see also Gottlieb, *Constitutional Discourse*, *supra* note 152, at 554 (describing compelling interests as “discretionary”).

¹⁵⁶ See Richard H. Fallon, Jr., *Individual Rights and the Power of Government*, 27 GA. L. REV. 343, 361 (1993) (describing this interdependence). But see David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 756 (1993–1994) (arguing that government power and individual rights must be defined independent of one another and that it would be “illegitimate to define individual liberty by virtue of the majority’s reasons for acting”).

¹⁵⁷ See, e.g., Fallon, *supra* note 156, at 361 (“The right is not defined by some process independent of and external to consideration of the sensible scope of government powers.”).

¹⁵⁸ *Id.* at 365.

¹⁵⁹ See *id.* at 362 (observing that the “conceptual limit of the constitutional right is not . . . another right, but a power of government, supported and identified by reference to underlying interests”).

¹⁶⁰ See, e.g., Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 326 (1997) (“[T]he current doctrine simply does not explain how legislative ends are to be evaluated, beyond describing the requirements that they be ‘legitimate,’ ‘important,’ or ‘compelling.’ . . . [T]he current doctrine and tiers were not really designed with scrutiny of governmental purposes in mind . . .”); Fallon, *supra* note 156, at 350 (“Controversy surrounds the identification of unenumerated rights, but until recently at least, there has been little similar worry about government interests.”); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 941 (1988) [hereinafter *Compelling Governmental Interests*] (“A survey of the governmental interests identified by both the full Court and its individual members in separate opinions indicates that such interests are subject to the same criticisms as

rights and liberties may be abridged when the government can proffer an interest substantial enough to justify the abridgment¹⁶¹ — it is unclear by what principles the Court may arrive at the conclusion that a proffered governmental interest is such that it may justifiably infringe a right. The question, then, is two-fold: (1) how may the Court deduce that a proffered state interest is legitimate?; and (2) how may the Court assign weight to that interest such that it may be balanced against a right? In its failure to articulate the principles by which it decides the existence and magnitude of state interests, the Court has been accused of being unprincipled in this regard.¹⁶²

With respect to the first question concerning the principles by which the Court can deduce that a state interest is a legitimate one, the question would be moot if the Court could just look to the text of the Constitution for an itemization of proper interests that the government may pursue via exercises of its power. However, such an itemization does not exist, although some scholars have made attempts at providing one.¹⁶³ Moreover, even if there were an itemization within the Constitution, some legislator or jurist would invariably argue that the itemization was not exhaustive and that extra-textual interests exist as well. Accordingly, it is likely that state interests must have non-textual sources.¹⁶⁴ However, what are these

fundamental rights: their sources are ambiguous and their relative weights impossible to gauge.”).

¹⁶¹ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958) (noting that in order for the government to abridge the exercise of a constitutionally protected right, “subordinating interest of the State must be compelling”) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)).

¹⁶² See Aleinikoff, *supra* note 138, at 982 (arguing that the weights of state interests “are asserted, not argued for”); Bhagwat, *supra* note 160, at 319 (“Across the spectrum, however, one central theme emerges from the literature: there is a need for a principled theory of permissible and compelling governmental purposes, and the Supreme Court has failed to articulate such a theory.”); Fallon, *supra* note 156, at 350 (“[T]he derivation of government interests from the Constitution is notoriously loose and easy.”); Gottlieb, *Compelling Governmental Interests*, *supra* note 160, at 937 (“[T]he Court’s treatment of governmental interests has become largely intuitive, a kind of ‘know it when I see it’ approach similar to Justice Stewart’s explanation of pornography.”).

¹⁶³ See, e.g., Gottlieb, *Compelling Governmental Interests*, *supra* note 160, at 941-63 (providing and analyzing an itemization of compelling governmental interests).

¹⁶⁴ See Gottlieb, *Constitutional Discourse*, *supra* note 152, at 553-54 (taking note of an argument about whether governmental interests “should be understood as defined by the Constitution or by some extratextual source” and affirming his belief in the latter); see also Levinson, *supra* note 153, at 758 (noting an argument about whether interests are textual or nontextual and concluding that there is “a fairly strong majority for the latter view” among the constitutional law scholars present at the

sources? And what are the processes by which interests are derived from these sources? Indeed, what is the source of the state's interest in protecting fetal "life"? Is this the same source of the state's interest in protecting the prosaic, biological life of the fetus? Just as the Constitution makes no explicit mention of the right to abortion, it makes no explicit mention of the state's interest in protecting life or "life."¹⁶⁵

