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Reproductive Freedom and the Constitution: The Limits on Choice

Gayle Binion†

I. INTRODUCTION

Contemporary jurisprudence on reproductive rights is characterized by two features: contraception and abortion rights are protected from only active governmental abridgement and the alternative choice to become a parent, despite dicta to the contrary, has virtually no constitutionally-based protection and little statutory protection. This Article suggests that the Constitution requires government to respect, and not just to tolerate, the exercise of reproductive choice. Consistent application of strict scrutiny1 to abridgements of the fundamental right of reproductive choice2 would yield a more socially progressive and legally defensible jurisprudence than contemporary common law and judicial practice.3

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1 Strict scrutiny has been applicable to abridgements of fundamental rights since Loving v. Virginia, 388 U.S. 1 (1967). It requires that the government meet a heavy burden of justification. The government must prove that 1) the policy's goal is compelling, 2) the means chosen will substantially affect that goal, and 3) there is no alternative less restrictive of constitutional rights that will affect the stated compelling goal. Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1963); NAACP v. Alabama, 377 U.S. 288, 307 (1963).


3 This Article only partially engages the debate within feminist legal scholarship on the appropriate jurisprudential approach to issues involving reproduction. That debate attempts to decide whether reproduction issues are fundamentally equality, rather than substantive due process issues and, if so, how they are to be resolved: whether to address and redress the oppression of women that is reinforced when these issues are viewed as those of equality and difference, or to rationalize and circumscribe the extent of dissimilar treatment of men and women that may be justified by reproductive difference. See, e.g., C. MacKinnon, Privacy v. Equality: Beyond Roe v. Wade, in FEMINISM UNMODIFIED 93 (1987); Kay, Equality and Difference: The Case of Pregnancy, 1 BERK. WOMEN'S L.J. 1 (1985); Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955 (1984); Littleton, Reconstructing Sexual Equality, 75 CALIF. L. REV. 1279 (1987); Siegel, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 YALE L.J. 929 (1985) (Note); Weissman, Sexual Equality Under
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The Article is divided into two sections that parallel the components of the right of reproductive choice. I begin with an analysis of the right not to bear children, a right which covers both the use of contraception and the procurement of an abortion. The discussion is divided into two parts: funding restrictions on abortions, and parental consent and notification statutes. The second section addresses the affirmative decision to have a child, with a focus on the areas of sterilization, welfare access, employment restrictions, and legal attempts to control the process of reproduction through forced medical procedures on pregnant women and other legal manifestations of paternalistic attitudes towards them. Each of these are discussed with reference to their impact on reproductive freedom.

II. THE RIGHT NOT TO BEAR CHILDREN

Since Griswold v. Connecticut and Roe v. Wade, the recognized contours of contraceptive and abortion rights, respectively, have developed to include protection against only punitive sanctions by government. Constitutional rights are typically conceptualized as simply immunities from active governmental abridgement. The decisions of the United States Supreme Court require no positive acts of support for choice by any level of government: there is neither an obligation to foster the conditions necessary for reproductive choice effectively to take place nor an obligation even to maintain a position of official neutrality as between the choices. Although the Court ruled in Roe that the decision whether to bear a child is, at least until presumed viability, a constitutionally protected choice, subsequent case law has allowed the federal


Even if we assume that the constitutional, economic and social issues involved in reproduction are inherently those of gender equality, that does not preempt a discussion of the unequal application of fundamental rights doctrine to this area of the law. While this Article treats the rights of privacy and reproductive choice under the rubric of substantive due process, this in no way undermines or minimizes the issues of gender equality. Indeed, the arguments for gender equality reinforce the principle that abridgements of reproductive choice must be subjected to strict scrutiny, as are other fundamental rights. Furthermore, gender equality is advanced by the impact of the application of such scrutiny where the challenged policies have served to reinforce the subordination and economic dependence of women.

4 381 U.S. 479 (1965).
5 410 U.S. 113 (1973).
6 See infra note 23.
7 See, e.g., Harris v. McRae, 448 U.S. 297, 315-17 (1980).
8 410 U.S. at 163. Until the fetus is viable outside the womb, the state's interest in protecting fetal life is inferior to the fundamental right of a woman to autonomy and privacy. Id. at 154, 164. The Court assumed that viability is at least possible at six months gestation and limited the constitutionally-based right to abort to the first two trimesters, unless the health or life of the pregnant woman is jeopardized by the continuation of the pregnancy during the third trimester. Id. at 164-65. While the foundations for this approach to abortion rights have been the subject of much debate and criticism, Kristin Luker has made an effective argument that
and state governments to preempt the choice of many thousands of young and/or indigent women and has, more generally, upheld the constitutionality of governmental disfavoring of the abortion and contraception alternatives.\(^9\)

### A. Funding Restrictions

For several years after *Roe*, the United States Supreme Court reinforced the principle that the state must not put unreasonable barriers in

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\(^9\) See, e.g., *Harris*, 448 U.S. at 315-17. Although the focus of this section of the Article is on the abortion rights of the medically indigent and minors, myriad other governmental policies institutionalize the disfavoring of abortion and contraception as well. Regulations promulgated in February 1988 by the Department of Health and Human Services (DHHS), under Title X of the Public Health Services Act, 42 U.S.C. §§ 300 to 300a-6, prohibited any federal grantee from providing counseling or referrals concerning the use of abortion as a method of family planning. 42 C.F.R. § 59.8 (1988). The regulations were challenged in four different cases. In two of the suits, permanent injunctions were entered enjoining enforcement of the regulations against the parties to those suits on grounds that the regulations violated the first amendment rights of the clinic personnel to speak and the pregnant client to be informed, and the fifth amendment right to privacy of the patient. Commonwealth of Mass. v. Bowen, 679 F. Supp. 137, 145-48 (D. Mass. 1988); Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465, 1473-78 (D. Colo. 1988). In the remaining two suits, the government prevailed and the complaints were dismissed. New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y. 1988); Rust v. Bowen, 690 F. Supp. 1261 (S.D.N.Y. 1988). All of the district court orders are currently on appeal. 53 Fed. Reg. 49320 (1988). As of October 28, 1988, DHHS was enforcing the regulations against certain organizations and not others. *Id.* Left intact in these decisions is the wording of Title X of the 1970 Public Health Service Act which prohibits the use of federal funds “in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6 (1988). Title X affects more than 5,000 clinics run by Planned Parenthood and other non-profit organizations, serving more than 4,300,000 women, most of them low income. *Title X Triggers Five Lawsuits*, Nat’l NOW Times, Dec./Jan. 1988, at 1, 3, col. 1; see also Goodman, *Reagan Troops Aim at Doctor’s Office*, L.A. Times, Feb. 16, 1988, pt. II, at 7; *Family Planning Regulations Suspended After Courts Rule Against Them*, Civ. Liberties (Winter 1988), at 4, col. 2.

Similarly, the recent decision of the United States Supreme Court in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988), was a setback for those who believe that if the government is to be involved in education on reproduction it should provide open, honest, and comprehensive information. In *Bowen*, the Court upheld, by a five to four vote, the 1981 Adolescent Family Life Act, 42 U.S.C. §§ 300z to 300z-10 (1982), which provides federal funds for programs to prevent adolescent pregnancies. *Bowen*, 108 S. Ct. at 2581. The Court rejected the argument that religion was established by the law’s preference for religious grantees. *Id.* at 2572. However, the Court acknowledged that the Act’s encouragement of self-discipline and adoption, although “not inherently religious . . . may coincide with the approach taken by certain religions.” *Id.*

Finally, jurisprudence on “wrongful conceptions” and “wrongful life” devalues the choice not to conceive or to procreate. Although courts have begun to recognize a parent’s cause of action for malpractice against physicians who have performed negligent sterilizations and abortions, damages have been limited to the costs of the negligent surgery and unwanted birth. See Steinbock, *The Logical Case for ‘Wrongful Life’*, 16 Hastings Center Rep. 15, 16 (1986). Damages do not extend to the cost of raising the child that the parents did not choose to have. *Id.* In cases brought by physically and intellectually impaired children against allegedly negligent physicians, the courts in all but three states have refused to recognize a tort of “wrongful life” because they believe that it would be contrary to public policy. *Id.; see also Annas, Righting the Wrong of ‘Wrongful Life’*, 11 Hastings Center Rep. 8 (1981); Smith, *Wrongful Birth, Wrongful Life: Emerging Theories of Liability*, in *Abortion, Medicine and the Law* 178 (1986).
the way of choice protected under Roe. Informed consent rules, restrictions on the practice of medicine, and attempts to empower potential fathers to prevent abortions were all treated skeptically by the Court. Simultaneously, however, the disfavoring of the abortion alternative became apparent in publicly funded medical care. Restrictions on federal funding of abortions for government employees under their health insurance and for the indigent under Medicaid, as well as their analogues in many of the states, have all fared well in the Supreme Court, despite their conflict with the principles of Roe and its progeny, and their inability to withstand strict scrutiny.

When challenged under the United States Constitution and Title XIX of the Social Security Act, all restrictions on abortion funding, local, state and federal, were upheld by the Supreme Court. 