With respect to the second question regarding the difficulty of balancing individual rights against governmental interests (once derived), the gravamen of the objection is that, in order to balance a right against an interest, the judge must use a scale by which ordinarily incomparable concerns can be compared. The origin of this scale is the vexing issue. It must not be that the personal preference of the Justice who authors the majority opinion is the "scale"; such an occasion would threaten to turn constitutional law into an "arbitrary act of will."¹⁶⁶ Differently stated, we may rightly feel that it is unjust if it were the simple personal preferences of the majority of the Court that led it to conclude that, as a matter of constitutional law, the state's interest in protecting fetal life was weightier than a woman's interest in avoiding motherhood. However, we may not feel that such a conclusion was unjust if an external scale of values led to the same result. Yet, we are rarely apprised of the scale; we are infrequently informed of how weights are assigned to interests. We must take a leap of faith and hope the scale exists and that we are just not privy to it. According to Aleinikoff:

[In] those cases in which the Court simply does not disclose its source for the weights assigned to interests, [t]hese balancing opinions are radically underwritten: interests are identified and a winner is proclaimed or a rule is announced which strikes an "appropriate" balance, but there is little discussion of the valuation standards. Some rough, intuitive scale calibrated in degrees of "importance" appears to be at

symposium at which he was speaking).

¹⁶⁵ Justice Stevens noted this point in his concurrence in *Casey*. See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 914 (Stevens, J., concurring in part and dissenting in part) ("Identifying the State's interests — which the States rarely articulate with any precision — makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns.").

¹⁶⁶ Aleinikoff, *supra* note 138, at 973.

work. But to a large extent, the balancing takes place inside a black box.¹⁶⁷

We must either be optimistic about the existence of the scale, or we may be pessimistic and assume that the scale is a fantasy — that it is Justices’ personal preferences that determine the results of balancing in any given case.¹⁶⁸

The problem is especially acute in the area of compelling state interests, as such interests by definition outweigh those rights that are, at least as imagined, entitled to the most respect — fundamental rights. If there is no theory guiding the Court in its determination that a state interest is compelling, the Court is free to find compelling interests wherever and whenever it pleases. The result is an end run around fundamental rights, with individuals being stripped of the guarantees contained in the Constitution.¹⁶⁹ Moreover, if individual rights are properly understood as constraints on government power,¹⁷⁰ and individual *fundamental* rights are properly understood as *imperative* constraints on government power, then stripping individuals of their fundamental rights through unprincipled judicial recognition¹⁷¹ of compelling state interests allows government power to go unchecked. The need for a theory of compelling state interests is then underscored. How does a judge or Justice determine that an interest is compelling and that it is legitimately pursued to the

¹⁶⁷ *Id.* at 976.

¹⁶⁸ *See id.* (noting that, in the absence of substantive discussions of how interests are balanced, the “specter” of judicial decision-making as an act of power and will is raised).

¹⁶⁹ *See* Gottlieb, *Constitutional Discourse*, *supra* note 152, at 549 (arguing that the concept of compelling interests “is both powerful and dangerous because it justifies a denial of protected rights and has often been used with that result”); Jed Rubenfeld, *On the Legal Status of the Proposition that “Life Begins at Conception”*, 43 *STAN. L. REV.* 599, 603-04 (1991) (“On the whole, however, the compelling state interest doctrine remains an unstructured balancing test in which our constitutional guarantees may always give way to *raisons d’état*.”).

¹⁷⁰ *See* Fallon, *supra* note 156, at 360 (“[R]ights sometimes derive from the interest in preventing abuses of government power . . .”).

¹⁷¹ It might be important to note that “unprincipled judicial recognition” of compelling government interests is properly understood as a species of judicial restraint — not judicial activism. Essentially, the judiciary defers to legislative determinations of purposes that they may constitutionally pursue. *See* Gottlieb, *Constitutional Discourse*, *supra* note 152, at 555 (noting that judicial restraint implies “broad recognition of legislative powers” and “broad recognition of compelling purposes”).

detriment of an individual's fundamental right? The Court's jurisprudence offers no answer to the question.¹⁷²

B. *Abortion and the Problem of Governmental Interests, Compelling or Otherwise*

1. A Compelling Governmental Interest in Protecting (Viable) Fetal Life?

Considering the wealth of academic attention that has been given to the *Roe* majority opinion over its twenty-eight years, it should be unsurprising that *Roe* has been accused of being deficient in both respects mentioned above. While a tidal wave of ink has been spilled on the propriety of the Court's conclusion that the Constitution is properly interpreted to support a fundamental right to terminate a pregnancy,¹⁷³ reams of paper have been filled with debates concerning the propriety of the Court's conclusion that there exists a governmental interest in protecting fetal life that is weighty enough, at the point of fetal viability, to abridge the woman's right to an abortion.¹⁷⁴ Blackmun, writing for the Court, offered viability as the point at which the presumably always extant state interest in