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10 See, e.g., Colautti v. Franklin, 439 U.S. 379 (1979) (supporting the rights of doctors to perform legal abortions without fear of prosecution under an unconstitutionally vague statute); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 69 (1976) (prohibiting the states from empowering a spouse to prevent an abortion). The general principles governing the restrictions on state authority to prohibit or harass the abortion choice by women and physicians were reiterated in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), and more recently by the Eighth Circuit Court of Appeals in Reproductive Health Serv. v. Webster, 851 F.2d 1071 (8th Cir. 1988), prob. juris. noted, 109 S. Ct. 780 (1989).

However, state courts do not necessarily interpret Danforth appropriately with respect to the lack of legal authority of potential fathers to affect the reproductive choices of pregnant women. In spring 1988, an Elkhart, Indiana superior court judge issued a temporary restraining order which he later dissolved when he denied the father's request for an injunction on the merits. Noted in Doe v. Smith, 108 S. Ct. 2136, 2136-37 (Stevens, Circuit Justice 1988). In denying the demand of the potential father, the trial judge cited Danforth as placing a heavy burden of proof on men seeking such injunctions. Id. Such factors as the continuing marriage of the plaintiff to another woman, his unstable marital and romantic life, and his ability to have other children were cited as bases for the Court's decision denying relief. Id. The decision was affirmed on appeal. Doe v. Smith, 527 N.E.2d 177 (1988) (per curiam), aff'd, 108 S. Ct. 2136 (Stevens, Circuit Justice 1988). Although the decision in Doe comports with Danforth, the latter should not be understood to be an invitation to ad hoc balancing by trial courts in which the rectitude or other positive qualities of the potential father, might, in another case, be used to deny to a pregnant woman her fundamental right of reproductive choice. In fall 1988, in Conn v. Conn, 525 N.E.2d 612, cert. denied, 109 U.S. 347 (1988), the Supreme Court refused to review a similar case in which an estranged husband had unsuccessfully sought an injunction to prevent his wife from obtaining an abortion. The Court declined the opportunity to reinforce Danforth and to prohibit lower courts from issuing even temporary restraining orders against women who, in exercise of their rights under Roe and Danforth, have unilaterally made the choice to terminate a pregnancy.

11 42 U.S.C. §§ 1396-1396s (1982). Title XIX established the Medicaid program, requiring participating states to assist the indigent in obtaining medical care. Id.


The lack of public funding for abortions has also been a relatively common feature of the health care systems of the states. GUTTMACHER INSTITUTE, ABORTIONS AND THE POOR: PRIVATE MORALITY, PUBLIC RESPONSIBILITY 23 (1979) [hereinafter ABORTIONS AND THE POOR]. Prior to the enforcement of the Hyde Amendment, several states restricted payments
Roe\textsuperscript{13} and its companion cases, Beal v. Doe\textsuperscript{14} and Poelker v. Doe,\textsuperscript{15} all supported the freedom of the state "to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."\textsuperscript{16} The Supreme Court rejected the argument that the state's \textit{preference for childbirth}, expressed through its funding of prenatal care while not funding elective abortion, constituted an impermissible "burden" on the right of reproductive choice.\textsuperscript{17} The Court reasoned that the choice to elect an abortion was not \textit{further} restricted by the existence of public funds for the childbirth option; indigent women would be no better able to secure an abortion if there were no funding for childbirth.\textsuperscript{18} The statutory scheme thereby escaped strict scrutiny. The Court \textit{assumed} the legitimacy of the state's preference for childbirth and subjected the funding policy to only rationality review.\textsuperscript{19}

When faced directly with the Hyde Amendment,\textsuperscript{20} the Court extended the logic of its 1977 rulings to a federal statutory prohibition on the funding of medically necessary abortions in \textit{Harris v. McRae.}\textsuperscript{21} By a five to four vote, the Court held that government is free to express a \textit{preference for childbirth} by prohibiting public funding of the abortion option, even where the policy threatens the health and well-being of indigent women.\textsuperscript{22}

1. The Economy Rationale

Although government is not ordinarily obligated to pay for the exercise of constitutional rights,\textsuperscript{23} the abortion funding cases cannot be easily

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\textsuperscript{13} 432 U.S. 464 (1977).
\textsuperscript{14} 432 U.S. 438 (1977).
\textsuperscript{15} 432 U.S. 519 (1977).
\textsuperscript{16} \textit{Maher}, 432 U.S. at 474.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 464.
\textsuperscript{20} \textit{See supra} note 12.
\textsuperscript{21} 448 U.S. 297, 315-17 (1980).
\textsuperscript{22} \textit{Id.} The Court rejected the plaintiff's argument that the Court could render a narrow pro-choice decision governing only medically necessary abortions. \textit{Id.}
\textsuperscript{23} However, various criminal justice cases support the conclusion that in at least some circumstances government can be obligated to incur the costs of the exercise of constitutional rights.
disposed of on that basis. While a rejection of the demand that government underwrite the individual’s exercise of her or his constitutional rights is often rationalized on the grounds of protecting the public fisc, the cost to government of childbirth for Medicare-dependent women is far higher than the cost of abortion. Consequently, the principle that government is not obligated to pay the cost of the exercise of one’s constitutional rights is not intuitively applicable to the abortion funding controversy. When a state chooses to fund childbirth but not abortion, economy is neither the goal nor the result.

See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985) (indigent defendant has the right to a psychiatric examination in preparing an insanity defense); Mayer v. Chicago, 404 U.S. 189 (1971) (indigent defendant must be given trial transcript if he cannot afford one so as to receive adequate appellate review); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring the appointment of free counsel for the indigent in criminal cases); Burns v. Ohio, 360 U.S. 252 (1959) (indigent defendant has the right to file for appeal without paying the filing fee).

Beyond the criminal justice system, there are some limited cases in which the government is obligated to pay costs associated with the exercise of constitutional rights. See, e.g., Little v. Streater, 452 U.S. 1 (1981) (state may not refuse to pay for blood tests of indigent defendant in paternity suit); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (law requiring indigent seeking medically necessary care to have lived in state for at least one year found unconstitutional); Boddie v. Connecticut, 401 U.S. 371 (1971) (state cannot limit indigents’ access to divorce court by charging fees); Shapiro v. Thompson, 394 U.S. 618 (1969) (requirement that one live in state for at least one year before becoming eligible for welfare is unconstitutional).

Although well beyond the scope of this research, one might argue that the true value of fundamental rights is not in their existence but in their exercise. Thus, governmental bodies have a duty to provide, where possible, the conditions and resources necessary for their actual exercise. One might offer the standard that when a constitutional right is assessed as fundamental, and the burden on government manageable, then we should opt for the positive obligation of government to provide the means necessary for its exercise. See Binion, The Constitution: The Next 100 Years, 21 BEV. HILLS B.A.J. 250, 252-54 (1987). In the area of reproductive choice this might include not only universal education programs about choice, but also the universal availability of contraception, abortion, prenatal, and perinatal health care.

ABORTIONS AND THE POOR, supra note 12, at 32. Moreover, the financial advantage to the government of abortion over childbirth is greatly magnified if one considers the cost of raising a welfare-dependent child. Indeed, the funding policy is more easily justified in the reverse case. What if the federal and/or state governments were to reach the conclusion that, not only is abortion far more economical than childbirth, but that population control is important? Both of these judgments are easily justified on entirely secular and pragmatic grounds. Should the state be able to promote this interest by funding abortion, and not childbirth, in its Medicaid system? The Court did not consider this ramification of its abortion funding rulings. Unless it is prepared to adopt not only this proposition but also the view that the governmental power of the purse allows it to control the exercise of all fundamental constitutional rights by those dependent on public funds for their existence, it cannot justify its rulings in the abortion funding cases.

Despite the absence of the economy rationale, Justice Stewart’s majority opinion suggested that it was a radical notion to expect the government to underwrite the exercise of constitutional rights.

To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Harris v. McRae, 448 U.S. 297, 318 (1980).

The weakness in Stewart’s argument is that the plaintiff was not demanding abortion funding on the ground that such funding is itself a constitutional right, but rather because reproductive choice is abridged in a scheme in which the option of childbirth has been publicly funded and the option of abortion has not.
Where economy has been present as a rational justification for a governmental policy, even if not necessarily the reason for its passage, courts have been comfortable assuming the existence of the economic, hence presumptively legitimate, goal. In such cases, courts have not felt compelled to determine whether a desire to prevent the exercise of a constitutional right actually gave rise to the policy.\(^26\) Thus, the Court's conclusion that the abortion funding cases are easily resolved as fiscal policy cases, despite the absence of the economy rationale that has characterized the precedents in this area, is not persuasive.

2. The Legitimacy of the Governmental Objective of Preventing Abortions\(^27\)

The Court averred in the abortion funding cases that "protecting potential life" is a "legitimate governmental objective."\(^28\) Armed with this proposition, the Court concluded that restricting Medicaid funding for abortions was a rational means of promoting the objective.\(^29\) What was not demonstrated in these decisions is how a governmental goal that is entirely illegitimate when pursued via criminal sanctions, as proscribed in \textit{Roe v. Wade},\(^30\) is assumed to be legitimate (although not necessarily compelling) when pursued through administrative regulations in public policies. The assumption that a policy goal that is illegitimate in the criminal law, because of the constitutional right to engage in the behavior proscribed, becomes a legitimate goal when pursued through the civil law, is suspect. The Court in \textit{Harris} failed to meet its fundamental challenge of persuading its critics that despite \textit{Roe}, the purpose of the Hyde Amendment was constitutional.

Assuming, arguendo, that the goal of promoting childbirth over abortion is, as the Court has averred, a legitimate governmental objective in administrative policy, the means used to promote the goal must, nevertheless, still be scrutinized with respect to their impact on the fundamental right to privacy as protected by \textit{Roe}. In this regard, the Court

\(^{26}\) See, \textit{e.g.}, \textit{Lassiter v. Dep't of Social Servs.}, 452 U.S. 18 (1981) (state does not have to provide counsel for parent in every case of termination of parental rights); \textit{Scott v. Illinois}, 440 U.S. 367 (1979) (state must provide counsel for an indigent defendant who is charged with a statutory offense for which imprisonment is imposed, rather than merely authorized); \textit{Ross v. Moffitt}, 417 U.S. 600 (1974) (state does not have to provide counsel for indigent defendants to make discretionary appeals); \textit{Fuller v. Oregon}, 417 U.S. 40 (1974) (state may require convicted defendant to repay costs of state-provided counsel if he is later able to do so); \textit{Dandridge v. Williams}, 397 U.S. 471 (1970) (state may put a maximum amount on welfare awards for families with children).

\(^{27}\) While a nefarious state purpose is not a necessary component of a constitutional violation, the unconstitutionality of the purpose of a challenged policy is an independent basis on which courts may void a policy. See Binion, "\textit{Intent} and Equal Protection: A Reconsideration", 1983 \textit{Sup. Ct. Rev.} 397 (1984).

\(^{28}\) \textit{Harris v. McRae}, 448 U.S. at 325.

\(^{29}\) \textit{Id.} at 324.

\(^{30}\) 410 U.S. 113 (1973).
should have reached two conclusions in the abortion funding cases. First, it should have acknowledged that the right to reproductive choice of the poor is preempted by these policies that effectively compel childbirth. Second, it should have noted the other means available to the government to promote childbirth that are less restrictive of the fundamental right of reproductive choice. By assessing the challenged abortion funding policies as merely providing "encouragements" to childbirth, the Court inappropriately lifted from the state the burden of satisfying the requirements of strict scrutiny for abridgements of fundamental rights.

3. The Constitutionality of the Means Employed to "Encourage" Childbirth

The Court in *Harris v. McRae* concluded that a prohibition on abortion under public medical subsidies constitutes only an "encouragement" of childbirth and an "incentive [ ] that make[s] childbirth a more attractive alternative than abortion for persons eligible for Medicaid." The Court did not recognize that for the nine percent of women of childbearing age who must rely on publicly funded medical care, such funding restrictions preempt choice. These are women who lack the financial means necessary to give meaning to terms like "encouragement" and "alternative." It is doubtful that a woman dependent on Medicaid for her medical care is able to decide whether or not to accept the largesse of the government in the form of prenatal care or to pay for a medically safe abortion on her own. In sum, for medically indigent women, this act of governmental disfavoring of abortion is not just a burden on the exercise of a fundamental right; it is an act tantamount to preemption of choice. The Court's assumption that public funding of childbirth serves as only an incentive is, thus, either naive or disingenuous.

4. The Least Restrictive Alternative

"Where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it . . . must be narrowly drawn to express only those interests [sought to be furthered by the state]." To survive strict scrutiny, a statute must employ the means

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31 See *supra* note 1.
32 448 U.S. at 315.
33 *Id.* at 325.
34 *Abortions and the Poor, supra* note 12, at 8.
35 Although the Court refers to such persons as "eligible" for Medicaid, *id.*, because eligibility is possible only for those whose financial status prevents them from securing medical care privately, the term "dependent" is a more accurate characterization.
least restrictive of the constitutional rights at stake.\textsuperscript{37} Governmental incentives for childbirth for indigent women that are not coercive or preemptive are certainly possible. Incentives might include guarantees of food, clothing, and childcare for children carried to birth. Such incentives, in contrast with the Hyde Amendment, would allow, perhaps encourage, poor women to choose to continue pregnancies, while not preempting the rights of those who would prefer not to.

The existence of incentives means that one of various \textit{available} alternatives is made more attractive than the others. Incentives for childbirth that would not preempt the right of reproductive choice are available, and constitute a \textit{less restrictive} alternative to the Hyde Amendment.\textsuperscript{38}

\section*{B. Parental Consent and Notification Requirements}

Disfavoring abortion by restricting the right of minors to obtain abortions has been attempted in thirty-four states.\textsuperscript{39} Although such statutes are not justified under significant state interest review, applicable to abridgements of the constitutional rights of minors,\textsuperscript{38} the Supreme Court has upheld a requirement of parental consent in \textit{Planned Parenthood Association v. Ashcroft}\textsuperscript{41} and a requirement of parental notification in \textit{Harris v. McRae, 448 U.S. 297, 316 (1980)}, and \textit{Maher v. Roe, 432 U.S. 464, 474 (1977)}, differentiated poverty from those restrictions on access to abortion that are of the government's own making. Court decisions subsequent to \textit{Harris} have not upheld governmental restrictions on abortion that create disincentives for the abortion option in the form of mandatory waiting periods, reporting, "counseling," or medically unnecessary hospitalization. \textit{Frisby v. Schultz, 108 S. Ct. 2495 (1988)}; \textit{Griswold v. Conn., 381 U.S. 479 (1965)}. The Court has never adequately demonstrated the difference between the restrictions on reproductive choice that it has upheld and those that it has struck down. If the government can constitutionally discourage the procurement of abortions, then the distinction between barriers of the government's making and other \textit{unofficial} barriers, such as poverty, are not especially germane. Incentives, by definition, are going to be different for different groups. It is, therefore, not easily understood why a 24-hour waiting period is an unconstitutional "burden" on choice whereas a preemption of choice for the poor under the Hyde Amendment is simply an incentive favoring childbirth. This is not meant to suggest that the government should be empowered under the Constitution to do either, it is only to challenge the Court's uneven reliance on the incentive concept.

\textsuperscript{38} The Court in \textit{Harris} v. \textit{McRae, 448 U.S. 297, 316 (1980)}, and \textit{Maher v. Roe, 432 U.S. 464, 474 (1977)}, differentiated poverty from those restrictions on access to abortion that are of the government's own making. Court decisions subsequent to \textit{Harris} have not upheld governmental restrictions on abortion that create disincentives for the abortion option in the form of mandatory waiting periods, reporting, "counseling," or medically unnecessary hospitalization. See, e.g., \textit{Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)}; \textit{Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)}. The Court has never adequately demonstrated the difference between the restrictions on reproductive choice that it has upheld and those that it has struck down. If the government can constitutionally discourage the procurement of abortions, then the distinction between barriers of the government's making and other \textit{unofficial} barriers, such as poverty, are not especially germane. Incentives, by definition, are going to be different for different groups. It is, therefore, not easily understood why a 24-hour waiting period is an unconstitutional "burden" on choice whereas a preemption of choice for the poor under the Hyde Amendment is simply an incentive favoring childbirth. This is not meant to suggest that the government should be empowered under the Constitution to do either, it is only to challenge the Court's uneven reliance on the incentive concept.

\textsuperscript{39} Of these, 24 have either been enjoined by the courts or assumed to be unconstitutional and enforceable. National Abortion Rights Action League & Reproductive Freedom Project of the ACLU, \textit{cited in Bonavoglia, Kathy's Day in Court, MS. MAGAZINE, Apr. 1988, at 51.}
\textsuperscript{40} The Court has offered three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner and the importance of the parental role in child rearing. \textit{Bellotti v. Baird, 443 U.S. 622, 634 (1979)} (plurality opinion); \textit{accord H.L. v. Matheson, 450 U.S. 398, 409-10 (1980)}. Consequently, while the state's goal must be compelling in order to justify abridgements of the fundamental rights of adults, with respect to minors, the goal served needs to be only significant. \textit{Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 74 (1975)}; \textit{accord Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 n.10 (1983)}. In cases affecting the constitutional rights of minors, the state must, therefore, demonstrate not only that its significant goal is actually served by the policy, but also that there is no less restrictive alternative available.

\textsuperscript{41} 462 U.S. 476, 490-93 (1983).
H.L. v. Matheson.\(^{42}\)

The Court has recognized a significant state interest in promoting familial communications and, on this basis, has upheld parental consent statutes.\(^{43}\) The only major restriction that the Court has placed on the power of the state in this area is that there must be a judicial bypass mechanism through which an adolescent can demonstrate either that she is mature enough to make the abortion decision on her own or that an abortion would be in her best interests despite her immaturity.\(^{44}\)

1. Such Statutes Do Not Engender Familial Communications

The upholding of parental consent and notification statutes is irreconcilable with the requirement that the restrictions on reproductive choice serve the state interests in the case. Even if the state has a significant interest in promoting familial communication, parental consent and notification requirements do not accomplish that goal.\(^{45}\) The data suggest that parental consent laws have no impact on familial communications. Over fifty percent of minors who obtain abortions at clinics have already told at least one parent about their pregnancy and planned abortion; the figure rises to seventy-five percent for girls under fifteen years of age. These data hold constant whether or not the state requires parental consent or notification for abortions.\(^{46}\) Rather than promoting familial communication, parental consent laws cause minors to obtain illegal abortions, to self-abort, to seek abortions in less restrictive states, or to carry unwanted pregnancies to term.\(^{47}\) After a parental notification law was put into effect in Minnesota, the birth rate for teens under eighteen rose thirty-eight percent in Minneapolis, whereas the birth rate for women over eighteen (and, therefore, not affected by the law) remained virtually constant.\(^{48}\)

Thus, while the goal of promoting familial communication is arguably significant, it is not advanced by parental consent and notification

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\(^{42}\) 450 U.S. 398, 413 (1981).