¹⁷² Accordingly, many have attempted to rise to the challenge, offering principles to guide the Court in its determination of whether or not a proffered state interest is compelling. Some have argued that interests are compelling when they are necessary to preserve the democratic state or the rule of law. See David Charles Sobelsohn, *Of Interests Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. REV. 462, 479 (1977) (arguing that "simple linguistic analysis" leads one to conclude that a "compelling state interest" is one that is so paramount that "a threat to it not only suggests, but actually *compels* government action" and that "[o]nly the interest of self-preservation can be so strong"); cf. Linde, *supra* note 154, at 726 ("[T]he word 'compelling' denotes compulsion; one should not use 'compelling' if one does not mean compulsion."). Others have asserted that interests are compelling when they advance the individual right that they would infringe. See Bhagwat, *supra* note 160, at 340. Others still have argued that interests are compelling when they protect life, liberty, or property or advance equality. See Gottlieb, *Compelling Governmental Interests*, *supra* note 160, at 939 ("It is reasonable to contend that the same solicitude for life, liberty, and property that underlies the due process clause should underlie respect for legislative efforts to protect life, liberty, and property by other means and in other circumstances A fourth right that might serve as the justification for a compelling governmental interest is the obligation of equality, which is explicitly developed in five amendments.").

¹⁷³ See *supra* note 14 and accompanying text.

¹⁷⁴ See *Roe v. Wade*, 410 U.S. 113, 162-63 (1973) (holding that the state has an "important and legitimate interest in protecting the potentiality of human life" and that this interest becomes compelling, and capable of overriding the pregnant woman's right to terminate her pregnancy, at viability).

protecting fetal life becomes compelling because it is then that the fetus “has the capability of meaningful life outside the mother’s womb.”¹⁷⁵ However, as many have noted, Blackmun here does not give a particularly convincing explanation as to *why* the state’s interest becomes compelling at viability (as opposed to other stages of a pregnancy, like conception, quickening, or birth); instead, he merely *defines* viability.¹⁷⁶

Much of the critique of *Roe*’s determination that the state’s interest in protecting fetal life becomes compelling at fetal viability is not generally due to the belief that a compelling state interest should not have been found at that point, thereby allowing the individual’s right to an abortion to remain unfettered subsequent to fetal viability. Instead, the critique often comes from those who are *also* critical of the Court’s interpretation of the Constitution to support an individual right to an abortion — especially the relatively expansive one that Blackmun’s majority opinion in *Roe* provided. Cases decided subsequent to *Roe* gave Justices opportunities to articulate their sense of the arbitrariness of *Roe*’s determination that the state’s interest in protecting life becomes compelling at viability. Just sixteen years after *Roe*, the Court in *Webster v. Reproductive Health Services* (upholding various regulations that functioned to limit the availability of abortion services)¹⁷⁷ would write, “[W]e do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.”¹⁷⁸

¹⁷⁵ *Id.* at 163.

¹⁷⁶ See Aleinikoff, *supra* note 138, at 976 (arguing that Blackmun’s defense of viability as the point at which the state’s interest in protecting fetal life becomes compelling “is a definition of viability, not an explanation of value”); Ely, *supra* note 11, at 924 (“Exactly why that is the magic moment is not made clear [T]he Court’s defense seems to mistake a definition for a syllogism.”).

¹⁷⁷ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 522 (1989).

¹⁷⁸ *Id.* at 519; see also *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting) (“The State’s interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State’s interest, if compelling after viability, is equally compelling before viability.”); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 461 (1983) (O’Connor, J., dissenting) (“[P]otential life is no less potential in the first weeks of pregnancy than it is at viability or afterward The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.”) (emphasis in original).

2. A Legitimate Governmental Interest in Protecting Fetal Life?

Then came *Casey*. And with *Casey* came the abandonment, arguably, of the conceptualization of the abortion right as a fundamental right¹⁷⁹ — which, in turn, meant rejection of strict scrutiny review of abortion regulations and the concomitant irrelevance of inquiries into the compellingness of the state's interest in protecting fetal life. However, while *Casey* removed from the table the question of when and why the Court ought to find that there exists a *compelling* state interest in protecting fetal life sufficient to override the fundamental individual right to abortion, another question moved to the forefront: when and why should the Court find that there exists a *legitimate* state interest in protecting fetal life sufficient to override the individual liberty interest in abortion?

The interesting thing is that *Casey* did not have to defend its determination that the state has a legitimate interest in protecting fetal life; it could simply rely on the precedential value of *Roe*, which first argued that the state has such an interest.¹⁸⁰ However, unexplored within the *Roe* decision was the question of whether the state's interest in protecting fetal life is a permissible one. Similar to the way that the Court seemingly pulled from thin air viability as the point at which the state's interest becomes compelling, it seemingly pulled from thin air the supposition that the state has an “important and legitimate interest”¹⁸¹ in protecting fetal life.¹⁸² There was no theory of compelling state interests to help the Court defend its finding of viability as that transformative moment at which the state's interest in protecting fetal life became compelling. Similarly, there was no theory of state interests to help the Court defend its finding that the state even has a legitimate interest in “protecting the potentiality of fetal life.”¹⁸³

¹⁷⁹ For a discussion of scholarship that maintains that the abortion right remains a fundamental right that, quite anomalously, is not protected by strict scrutiny, see *supra* note 110.

¹⁸⁰ See *Roe v. Wade*, 410 U.S. 113, 162 (1973) (stating that the state has an “important and legitimate interest” in protecting fetal life).

¹⁸¹ *Id.*

¹⁸² Cf. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 182 (1972) (Rehnquist, J., dissenting) (arguing that the text of the Constitution provides no guidance to the Court on how to discern what a “legitimate” state interest is, and concluding that the concept is “an invitation for judicial exegesis over and above the commands of the Constitution, in which values that cannot possibly have their source in that instrument are invoked to either validate or condemn the countless laws enacted by the various States”).

¹⁸³ *Roe*, 410 U.S. at 162.

One could observe that, as a general principle of constitutional law, a governmental interest is legitimate as long as it does not violate another constitutional principle — like antidiscrimination¹⁸⁴ or economic anti-protectionism.¹⁸⁵ The Court’s holdings also provide that the “bare . . . desire to harm a politically unpopular group[]’ [is] not [a] legitimate state interest[].”¹⁸⁶ It would follow that if the interest in protecting fetal life violates no constitutional principle nor seeks to harm a politically unpopular group, then it is legitimate — requiring extensive interrogation by neither *Roe* nor *Casey*.

However, one can begin an answer to the claim that a governmental interest in protecting fetal life violates no constitutional principle with Justice Stevens’s observation in *Casey* that “in order to be legitimate, the State’s interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest.”¹⁸⁷ If the belief that the fetus is a potential life/unqualified life/“life” is a theological claim, then the state’s interest in protecting it may be illegitimate. Scholars, philosophers, ethicists, and jurists have disagreed about how to answer this question.¹⁸⁸ However, the question

¹⁸⁴ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (stating that catering to private racial biases is not a legitimate governmental interest); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (stating that “[p]referring members of any one group for no reason other than race or ethnic origin” is an impermissible state interest because such preference constitutes “discrimination for its own sake”).

¹⁸⁵ See, e.g., *Or. Waste Sys. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 106 (1994) (“Our cases condemn as illegitimate, however, any governmental interest that is not unrelated to economic protectionism . . .”) (quotations omitted).

¹⁸⁶ *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); see also *Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

¹⁸⁷ *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 914 (1992) (Stevens, J., concurring).

¹⁸⁸ Compare *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 565-67 (Stevens, J., concurring in part and dissenting in part) (arguing that beliefs surrounding fetal life necessarily have a “theological basis” with “no identifiable secular purpose”), *DWORKIN*, *supra* note 28, at 155 (“We may describe most people’s beliefs about the inherent value of human life — beliefs deployed in their opinions about abortion — as essentially religious beliefs.”) (emphasis in original), *LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES* 116 (1990) [hereinafter *ABORTION*] (arguing that “beliefs about the point at which human life begins” have a “theological source”), and *Laurence H. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 *HARV. L. REV.* 1, 21 (1973) [hereinafter *Foreword*] (arguing that a statement about fetal life “entails not an inference . . . from generally shared premises, whether factual or moral, but a statement of religious faith”), with *TRIBE, ABORTION*, *supra*, at 116 (“[A]s a matter of constitutional law, a question such as this, having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and

can remain unresolved because it is without a doubt that arguments that the fetus is a potential life/unqualified life/"life" are *moral claims*.¹⁸⁹

3. One Theory: The Illegitimacy of a Governmental Interest in Protecting Fetal Life

Recent developments in constitutional law suggest that it may be illegitimate for the state to use moral claims to constrain the ability of a segment of society to live the lives that they want to live. The most

organized religious groups inevitably take strong positions on it."). Nevertheless, it seems patent that one can make an argument in favor of fetal "life" without referencing religion. See, e.g., Sidney Callahan, *Moral Duty to the Unborn and Its Significance*, in *THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE* 43, 49 (Brad Stetson ed., 1996) ("The unborn human being has value because it is a member of the human family and shares in the heritage of the human species. The human status and human potential of the dependent embryo deserve respect and protection Is human life a gift which we accept gratefully? . . . A vision of human bonding and the value of all the living urges us to answer yes.") Justice White may have articulated the secular basis for protecting fetal "life" most eloquently:

[O]ne must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being [T]he continued existence and development — that is to say, the *life* — of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy

Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting).