\(^{44}\) Bellotti, 443 U.S. at 643. The Court has also rejected mandatory waiting periods imposed upon either adults or minors. By a vote of four to four, the Court upheld a ruling of the Seventh Circuit Court of Appeals invalidating a 24-hour waiting period provision of the Illinois parental notification law. Hartigan v. Zbaraz, 108 S. Ct. 479 (1987) (per curiam), aff'g 763 F.2d 1532 (7th Cir. 1985). Inadequate judicial bypass and anonymity provisions were also implicated. \(\text{id.}\)

\(^{45}\) Donovan, Judging Teenagers: How Minors Fare When They Seek Court Authorized Abortions, 15 Fam. Plan. Persp. 259, 260 (1983).

\(^{46}\) Benshoof & Filpel, Minors' Rights to Confidential Abortions: The Evolving Legal Scene, in Abortion, Medicine and Law 137, 144 (1986).

\(^{47}\) \(\text{id.}\) at 144-45. See also ACLU Foundation, Parental Notice Laws: Their Catastrophic Impact on Teenagers' Right to Abortion 4-7 (1986) [hereinafter Parental Notice Laws].

\(^{48}\) Parental Notice Laws, supra note 47, at 7.
statutes. These laws therefore fail the requirement that laws abridging the abortion rights of minors serve a significant state interest. Here, the stated goal is not achieved by the means chosen.

2. The Actual Objective of These Statutes is the Prevention of Abortions

The data on the impact of parental consent and notification laws and the indefensibility of such statutes on grounds that they further familial communications, are presumably known to legislatures. Therefore, it is not unreasonable to conclude that the objective of these challenged statutes is not to engender familial communications, but rather, to discourage and prevent teenage abortions. Indeed, all such laws passed in the last thirteen years have been drafted by anti-choice groups which have as their primary goal ending all abortion.49

In further support of this conclusion is the differential treatment of abortion and childbirth under the laws of the states. The vast majority of the states permit minors to give their own consent for prenatal care as well as for treatment of venereal disease.50 Thus, it is only the choice to abort that triggers the states’ alleged interest in familial involvement.51

3. Public Health and Other Considerations Argue Against Such Statutes

More than half of the states have chosen a policy that overtly disfavors and, for many pregnant minors, prevents abortions. Is the prevention of abortions on pregnant minors a significant state interest? If one sets aside the religiously-based considerations as one must when analyzing the power of the state, it is at best difficult to identify the basis on which the state can justify this interest. Public health considerations point the other way. At no point in pregnancy is the mortality rate for abortion higher than for childbirth; abortions at eight weeks gestation or less involve a risk of death only one twentieth of that in childbirth.52 Health data further demonstrate that morbidity is substantially greater at

49 Id. at 3.
50 Id. at 5.
51 In California, for example, a parental consent statute was passed in 1987 which covers only the abortion alternative. Cal. Health & Safety Code § 25958 (West Supp. 1989). Since 1953, pregnant minors have been able to obtain prenatal care without parental consent or notification. Cal. Civ. Code § 34.5 (West Supp. 1989). The consent statute does not change the latter law. The assumption that parents control the reproductive medical care and choices of their minor daughters is also faulty: parents cannot force a minor daughter to have an abortion if she does not want to; courts faced with requests for orders in support of parental choice have refused them. In re Smith, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972); In re Mary P., 8 Fam. L. Rep. (BNA) 2140 (N.Y. Fam. Ct. 1981); see also Eaton, Comparative Responses to Surrogate Motherhood, 65 Neb. L. Rev. 686, 720 n.141 (1986).
52 Parental Consent Laws, supra note 47, at 4.
childbirth than it is during an abortion performed at any stage of pregnancy. Moreover, teenage mothers and their offspring are particularly at risk with respect to death and serious health problems. Data on mental health, like those on physical health, also suggest that childbirth is far more detrimental to teens than is abortion.

If mental and physical health concerns distinctly undermine the states' interest in promoting childbirth rather than abortion for pregnant teens, socio-economic data provide further evidence of the folly of the position. A comparison of women in America who had abortions as teenagers, with those who gave birth while teenagers, demonstrates that the former were more likely to prevent unwanted pregnancies in the future and more likely to realize their family goals. Women who delay childbirth until after age twenty are twice as likely to finish high school and four to five times more likely to finish college than are those who give birth before age eighteen. Families headed by teenage mothers are, not surprisingly, seven times more likely to be impoverished than are other families. In sum, a significant state interest in preventing pregnant teens from choosing to abort is not readily determinable.

In conclusion, the Court has inadequately protected the right not to bear children. Governmental disfavoring of the abortion option for both teens and medically indigent women runs contrary not only to the principles of bodily and decision-making autonomy inherent in the right to privacy that underlies reproductive choice in Roe, but is indefensible under the ordinary process of determining the constitutionality of abridgements of fundamental rights. In the funding cases, the economy rationale is unavailable and the goal of preventing indigent women from choosing abortions is illegitimate. Furthermore, an outright ban on the

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53 Id.
54 Id. This includes, for example, the fact that teenagers are two and a half times more likely to die in childbirth than are women 20 to 24 years of age. Id.
55 Id. at 7.
56 Id.
57 Id.
58 Id.
59 Ironically, the United States Supreme Court has found the prevention of teen pregnancy sufficiently significant to allow the enforcement of criminal statutory rape laws against even minor males for engaging in consensual sex with minor females. See Michael M. v. Superior Court, 450 U.S. 464 (1981).
60 See H.L. v. Matheson, 450 U.S. 398 (1981), where the Court averred "The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences." Id. at 412; see also Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), where the Court reiterated that, "[a] State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial." Id. at 490-91.
funding of abortions coerces, rather than "encourages" childbirth for those dependent on the government, and is not the "least restrictive alternative." In the minors' rights cases, even if one acknowledges the significance of the professed goal of furthering familial communications, it is not furthered by parental consent and notification statutes. Moreover, the encouragement of childbirth among minors is equally indefensible.

III. THE RIGHT TO HAVE CHILDREN

While the United States Supreme Court has granted to the federal and state governments significant power to disfavor the abortion choice, there is, alternatively, no substantially established and judicially recognized constellation of constitutional rights supportive of the option to have children and to control the conditions under which one procreates. This can be seen in the case law governing sterilization, welfare entitlement, employment rights, and most recently in judicial control over the medical care of pregnant women. Despite dicta supporting the constitutional right to choose to be a parent,61 decisions of the Supreme Court have affected only minor restrictions on the authority of the state to deny, restrict, or burden this choice, while contemporary practices of lower courts threaten to exact from pregnant women the very high price for reproduction of forfeiting their right to bodily autonomy.

A. The Right to Procreate: Sterilization

The case law on sterilization reveals that the right to procreate is protected more in dicta than in reality, from Skinner v. Oklahoma62 to the decisions in Buck v. Bell63 and Stump v. Sparkman.64 Although Skinner asserted that involuntary sterilization "involves one of the basic civil rights of man," and "[m]arriage and procreation are fundamental to the very existence and survival of the race,"65 the case was decided not specifically on this basis but rather on the basis of invidious discrimination as between the felons who were and those who were not subjected to sterilization under the challenged Oklahoma statute.66 The Skinner decision did not resolve the question of whether or not the state had the power to sterilize all similarly situated felons; it prohibited only the une-

63 274 U.S. 200 (1927).
65 316 U.S. at 541.
66 Id.
qual use of this authority.  

While the state practice challenged in *Skinner* was extremely rare, significantly more common in American society have been involuntary sterilizations of women assumed to be retarded and women of color who are poor and fundamentally defenseless against the medical authorities with whom they deal. During the first half of the twentieth century approximately 60,000 sterilizations of the developmentally disabled were done in the United States. Yet, in *Buck v. Bell* and *Stump v. Sparkman*, the two cases that reached the Supreme Court in this century, the Court expressed no serious concern about the abridgement of the fundamental right to procreate that had been preempted by the state in each of these sterilization cases. With substantially inaccurate information both about Carrie Buck and the inheritability of retardation Justice Holmes upheld the sterilization order in *Buck* with only passive rationality scrutiny of the action:

> It is better for all the world, if instead of waiting to execute degenerate offspring for a crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles is enough.