¹⁸⁹ See Michael C. Dorf, *Truth, Justice and the American Constitution*, 97 COLUM. L. REV. 133, 159 (1997) (describing beliefs about the fetus as "moral claims"). For arguments that the belief that the fetus is a life is more of a religious than a moral claim, see Ronald M. Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 414 (1992) ("[B]eliefs about the intrinsic importance of human life are distinguished from more secular convictions about morality, fairness, and justice."); Kent Greenawalt, *Religious Convictions and Law Making*, 84 MICH. L. REV. 352, 379 (1985) ("If the moral status of the fetus and desirable legal policy are not resolvable on rational grounds, individuals must decide these questions on some nonrational basis. For many persons, the basis for judgment is supplied in whole or part by religious perspectives, which either indicate the fetus' moral status or gravely influence one's mode of thinking about it."); Sanger, *supra* note 31, at 807 (stating that although the "life" referenced in the "culture of life" "sounds secular enough . . . its rhetorical value is much enhanced by its association with Christianity"); cf. Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 340 (1995) (suggesting that some "moral regulations are essentially religious in nature").

legible sign of this is *Lawrence v. Texas*, which struck down a Texas statute criminalizing same-sex sodomy.¹⁹⁰ The Court argued that Justice Stevens’s dissenting opinion in *Bowers v. Hardwick*, which upheld a Georgia statute criminalizing all manner of sodomy,¹⁹¹ ought to have been controlling.¹⁹² Justice Stevens contended that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹⁹³ The *Lawrence* majority reformulated the claim in the language of governmental interests: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹⁹⁴ In its most expansive reading, *Lawrence* sounds the death knell for all morals-based regulations.¹⁹⁵ However, for many reasons, such a reading is not very probable.¹⁹⁶ More likely, *Lawrence* should be read

¹⁹⁰ *Lawrence*, 539 U.S. at 579 (reversing the lower court’s decision to uphold the statute).

¹⁹¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. 558.

¹⁹² *Lawrence*, 539 U.S. at 578.

¹⁹³ *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).

¹⁹⁴ *Lawrence*, 539 U.S. at 578.

¹⁹⁵ *See id.* at 599 (Scalia, J., dissenting) (noting that if the majority accepts Stevens’s proposition that a state’s belief that a practice is immoral could never constitute a legitimate state interest, then “[t]his effectively decrees the end of all morals legislation”). It is worth observing that the Court’s movement from *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (which held that a state could prohibit public nudity if it found the activity *immoral*) to *City of Erie v. Pap’s, A.M.*, 529 U.S. 277, 291 (1999) (which held that a state could prohibit public nudity only if it found that public nudity has negative “secondary effects”) suggests that we are entering a jurisprudential period in which the state may not legitimately legislate morality.

¹⁹⁶ *See* John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 Ky. L.J. 1, 5 (2010) (“[R]ecent constitutional cases do not sound the death knell for most forms of ‘morals legislation.’ It is well within the constitutional authority of the states to achieve many, though not quite all, of the types of state interests traditionally associated with the ‘moral function of law.’”); Eric A. Johnson, *Habit and Discernment in Abortion Practice: The Partial Birth Abortion Ban Act of 2003 as Morals Legislation*, 36 RUTGERS L.J. 549, 573 (2005) (arguing that many aspects of the majority in *Lawrence* “leave open the possibility that indirect harm to persons or society could serve adequately to justify morals legislation”); Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 7 (2006) (arguing that “explicit reliance on moral rationales for law should not be banished altogether from the realm of legitimate government interests”). *But see* Gey, *supra* note 189, at 331 (arguing that “government policy must be premised primarily on some rationale other than morality” in order to pass constitutional muster); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1289 (2004) (“Whatever credibility the Court might have possessed previously

to restrict the government's ability to legislate morality when the legislation demeans¹⁹⁷ or could sanction discrimination against¹⁹⁸ an identifiable group in society. Stated differently, pursuit of a moral conviction is an illegitimate state interest when the morals-based regulation enacted in pursuit of the conviction would violate principles of antidiscrimination. If this is a proper reading of *Lawrence*, then there is an argument that regulations motivated by the state's interest in protecting pre-viable fetal life¹⁹⁹ are illegitimate inasmuch as they are based on a moral claim that has the effect of demeaning or sanctioning discrimination against *women*. Women are demeaned insofar as their decision-making capacities are called into question by states that attempt to protect fetal life through the informed consent process. Legislation that tries to convince a woman that the moral status of the fetus that she carries demands the continuation of the pregnancy ostensibly proceeds from the

to announce moral consensus on particular issues has slipped away entirely The lack of an authoritative alternative to majoritarian preferences that could enable meaningful, objective assessment of proposed moral justifications has reinforced, in turn, the Court's disinclination to rely on morality-based justification.”)

¹⁹⁷ See *Lawrence*, 539 U.S. at 575 (arguing that legislation that punishes sexual activities in which gay persons engage “demeans the lives of homosexual persons”).

¹⁹⁸ See *id.* (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”). For a similar reading of *Lawrence*, see Johnson, *supra* note 196, at 566, which notes that part of the impetus of the decision in *Lawrence* was the Court's “recognition of the relationship between sodomy laws and other forms of discrimination against gays and lesbians.”

¹⁹⁹ The state may legitimately regulate abortions of viable fetuses because, although the regulation remains based on a moral claim about the significance of the fetus at that stage of development, and the state's pursuit of the moral claim may compel women to become mothers, a larger moral consensus has developed around the viable fetus. Because there is a moral consensus that has developed around the viable fetus, regulations of abortions of viable fetuses lose their cognizability as *moral* regulations. Essentially, the logic is that, in the face of a moral consensus, a moral claim is less cognizable as a moral claim; alternately, in the face of a moral dissensus, a moral claim is more cognizable as a moral claim.

Consider murder. A law prohibiting murder might be based on a moral claim that it is wrong to kill another person. However, that moral claim is less cognizable as a moral claim in light of the moral consensus around the wrongfulness of killing others. Compare this law with a law proscribing “homosexual sodomy.” Such a law might be based on a moral claim that homosexual sodomy is wrong. Moreover, that moral claim is highly cognizable as a moral claim in light of the moral dissensus around the propriety of sexual relations between members of the same sex.

In light of this, because we do not witness the same moral consensus having developed around the pre-viable fetus, then regulations of abortions of pre-viable fetuses are properly recognized as *moral* regulation.

assumption that women have not thought about the consequences of their decisions to terminate their pregnancies.²⁰⁰ Moreover, morals-based regulations enacted in pursuit of the state’s interest in protecting fetal life sanction discrimination against women because, essentially, they attempt to coerce women into becoming mothers. In this attempt, they legitimize the belief that women are *properly* mothers — the consummate stereotypical gender role.²⁰¹ As such, these regulations sanction discrimination against women who reject stereotypical gender roles. In sum, the state’s interest in protecting fetal life may function to demean and sanction discrimination against women, making pursuit of its moral claim an illegitimate state interest, consistent with the Court’s holding in *Lawrence*.

The uninterrogated assumption made in *Roe* that the state has a legitimate interest in protecting fetal life has gradually transformed with *Carhart II* into an assumption about the state’s interest in protecting fetal “life.” Moreover, the thrust of this Article is to argue that this assumption could ultimately prove fatal to the abortion right. The advent of the protection of fetal “life” as a state interest underscores the need for a developed theory of state interests. As this Article will argue in the next Part, fetal “life” is such a momentous proposition that, when a government pursues the protection of this concept, it is implausible that any individual right or liberty will outweigh it in a balancing test. The concept comes into being as the gravest of propositions. Moreover, embedded within the very concept of fetal “life” is its own vulnerability. Indeed, the concept presupposes its own desperate need for protection. As both profoundly grave and profoundly susceptible to destruction, fetal “life” necessarily defeats rival concerns; certainly, the concerns that lead women to decide to terminate a pregnancy, including her interest in safeguarding her health,²⁰² pale in comparison to the magnitude of fetal “life.” Should a theory of state interests lead to the conclusion that the protection of

²⁰⁰ See Corbin, *supra* note 61, at 1010 (arguing that biased counseling laws insult women as autonomous decision makers insofar as the state attempts to change their minds about a decision that most women surely contemplate extensively before making).

²⁰¹ Cf. Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265 (1992) (noting that abortion restrictions embody and enact value judgments about the proper roles that women can assume in society).

²⁰² It bears noting that Professor Ely expressed skepticism that a woman’s interest in her health ought to defeat the state’s interest in protecting fetal life. See Ely, *supra* note 11, at 921 n.19 (arguing that *Roe* got it wrong when it held that there had to be health and life exceptions to abortion prohibitions during the third trimester).

fetal “life” is a valid pursuit of government, the abortion right would have to reckon with its inevitable outweighing. However, a theory of state interests would first have to declare the legitimacy of the protection of fetal “life” as a goal of the state. Until such a theory is developed, we ought to be skeptical of the advent of an interest that functions to always and necessarily defeat a right once articulated as fundamental.

IV. “LIFE” AND THE DEFEAT OF BALANCING TESTS

When the protection of fetal “life” is a governmental interest against which any right or liberty is balanced, it most assuredly will be deemed weightier than that against which it is balanced. *Essentially, the protection of fetal “life” will defeat a woman’s interest in terminating a pregnancy under all balancing tests, from the undue burden standard to strict scrutiny.* “Life,” as culturally constructed, is such a weighty proposition that it necessarily outweighs any individual right or liberty.

A. *The Present Undue Burden Standard*

Under the present formulation of the undue burden standard, no regulation passed in the pursuit of the protection of fetal “life” will be found to be an unconstitutional undue burden on the abortion right. This result occurs principally because the undue burden standard is a balancing test, and fetal “life” is one of interests that must be balanced. As discussed above,²⁰³ the standard is ostensibly an effects test that requires a reviewing court to quantify the burden that a regulation places upon the abortion right. If the court finds that the effect of the law is unduly burdensome on abortion access, it must strike down the law; alternately, if the court finds that the effect of the law is not unduly burdensome, the law must be upheld. However, as observed, the undue burden standard requires balancing, albeit implicitly. That is, in arriving at the conclusion that the effect of the law is or is not unduly burdensome, the judge tacitly balances the state’s interest in protecting fetal “life” against the woman’s right.²⁰⁴ The result of that balancing determines the result of the judge’s quantification of the burden. If the interest in fetal “life” outweighs the abortion right, the law’s effect on abortion access will not be found to be weighty enough to constitute an undue burden. If the abortion right outweighs the

²⁰³ See *supra* note 115 and accompanying text.