While the state of eugenics knowledge arguably explains the Court’s decision in *Buck*, the decision in *Stump* in 1978, immunizing judges from legal repercussions of even gross violations of their obligations under the law, suggests that concern for the right to procreate did not outweigh the Court’s concern for judicial immunity. There, a fifteen-year-old girl was sterilized without her knowledge, under a court order

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67 Id.
69 *See, e.g., Dreifus, Sterilizing the Poor*, in *Feminist Frameworks* 58 (1984); Velez, *Se Me Acabó La Canción: An Ethnography of Non-Consenting Sterilizations Among Mexican Women in Los Angeles*, in *Mexican Women in the United States* 71 (UCLA Chicano Studies Research Center, Occasional Paper No. 2, 1980); *see also Madrigal v. Quilligan*, No. CV 75-2057 JWC (C.D. Cal. June 30, 1978) (finding that the plaintiffs were not involuntarily sterilized because the doctors believed that the woman had consented).
71 274 U.S. 200 (1927).
74 *Buck*, 274 U.S. at 207 (citation omitted).
75 *Stump*, 435 U.S. at 359-60.
approved by Judge Harold Stump. In an ex parte proceeding, the mother had alleged that her daughter was "somewhat retarded," and that the sterilization was necessary to prevent potentially unwanted pregnancies. The petition was granted without argument, the appointment of a guardian ad litem, or any statutory or common law empowering the judge to grant such an order. Under Indiana law, the only provision for involuntary sterilization pertained to institutionalized mentally retarded persons and provided an administrative process that was appealable to the courts. The majority of the Court in Stump concluded, nevertheless, that Judge Stump acted in a judicial capacity when he granted the ex parte petition for the sterilization of Linda Kay Sparkman, thereby rendering him absolutely immune from suit under 42 U.S.C. § 1983. While one might conclude that Stump is expressly about the power of judges rather than the right to procreate, in balancing the respective constitutional equities, the United States Supreme Court chose to expand significantly the immunity of judges at the cost of the fundamental right of reproductive choice. If the Court had supported the principle that the right to procreate is in fact fundamental, it would have asked whether there is a compelling state need to immunize such a judicial action, an action beyond judicial authority under state law and taken without regard to ordinary principles of due process of law. Had the issue been framed in this manner, a manner appropriate to official abridgements of fundamental rights, the Court would have been unable to justify the resulting expansion of judicial immunity at the expense of constitutional rights. 

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76 Id. at 352-53.
77 Id. at 351. In fact, there was evidence that she had been making normal progress in elementary and secondary education in "normal" classes. Id.
78 Id.
79 Id. at 351-52.
80 Id. at 366 (Stewart, J., dissenting) (citing Ind. Code Ann. §§ 16-13-13-1 to -4 (repealed 1974)).
81 Id.
82 Id. at 359-60. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

State and local governmental officials are, thus, ordinarily subject to civil suit under federal law for their actions which deprive individuals of their federally secured rights. Consequently, Linda Kay Sparkman sued Stump under this statute.

83 The critical weakness of the majority's resolution of Stump is not that the Court valued the principle of judicial immunity per se, but rather that the Court thought it necessary to expand the principle to a case in which the judge was acting with no recognized legal authority and in violation of the procedural and substantive rights of the respondent. In contrast, two major precedents on judicial immunity cited by the Court in Stump involved clearly "judicial acts" within the discretion of the judge under the law. See Bradley v. Fisher, 70 U.S. (13 Wall.) 335 (1872) (order to strike attorney's name from court's roll is judicial act for which judge is not liable); Pierson v. Ray, 386 U.S. 547 (1967) (in civil rights case, judge's immunity from liability for damages from his judicial acts prevailed when suit was brought under 42 U.S.C.
In sum, despite the dicta, the case law on the right to procreate, with respect to sterilization, casts doubt on the importance the Supreme Court actually attaches to the right. While some states have been making progress in providing causes of action for those alleging that they were involuntarily sterilized, the constitutional foundations for seeking relief and the application of 42 U.S.C. § 1983 remain limited.

B. Burdening Reproductive Choice: The Welfare and Employment Contexts

*Dandridge v. Williams,* put to rest not only the assumption that there is a basic constitutional right to subsistence, but also that the right of the indigent to procreate is *fundamental.* Although that decision focused on the level of scrutiny to apply to governmental policies affecting the poor, the decision limits the procreative choice of the indigent under a mere rationality standard of review.

In upholding Maryland's maximum public assistance stipend policy, the Court permitted the state to limit its maximum welfare grants to the level of need determined for families of six. Consequently, two parents with five children who qualify for public assistance received assistance for only four of those children. The policy in question raises myriad constitutional issues. What is noticeably absent from both the majority opinion and the compassionate dissents of Justices Douglas, Brennan, and Marshall is any attention to the challenged policy's implications for reproductive choice. The Maryland law served as a deterrent to having more than four children. Those dependent on welfare would not be eligi-
ble for subsistence support for these children. Because of the impact on reproductive rights of this policy, a scrutiny more sensitive to the fundamental right of reproductive choice ought to have been applied by the Court. By its own “rules,” the statute ought to have been subjected to a compelling state interest standard of review.

In employment law, as in welfare law, burdens on reproductive choice have received little constitutional scrutiny from the Supreme Court. Ironically, courts traditionally upheld work restrictions on women as necessary to protect women in their role as bearers of the next generation. Because of this role, their health, welfare, morals, and safety were therefore of concern for the survival of the race. The irony of this protectiveness is that rather than signalling a public commitment to support the choices of women to reproduce, the protectiveness has proven to be a precursor of state control over the bodies and medical decisions of pregnant women. In effect, the state's support for the positive act of reproduction is exercised more on behalf of fetuses than on behalf of the right of women to choose to become mothers.

With only rare and limited exception, considerations of cost and convenience to the state and employers are entirely preemptive of the rights of pregnant workers. The Court's first Title VII case on sex discrimination in employment implicitly raised the issue of reproductive choice. In Phillips v. Martin-Marietta, the plaintiff challenged the defendant's refusal to hire women with preschool age children because it did not apply the policy to similarly situated men. Although the court rejected Martin-Marietta's hiring criterion, it held that such a policy would not violate Title VII if the requirement that women not have chil-

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91 Maryland offered as a justification for its policy its interest in providing “incentives for family planning.” 397 U.S. at 484. It was thus clear that restricting reproductive choice was an overt goal of the state of Maryland. While I do not believe that the identification of a nefarious motive or purpose is necessary for a challenged public policy to be found unconstitutional, see Binion, “Intent” and Equal Protection: A Reconsideration, 1983 Sup. Ct. Rev. 397, 410 passim (1984) (arguing that the impact of a policy is critical), courts must assess goals and purposes of public policies in order to determine how compelling they may be and whether they may be effected with less restrictive consequences for fundamental rights.

92 Applying strict scrutiny to the state's policy merely takes account of the important needs of those affected by the policy. When the challenged policy must further a compelling state interest, the government rarely prevails. However, this is not necessarily the case. See, e.g., Storer v. Brown, 415 U.S. 724 (1974).


94 Id.

95 See infra notes 134-64 and accompanying text.

96 See, e.g., Wimberly v. Labor and Indus. Relations Comm'n, 479 U.S. 511 (1987); Geduldig v. Aiello, 417 U.S. 484 (1974); Phillips v. Martin-Marietta, 400 U.S. 542 (1971). Cost to the government may well be a legitimate consideration in controversies surrounding the exercise of fundamental rights; however, it cannot be assumed conclusively to resolve the controversy, see supra note 23.

97 400 U.S. 542 (1971).
dren were a bona fide occupational qualification. Employers could refuse to hire women with children if such women were shown to be, as a group, more torn by their dual responsibilities than were men who were also parents. "The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act."99

Pregnant women fared just as poorly as had mothers in their first constitutional challenge to discrimination in the public sector. *Cleveland v. La Fleur*100 stands as the only constitutionally-based challenge to discrimination against pregnant women in which burdens on reproductive choice in the employment context have been proscribed by the Supreme Court.101

There, the Court acknowledged that the right of reproductive choice was implicated in pregnancy leave policies that disallowed women from teaching school after the fourth or fifth month of pregnancy.102 In doing so, the Court stressed the violation of due process of law inherent in such an irrefutable presumption.103 Similarly, the Court prohibited the Cleveland school district from barring a teacher’s return to her job until at least three months after the birth of her child.104 The Court left intact the district’s policy requiring teachers to demonstrate that their children would be cared for while they were at work, and a waiting period for reintegration into the work force of up to one semester (Cleveland) or one school year (Chesterfield).105

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98 Id. at 544.
99 Id. *Phillips* undermined a major potential impact of Title VII: to outlaw discrimination on the basis of motherhood. The bona fide occupational qualification (BFOQ) exception to Title VII, allows "an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Title VII § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1982) (emphasis added). This suggests that the exception refers to peculiar characteristics of particular jobs and not to generalizations about the lesser desirability of a protected class of workers.
102 414 U.S. at 640.
103 Id. In Cleveland, Ohio the policy required a pregnant woman to take leave without pay at least five months prior to the expected birth of her child. Id. at 634. In Chesterfield County, Virginia the policy required that the unpaid leave begin no later than four months before the expected birth. Id. at 636.
104 Id. at 640.
105 Id. at 643. These two policies received only minimal scrutiny. The Court failed to recognize discrimination on the basis of gender in the policy of requiring new mothers to satisfy the school district’s concern that their children would be cared for in their absence. Moreover, mandatory waiting periods for placement when returning from unpaid child-bearing leave, although arguably supported by administrative convenience, burden reproductive choice. However, the Court never balanced the rights to equal protection and reproductive choice against the goals furthered by the challenged policies.
The Court's protection of reproductive choice in *LaFleur*, although significant, was limited and short-lived. ¹⁰⁶ Five months after *LaFleur*, the Court decided *Geduldig v. Aiello*.¹⁰⁷ It was a major setback for those opposed to workplace burdens on pregnancy, and it remains valid constitutional precedent.¹⁰⁸ In allowing states to exempt normal pregnancy from their disability programs, the Court refused to view these policies as creating a sex-based classification and failed to consider the effect of these policies on the right of reproductive choice:

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect [sic] an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.¹⁰⁹

The Court concluded that the classification within the law was between "pregnant women and nonpregnant persons."¹¹⁰ The irony of this position is highlighted by the majority opinion's reference to the "unique characteristics" of pregnancy. What makes pregnancy especially unique is not only that it distinguishes all men from most women, but also that it is the only cause of temporary employment disability that is constitutionally protected. Nevertheless, the state's policy of disadvantaging pregnancy was subjected to only passive rationality analysis and was upheld as a legitimate way to save money.¹¹¹

With *Geduldig* as precedent, the disposition of *General Electric v. Gilbert*¹¹² two years later was virtually a foregone conclusion. In *Gilbert*, the Court extended its narrow concept of sexual equality, sans consideration of the fundamental right of reproductive choice, to the private sector under Title VII.¹¹³ If the state was not to be held accountable for the unequal burdening of a basic constitutional liberty in a public disability

¹⁰⁶ The *LaFleur* Court primarily took issue with the irrebuttable presumption of unfitness. 414 U.S. at 640. The holding was not that employees' constitutional rights were entitled to greater weight than was governmental administrative convenience, but rather, that the lack of fit between means and ends of the policies revealed a different justification. The Court acknowledged that the challenged policy came less out of administrative need than out of a Victorian concern about the inappropriateness of young children seeing their teacher pregnant. *Id.* at 641 n.9.


¹⁰⁹ *Geduldig*, 417 U.S. at 496 n.20.

¹¹⁰ *Id.*

¹¹¹ *Id.* Even the dissenters in *Geduldig*, Justice Brennan, joined by Justices Douglas and Marshall, failed to address the right of reproductive choice. *Id.* at 497-505.

¹¹² 429 U.S. 125 (1976).

¹¹³ *Id.* at 136.
program without the existence of a clear statutory mandate to the contrary, the private sector was unlikely to be held to a more rigorous standard by the Court.

However, the Court did hold that Title VII prohibited an employer from denying full seniority and benefits to a woman employee returning from a mandatory pregnancy leave in *Nashville Gas Co. v. Satty*. The majority found it pivotal that benefits were denied, whereas in *Gilbert* they were withheld. It remains unclear why a classification of pregnancy is gender-based when it implicates a denial of benefits, but not so when it implicates a withholding of them. It seems likely that the Court found the discriminatory scheme in *Satty* so egregiously unfair as to violate Title VII and then attempted to reconcile its *Gilbert* decision. But the legal distinction between these two cases on the question of whether discrimination on the basis of pregnancy constitutes sex discrimination remains unpersuasive.

In response to *Gilbert*, Congress passed the Pregnancy Discrimination Act (PDA) which requires that the private sector respect, but not necessarily integrate or accommodate, the right to reproduce. The PDA prohibits covered employers, public and private, from subjecting pregnancy to disadvantageous treatment with respect to all employment-related purposes.

A substantial limitation of the Act is that it requires only equality of treatment as between pregnancy and other temporary employment disabilities. Employers who have no, or inadequate, leave policies, and are not otherwise required by state law to have such policies for disabled workers, are not obligated by the PDA to accommodate the reproductive needs of their female employees.

However, states remain free to provide greater protection to pregnant workers than that afforded other workers. The California Fair Employment and Housing Act requires that employers allow pregnant workers reasonable unpaid leave of up to four months for child-bearing,

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115 *Id.* at 141-42.
116 42 U.S.C. § 2000e(k) (1982). Specifically, the PDA added subsection (k) to Sec. 701 of Title VII of the 1964 Civil Rights Act, the definitional section. Title VII now includes pregnancy and pregnancy-related conditions within its definition of sex discrimination. Ironically, in the first of the only two Supreme Court cases under the PDA, *Newport News Shipbuilding & Drydock Co. v. EEOC*, 462 U.S. 669 (1983), the Court decided that an employer's health insurance plan that did not give pregnant spouses of male employees the same maternity coverage that pregnant female employees received for themselves, violated the equal employment rights of men under Title VII.
118 See Brief Amici Curiae of Coalition for Reproductive Equality in the Workplace *passim*, in *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272 (1987), (No. 85-494). Women are treated unequally because men need not risk their employment by deciding to become parents, whereas women, unaided by constitutional or statutory law, must face such risk in exercising their reproductive choice. *Id.* at 14.
119 CAL. GOV'T CODE §§ 12900-12996 (West 1980).
when medically necessary. This law was upheld in *California Federal Savings & Loan v. Guerra* against the challenge that it was not neutral with respect to pregnancy and therefore, ran afoul of the PDA’s prohibition against discrimination on the basis of pregnancy. The United States Supreme Court found that the statute was supportive of the spirit of Title VII (as amended by the PDA) that women should not be forced to choose between work and children, and that the statute did not force an employer to choose between obeying state law and federal law. While California statutory law required only that pregnant workers have medically necessary pregnancy leaves, consistent with state law, employers were free to provide similar leaves to any temporarily disabled worker. *Cal. Fed.* is, thus, more important for the room it allows states to promote the reproductive rights of employees through state statutory schemes than for any expansive definition of these rights.

That reproductive choice is only minimally protected by federal law is also evident from judicial treatment of unemployment insurance cases. *Wimberly v. Labor and Industrial Relations Commission*, decided only one week after *Cal. Fed.*, rejected the claim that a woman has a right to receive unemployment benefits after leaving work due to pregnancy. Interpreting the Federal Unemployment Tax Act as barring discrimination solely on the basis of pregnancy in states’ unemployment insurance programs, the Court ruled unanimously that Missouri’s policy was consistent with federal law. Since Missouri could, consistent with federal law, bar eligibility for a worker who leaves his or her work “voluntarily without good cause attributable to his work or to his employer,” Wimberly’s leaving her job voluntarily in order to have a child made her ineligible on neutral grounds. Wimberly had not quit her job but had taken a leave of absence and was fit to return to work three weeks after giving birth. Pursuant to J.C. Penney’s policy of granting “leaves without guarantee of reinstatement” to temporarily disabled workers, she was informed that no job was available when she requested reinstatement.

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120 *Id.* at § 12945(b)(2).
122 *Id.* at 284, 292.
123 *Id.* at 288-92.
124 *Id.* at 291.
125 While there are several excellent analyses and critiques of the constitutionality of employing the classification scheme of pregnancy under the framework of equal protection, see, e.g., Kay, *supra* note 3, the argument herein focuses on the need to support the right of reproductive choice for women so as to minimize our inequality with men with respect to the attendant and implicated costs and risks of reproduction.
127 *Id.* at 521-22.
129 479 U.S. at 516, 520-22 (Blackmun, J., not participating).
130 *Id.* at 513 (quoting Mo. Rev. Stat. § 288.050.1(1) (Supp. 1984)).
131 *Id.* at 513, 517.
132 *Id.* at 513.
ment. Thus, she was forced to risk her job to give birth. Without seeking evidence as to whether Penney's had a history of reinstating other employees with greater frequency than it reinstated women who had given birth, the Court unanimously concluded that, for purposes of the Missouri statute, Wimberly had voluntarily left her job.133

In sum, in unemployment insurance schemes, as in child-bearing leave and disability insurance policy, no protection for the positive right of reproductive choice is constitutionally required and federal statutory public policy is prohibitive of only discrimination between reproductive choice and other employment disabilities. That pregnancy, unlike other temporary disabilities, is a constitutionally protected right, has had no appreciable impact on either the level of scrutiny applied by judges or on the non-discrimination principles in statutory law.

C. Controlling the Process of Reproduction

1. Involuntary Medical Procedures

The incidents of court-ordered control over the medical care of pregnant women and accusations of fetal abuse or neglect against them constitute an egregious lack of legal respect for the reproductive decision-making processes of women.134 While American jurisprudence prohibits state-imposed medical care on unwilling, competent, sentient adults,135 in numerous cases, courts have ordered involuntary invasions of the bod-

133 Id. at 513-514. I do not mean to suggest that J.C. Penney had a history of discrimination. I suggest only that such a determination under Title VII should be relevant to a determination of the question of non-discrimination by the state in its administration of its unemployment insurance plan which covers privately run businesses.


135 For common law decisions finding a right to immunity from invasions of bodily integrity, see, e.g., In re Yettet, 62 Pa. D. & C.2d 619 (1973); In re Osborne, 294 A.2d 372 (D.C. 1972). For decisions finding a constitutional basis for the principle of bodily integrity, see, e.g., Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 738-45, 370 N.E.2d 417, 424-27 (1977); In re Quinlan, 70 N.J. 10, 38-42, 355 A.2d 647, 662-64 (1976), cert. denied, 429 U.S. 922 (1976). For a general discussion of the bases for the right, including a discussion of the impact of Roe v. Wade, see Gallagher, supra note 134, at 17-31. Also significant with respect to the constitutional foundation for the right to refuse medical care and procedures is Winston v. Lee, 470 U.S. 753 (1984). The Supreme Court upheld, on fourth amendment grounds, a robbery suspect's right to refuse surgery to remove a bullet that could have provided significant evidence in the state's case against him. Id. at 766. It is thus arguable that the rights of individuals, generally, to determine the medical procedures that will and will not be performed on them has been deemed to be fundamental.
ily integrity of pregnant women. Although courts have overseen the medical care of minors whose parents' religious beliefs prohibit medical treatments which can be life-saving, only in the case of pregnant women does the judiciary presume to have such authority over competent adults.