²⁰⁴ See *supra* Part II.C.

interest in fetal “life,” the effect found will be sufficiently weighty to constitute an undue burden.

Ultimately, as long as the standard is a balancing test, the results will be the same. To put it simply, if fetal “life” is an element in a balancing test, it will necessarily outweigh the competing interest against which it is balanced. This is because fetal “life” is unmatched in its profundity. Accordingly, it is impossible that those who believe the fetus to embody “life” could find that any other pursuit outweighs it. The woman’s interest in pursuing higher education or career advancement, in averting enduring poverty, in extricating herself from a physically or emotionally abusive relationship (or simply extricating herself from an unfulfilling relationship), in continuing or changing the trajectory her life has taken thus far, in avoiding the stigma of single motherhood or welfare dependency, in avoiding being physically harmed by continuing an otherwise wanted pregnancy,²⁰⁵ in protecting her own life, etc. — all of these interests pale in comparison to fetal “life.” “Life,” easily and necessarily, trumps all of these.

And this is precisely what the undue burden standard has yielded since *Carhart II*’s implicit directive that governments may properly pursue the protection of fetal “life” — and courts may recognize as legitimate the government’s pursuit of the protection of fetal “life.” Courts have had ample opportunity to demonstrate this aspect of the undue burden standard insofar as there has been a deluge of regulations passed by states that purport to further the interest in protecting fetal “life.” These regulations take the form of fetal pain laws,²⁰⁶ biased informed counseling laws,²⁰⁷ and ultrasound viewing

²⁰⁵ As noted above, *Carhart II*’s upholding of the federal PBA without a health exception arguably signals the waning of the requirement in *Roe* and *Casey* that the state’s pursuit of the protection of fetal life must yield to the woman’s interest in her own health, if not her life. See discussion *supra* Part I.B.4.

²⁰⁶ Arizona, Minnesota, Missouri, Oklahoma, and Utah have all passed laws that require women to be told that their fetuses are capable of feeling pain. See *State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INST. (Jan. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

²⁰⁷ See, e.g., L.B. 594, 101st Leg. 2d Sess (Neb. 2009), available at <http://nebraskalegislature.gov/FloorDocs/101/PDF/Final/LB594.pdf> (imposing onerous informed consent requirements).

laws.²⁰⁸ Moreover, they have been largely upheld when reviewed under the undue burden standard.²⁰⁹

²⁰⁸ Twenty-one states have some kind of requirement with respect to viewing ultrasounds, ranging from actually making the woman view the image to requiring the physician to offer to display an ultrasound image. See *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (Dec. 1, 2012), available at http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

²⁰⁹ See Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 115 (2008) (demonstrating that laws regarding information that must be given to a woman before allowing her to obtain an abortion have generally been upheld when the court's analysis looks at burdens, though they sometimes are struck down under strict scrutiny). Courts tend to reject facial challenges to informed counseling laws. See, e.g., *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 667-70 (8th Cir. 2011), *vacated in part on reh'g en banc*, 662 F.3d 1072 (8th Cir. 2011), *rev'd in part on reh'g en banc*, 686 F.3d 889 (8th Cir. 2012) (finding that laws requiring doctors to inform a woman that her fetus is a "living human being" and that she has a protected "relationship" with the unborn child are not facially invalid since they do not cause undue burdens in all cases). But see, e.g., *Planned Parenthood Minn. v. Daugaard*, 799 F. Supp. 2d 1048, 1063 (D.S.D. 2011) (granting a preliminary injunction against requirements that a woman must get counseling from a "Pregnancy Help Center" before being allowed to obtain an abortion in part because forcing a woman to disclose her decision to an irrelevant third party is degrading); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1045 (D. Neb. 2010) (enjoining an informed consent legislative bill that required doctors to preform extensive preabortion assessments and subjected them to civil liability because it would have a chilling effect of discouraging doctors from providing abortions, creating an undue burden and depriving women of due process of law); *Summit Med. Ctr. of Ala., Inc. v. Siegelman*, 227 F. Supp. 2d 1194, 1202 (M.D. Ala. 2002) (enjoining a law requiring informed consent to women who had ectopic pregnancies or fetuses with lethal anomalies because these women had no chance of successfully delivering a child so this information was irrelevant). Laws requiring the presentation of medical information are also usually upheld because courts do not find objectively truthful information to be an undue burden. See, e.g., *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012) (arguing that medical information, such as a sonogram, is not an undue burden because information regarding fetal development is relevant to deciding whether or not to have an abortion and this information is "inherently truthful and non-misleading"); *Karlin v. Foust*, 188 F.3d 446, 492-93 (7th Cir. 1999) (holding that laws requiring doctors to inform a woman that she had the option to listen to the fetal heartbeat did not cause an undue burden because this is truthful medical information). Critics of these laws feel that they do create an undue burden because they serve as a lesson in morality to women and do not allow them to opt out if they have already reached a decision. See Sarah E. Weber, Comment, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 367-68 (2009) (arguing that forced viewing of an ultrasound is an undue burden). But see Katherine E. Engelman, *Fetal Pain Legislation: Protection Against Pain is Not an Undue Burden*, 10 QUINNIPIAC HEALTH L.J. 279, 316 (2007) (arguing that fetal pain laws are necessary for the protection of unborn children and that they merely serve to inform rather than to persuade).