In two "known" cases involving the right of Jehovah's Witnesses to shun blood transfusions, courts have ordered women to undergo such procedures, because they were pregnant. The earlier of these cases, Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson was decided before Roe v. Wade and involved a woman who was approximately eight months pregnant. More troubling is the 1985 decision in which a Jehovah's Witness, only four months pregnant, was forced to receive a blood transfusion against her will. While the judge acknowledged that the woman was legally entitled to abort, and that she had a "protected interest in the exercise of her religious beliefs," he concluded that this was outweighed by the state's "highly significant interest in protecting the life of a mid-term fetus."

More common than forced blood transfusions are judicial orders compelling pregnant women to undergo Cesarean deliveries. Despite the right of the individual to reject medical procedures, one study reports fifteen documented cases, though generally unreported, of courts ordering women to have Cesarean sections against their will.

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136 See Kolder, Gallagher & Parsons, supra note 134, at 1193.
138 See, e.g., Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied, 377 U.S. 985 (1964); In re Jamaica Hosp., 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (1985). Another case often cited as upholding judicial authority over pregnant women who refuse treatment on religious grounds involved a judicial order to transfuse a Jehovah's Witness who was not pregnant, but was the mother of a young child. The decision however, rested on the perceived mental incompetence of the woman to make the decision and the perceived passivity of her husband. Application of the president and directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1964).

One of the difficulties in analyzing the so-called fetal rights cases is that there are only a handful of reported cases. Only two opinions directly support court-ordered medical intervention on behalf of the fetus. See Nelson & Miliken, supra note 134, at 1063. Because of the emergency nature of these court orders, the initial judges' actions are seldom reviewed or overturned by appellate courts before they are carried out. Thereafter, causes of action are limited since physicians and hospitals may claim the protections of their court orders and the judges who issued the orders enjoy immunity for their judicial acts. See supra note 83.

139 See Raleigh Fitkin-Paul, 42 N.J. 421, 201 A.2d 537; In re Jamaica Hosp., 128 Misc. 2d 1006, 491 N.Y.S.2d 898.
140 42 N.J. 421, 201 A.2d 537 (1964). Despite the precedential value of this decision, it had no immediate effect since the patient left the hospital before the court order became final.
141 In re Jamaica Hosp., 128 Misc. 2d 1006, 491 N.Y.S.2d 898.
142 Id. at 1007, 491 N.Y.S.2d at 899.
143 Id. at 1008, 491 N.Y.S.2d at 900.
144 See Kolder, Gallagher & Parsons, supra note 134, at 1193. They documented and reviewed 21 different requests by doctors and hospitals for court orders, 15 of which were sought for Cesarean sections, and found a "success" rate of 86% for the medical personnel. 80% of these women were minorities (Black, Hispanic and Asian), 27% were not native English-speaking.
Women's refusals of Cesarean surgery for religious\textsuperscript{145} and other reasons\textsuperscript{146} have been overridden by courts. Perhaps no case received more media attention nor crystallized the issues more firmly than that of Angela Carder. In November 1987, a superior court judge in Washington, D.C. granted the administrators of George Washington University Medical Center an order allowing them to perform a Cesarean section on a woman who was twenty six weeks pregnant and terminally ill with cancer.\textsuperscript{147} The court reasoned that because she was about to die, her right to bodily integrity and autonomy could be waived in the interests of saving the fetus.\textsuperscript{148} The D.C. Court of Appeals denied a stay of the order.\textsuperscript{149} The surgery was performed, the fetus was not viable and Angie Carder died shortly thereafter.\textsuperscript{150} Although the D.C. Court of Appeals later reconsidered its decision and vacated its denial of the stay,\textsuperscript{151} the damage had been done.

2. \textit{Roe v. Wade}\textsuperscript{152} and \textit{Thornburgh v. American College of Obstetricians and Gynecologists}\textsuperscript{153} Prohibit Forced Cesareans and Blood Transfusions

One searches in vain for a legal basis on which to support the

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  \item and all of the women were treated in a clinic at a teaching hospital or were on public assistance. \textit{Id.}
  \item Not surprisingly, a Jehovah's Witness, who had rejected such surgery because of her religion's ban on blood transfusions, was the subject of the the most regularly cited case supporting such authority in judges. \textit{Jefferson v. Griffin Spalding County Hosp. Auth.}, 247 Ga. 86, 274 S.E.2d 457 (1981). Interesting, although not dispositive of the constitutional issues, is the fact that the predictions of the doctors in \textit{Jefferson} were not reliable. It was asserted that if Ms. Jefferson delivered vaginally, she had a 50% probability, and the fetus a 99% probability, of death. On the basis of this medical certainty the judicial order was issued. Ms. Jefferson subsequently gave birth without surgery; she and the child were fine. Daniels, \textit{supra} note 134, at 1070.
  \item Refusals of Cesarean surgery in U.S. hospitals have also occasionally reflected the cultural values within Haitian, Jamaican and African societies which attach a serious taboo to a child who is born in this manner. Rhoden, \textit{supra} note 144, at 2006 n.275, cites an interview with Wayne Cohen, M.D. recounting such incidents involving women of these cultural groups in U.S. hospitals. More commonly, women calculate that the danger to the fetus and/or to themselves of vaginal birth is not as great as their physicians suggest and reject Cesarean surgery as unnecessary. As Rhoden suggests, medical research on indications for Cesarean surgery demonstrates an inordinately high level of disagreement among physicians on when such surgery is necessary, as well as a very high rate of false positive indications for surgery from fetal monitoring equipment. \textit{Id.} at 2011-23. Added to these phenomena is the not uncommon clash of interests between the patient and the obstetrician in that the incentive system for the latter is almost uniformly supportive of performing Cesarean surgery (particularly with respect to the potential for malpractice litigation, if not the incentive of generating higher professional fees) whereas, for the patient, Cesarean surgery is generally undesirable. In sum, it would be inaccurate to characterize the involuntary Cesarean issue as a clash between reliable medical science and maternal irrationality.
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\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{152} 410 U.S. 113 (1973).
\textsuperscript{153} 476 U.S. 747 (1986).
authority of the state actively to invade the bodily integrity of any competent adult, including a pregnant woman. Every competent adult has the right to refuse treatment. While the state has been given the authority under the Constitution to ban purely elective abortions after presumed viability at six months gestation,\textsuperscript{154} there is no legal basis on which to justify such court-mandated active and risky intrusions upon the body as blood transfusions and Cesarean surgery.\textsuperscript{155} This limitation on state authority is implicit in \textit{Roe}, and relatively more explicit in \textit{Thornburgh}.

Despite the Court’s finding of a compelling state interest in fetal life during the third trimester of gestation, \textit{Roe} may be understood to permit the state only the power to ban elective abortions after this point of presumed fetal viability. “If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, \textit{except when it is necessary to preserve the life or health of the mother.”}\textsuperscript{156} \textit{Roe} does not offer support for any state action to protect potentially viable fetuses beyond banning elective abortion. The use of the phrase, “may go so far,” suggests that the state may go no further. Similarly, the section of the opinion in \textit{Roe} prohibiting a ban on post-viability abortions, when necessary to preserve maternal health, demonstrates that maternal health is at all times a superior claim to that of fetal life. Cesarean sections, like all major surgery, threaten maternal health.

Even more clearly delimiting of the states’ constitutional authority to protect presumably viable fetuses is the Court’s resolution of \textit{Thornburgh}. Although the case challenged several provisions of a Pennsylvania law designed to limit abortions, germane to the instant discussion was the Court’s rejection of provisions requiring that post-viability abortions be done in the manner most likely to preserve the life of the fetus, and that a second doctor be present during such procedures. While the former provision was inapplicable to conditions under which it “would present a \textit{significantly greater medical risk} to the life or health of the pregnant woman,” the Supreme Court agreed with the court of appeals that it was, nevertheless, unconstitutional.\textsuperscript{157} The Supreme Court, in unequivocal language, held that the Constitution permits no “trade-off” between the woman’s health and the life of the fetus and

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  \item 154 \textit{Roe}, 410 U.S. 113.
  \item 155 Even prior to AIDS, there was a risk of contracting other infections of various types through blood transfusions. Daniels, supra note 134, at 1069. Cesarean sections have a maternal death rate four times that of vaginal deliveries. \textit{Id}. Mathematical analysis suggests that the use of Cesarean surgery, whenever indicated by fetal monitoring, would result in the death of one woman for every eight fetuses saved. Rhoden, supra note 134, at 2023 (citing Munsick, \textit{Comments to Haverkamp Study}, 134 AM. J. OBSTET. \& GYNECOL. 409, 411 (1979)). While these numbers may differ today, this estimate does not include the myriad health problems, short of death, that are associated with such surgery. \textit{Id}.
  \item 156 \textit{Roe}, 410 U.S. at 163-64 (emphasis added).
  \item 157 \textit{Thornburgh}, 476 U.S. at 768-69 (emphasis added).
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"that maternal health [must] be the physician's paramount concern." The Court also rejected the provision of the Pennsylvania law requiring the presence of a second physician during a post-viability operation because there was no specific provision for waiving this requirement despite the possibility that in certain cases any delay might endanger the health of the pregnant woman.