Essentially, the undue burden standard has been woefully unable to protect the abortion right from nullification. This nullification, moreover, is a product of the incorporation of fetal “life” into what is a balancing test. The outcome will not be remedied until fetal “life” is extracted from the test — until protecting fetal “life” is no longer an interest that the state may legitimately pursue.

B. *Strict Scrutiny*

Some proponents of the abortion right have argued that the only way to prevent it from being diminished by various forms of incrementalist regulation is to recognize its fundamentality and to protect it with nothing less than strict scrutiny.²¹⁰ Their argument is that strict scrutiny, and only strict scrutiny, is capable of striking down regulations that restrict women’s access to abortion services. However, strict scrutiny, like intermediate scrutiny and rational basis review, is a balancing test.²¹¹ And the strength or efficacy of any balancing test depends on the elements that are plugged into the test. Moreover, when fetal “life” is plugged into the strict scrutiny test, the test is rendered into any other balancing test that has been ineffective at protecting a woman’s right to terminate an unwanted pregnancy.

The standard formulation of strict scrutiny is that a regulation burdening a fundamental right will be struck down unless the state can demonstrate that the law pursues a compelling interest. Moreover, the means to pursuing that interest must be narrowly tailored to accomplish the ends.²¹² There should be no doubt that protecting fetal “life” would qualify as a “compelling” governmental interest. As this Article has argued, “life” cannot be fairly described as anything *but* compelling; thus, the protection thereof is one of the most compelling activities that a government can undertake. Accordingly, the only

²¹⁰ See e.g., Wharton et al., *supra* note 16, at 327-28 (discussing cases in which abortion restrictions were reviewed with strict scrutiny under state constitutions, and arguing that strict scrutiny, unlike the undue burden standard, offered robust protection of abortion right by being able to strike down various incrementalist regulations).

²¹¹ This Article strongly argues that strict scrutiny should be understood as a balancing test — requiring courts to balance the weight of the fundamental right against the weight of the state’s interest. Only a compelling state interest will be found to outweigh a fundamental right. However, some disagree that strict scrutiny is properly understood as a balancing test. See, e.g., FALLON, *supra* note 129, at 84 (arguing that strict scrutiny is not a balancing test because, “[e]ven if something approaching the form of balancing is observed,” it is unhelpful to describe the test as involving balancing because it is frequently “fatal in fact”).

²¹² See *supra* note 7 and accompanying text.

open inquiry for a reviewing court is whether the regulation is narrowly tailored to accomplishing the protection of fetal “life.” Skepticism should follow any assertion that a regulation would be struck down on those grounds. Again, this is because of the nature of “life.” Even the most unwieldy of regulations would likely be upheld because of the profundity — and the profound vulnerability — of the object being pursued.

CONCLUSION

Sociologist Pierre Bourdieu perhaps most eloquently described the dialectical relationship between law and culture when he observed, “It would not be excessive to say that [law] creates the social world, but only if we remember that it is this world which first creates the law.”²¹³ The advent of a state interest in the protection of fetal “life” demonstrates the dialectical relationship between law and culture. The notion of “life” is the product of many disparate and far-ranging cultural practices. However, deserving at least some credit for its development and for its saturation into culture — for its maturation into something that is commonplace in the United States — is the law. Specifically, the interpretation of the Constitution to support a woman’s right to determine whether she will become a mother provided fertile grounds for the development of a backlash. The cultural concept of “life,” as the object of the abortion procedure, is properly understood as part of the backlash. This Article has argued that, with *Carhart II*, the cultural notion of “life” has become embedded within law. And, *Carhart II*, as law, will undoubtedly spur cultural responses. Therein lies the dialectical relationship between law and culture.

It should come as no surprise that law produces culture and that culture produces law. Law is, fundamentally, a cultural phenomenon. However, more than merely reflecting the culture from which it emerges, the law has been charged with the task of *directing* that culture. Allowing the undue burden standard to become embedded with “life” makes impossible the standard’s task of directing culture to accommodate sometimes radically different perspectives on the fetus. For those who believe that this accommodation is an essential function of the Constitution, it is imperative that we recognize the perversion of the undue burden standard and act to extract “life” from this particular balancing test.

²¹³ Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 839 (1987) (emphasis removed).