Thornburgh and Roe, although premised on the principle that there is a compelling state interest in post-viability fetal life, empower the states to express this interest only through a ban on purely elective abortions during the third trimester, and simultaneously deny to the states the authority to impose any risk to maternal health to preserve fetal life. Cesarean sections and blood transfusions pose such risks.

3. The Common Law of Bodily Integrity

That there is no recognized compelling state interest to save fetal life sufficient to justify judicial invasions of the bodily integrity of pregnant women is evidenced by the lack of state authority to save actual human life through bodily invasions of others. Even the common law concept of duty to rescue, relatively unknown in American law, does not apply when the rescue would entail any danger or undue intrusion upon the rescuer. Courts will not order someone to donate bone marrow to save the life of another nor order an individual with two kidneys to give one to an ailing relative. As one analysis has noted very perceptively, only thirteen percent of the people who die each year donate their organs. Despite the need for additional organs, the bodily integrity of those who choose not to donate their organs is honored. As the

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158 Id.
159 Id. at 771.
161 Only four states (Vermont, Massachusetts, Minnesota and Hawaii) have broad duty-to-assist statutes; even these require only non-risky acts of good Samaritanship. Similarly, in European countries which do recognize a duty of good Samaritanship, such duty does not extend to acts involving personal risk to the rescuer. More States Enact Laws that Require Citizens to be Good Samaritans, L.A. Times, Oct. 11, 1984, pt. I-B, at 5, col. 1; see also Radcliffe, A Duty to Rescue: The Good, the Bad and the Indifferent—the Bystander's Dilemma, 13 PEPPERDINE L. REV. 387 (1986) (Note).
162 See, e.g., Rhoden, supra note 134, at 1975-82; McFall v. Shimp, 10 Pa. D. & C.3d 90 (C.P. Ct. 1978) (rejecting obligation of defendant to provide bone marrow for cousin who might thus have been saved from death, because such an order would violate every premise of bodily integrity in American jurisprudence). A similar conclusion was reached in In re George, 630 S.W.2d 614 (Mo. App. 1982), in rejecting an attempt by an adopted man to uncover the identity of his father in order to seek his assistance in a bone marrow transplant. In George, the putative father denied paternity and did not wish to be contacted by his alleged son. Despite the life-threatening nature of the plaintiff's condition, the court held that the "compelling circumstances" necessary to allow the disclosure of confidential adoption records did not exist, given the necessity of the alleged father's voluntary participation in both testing and treatment procedures. Id. at 622-23.
163 Nelson & Milliken, supra note 134, at 1065.
authors of the analysis, Nelson and Milliken, conclude, "We see no good reason why pregnant women should be treated with less respect than corpses." 164

While one would ideally want all pregnant women to do whatever they can to create a healthy child, it is a far different matter for the state to preempt women's liberty on the basis of the state's interest in fetal protection. The act of becoming pregnant ought not to vitiate one's fundamental constitutional right to bodily integrity, nor should the right of reproductive choice be defined so narrowly as to preclude the right to self-determination over how one chooses to experience the process.

4. Further Burdens on the Choice to Reproduce

The involuntary medical care cases, such as those involving blood transfusions and forced Cesareans, are only a small piece of the pattern of preemption of the fundamental rights of pregnant women that undermines effective reproductive choice. These cases reflect a judicially sanctioned presumption that pregnant women live in a different relation to the state than do others. Moreover, the presumption is not confined to the judiciary. The legislative, policy-making process and the criminal justice system contribute to the legitimation of this perspective.

An initiative measure in California in 1988 entitled The Humane and Dignified Death Act provided for the right of terminally ill people to hasten their deaths, including the right to be assisted by a physician in obtaining lethal medication. 165 Exempt from the provisions of this measure were children, presumed to be too immature to give such consent, and pregnant women. 166 The Act failed to obtain enough signatures to qualify for the ballot, 167 but the incident demonstrates that even progressive political forces which fight for the right of bodily autonomy for the terminally ill accept the proposition that pregnant women's rights are not co-equal and that through the act of becoming pregnant one has waived a fundamental right.

Even allegedly "benign" public policy initiatives, such as laws requiring fetal alcohol syndrome warnings where alcohol is sold, serve to reinforce the notion that the behavior of pregnant women requires special oversight by the state. Public health and welfare is not the operative governmental concern since these warning signs do not mention the relationship between alcohol consumption and cirrhosis of the liver, nor the

164 Id.
166 Id.
extremely high association between spouse abuse and alcohol consumption.

Governmental attempts to control drug use by pregnant women threaten the use of criminal sanction. An Illinois court made a fetus a ward of the court and ordered the woman into a drug rehabilitation center, while a court in Maryland ordered periodic drug tests on a pregnant woman charged with fetal abuse.168 Similarly, in California, in 1987, the San Diego District Attorney attempted unsuccessfully to prosecute Pamela Rae Stewart for fetal abuse when her baby died shortly after birth.169 The basis for the attempted prosecution was that her physician's directives on drug use, sexual activity, and seeking medical aid were allegedly ignored.170 While the Stewart case was dismissed,171 the principle of the state's power to control pregnant women's lives and bodies and to turn to the courts for assistance clearly remains a problematic trend in American law.

III. Conclusion

Since Roe v. Wade in 1973, our constitutional jurisprudence has included the principle of reproductive choice. In practice, this has meant only that one cannot be prohibited from using birth control, or from obtaining an elective abortion during the first two trimesters of gestation. The choice not to have a child does not fully extend to minors whose right may be burdened by parental consent and notification statutes. Poor women, dependent on public funds for their medical care, and federal employees, dependent on their health insurance, are similarly restricted in their right not to have a child. Consequently, in conflict with ordinary standards of fundamental rights jurisprudence, government has been free to institutionally disfavor the abortion alternative.

Although the disfavoring of the abortion alternative has been legitimated by the Court's recognition of a state interest in preferring childbirth, this has not been accompanied by legislative or judicial support for the right to have children. The case law on sterilization, as well as on discrimination in the welfare and employment contexts, suggests the view of the contemporary United States Supreme Court is that while the government presumably cannot criminally prohibit reproduction, the Constitution permits official discrimination against pregnancy wherever that discrimination serves the state. In partial contrast, recent progressive legislation, such as the Pregnancy Discrimination Act, requires only neutrality as between pregnancy and other temporarily disabling condi-

168 See Andrews, supra note 134, at 33.
170 Id.
tions. The fundamental right to reproduce, therefore, has no constitutional protection from governmental burdening, and no statutory protection beyond that afforded any temporarily disabling condition, neither of which is protected by federal law.

The current state of the law on the bodily integrity of pregnant women best represents contemporary limitations on reproductive choice. The decisions of several dozen state and federal courts give to the state and to the medical profession, physical control over pregnant women unknown in any other area of law affecting competent adults. Because women's fundamental rights to bodily integrity and to medical self-determination are preempted as a cost of pregnancy, reproductive choice is unduly burdened.

What is needed is both a fundamental reconsideration by the Court of the right of reproductive choice and federal legislation to effectuate that right. Primary in the judicial reconsideration of reproductive choice should be an acknowledgement that policies need not explicitly deny a right to burden it. The implications of differential treatment of pregnant women and women with children for the right of reproductive choice ought to be recognized. Such policies should consistently be strictly scrutinized.

Statutorily, progress on these issues can be made by a variety of congressional actions. Some positive major initiatives would include the following: first, Congress should repeal the Hyde Amendment and restrictions on the right of federal employees to use their health insurance to obtain abortions. Second, Title X must be amended to eliminate the disfavoring of contraception and abortion and to require the provision of full and complete information and health services. Third, legislation protecting the employment rights of pregnant women and new parents must be enacted to eliminate the notion that non-discriminatory treatment of pregnant workers under the PDA and the Federal Unemployment Insurance Act is sufficient to protect the right of reproductive choice. Finally, statutory law pursuant to congressional power to protect "liberty" under section five of the fourteenth amendment is needed to

\[172\] The power of Congress to enforce the provisions of the fourteenth amendment through appropriate legislation is broad. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966); Ex Parte Virginia, 100 U.S. 339, 345-46 (1879). Moreover, although the fourteenth amendment does not directly reach federal actors, Congress has the authority to incorporate fifth amendment jurisdiction under fourteenth amendment legislation. Bolling v. Sharpe, 347 U.S. 497 (1954). Thus, the exercise of Congress's section five power would be an appropriate way to restrict judicial actions, state and federal, that deny to pregnant women the fundamental right of bodily integrity afforded all others. The two major provisions of section one of the fourteenth amendment, due process and equal protection, are undermined by these judicial orders and each should therefore be cited in such "corrective" congressional legislation. While substantive due process is the constitutional foundation of the right of reproductive choice, equal protection is violated by the differential and inferior protection of the fundamental rights of pregnant women.
prohibit judges nationwide from interfering with the bodily integrity of pregnant women.