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Webster and the Future of Substantive Due Process

James Bopp, Jr.*
Richard E. Coleson**

I. INTRODUCTION

After the United States Supreme Court handed down Webster v. Reproductive Health Services,¹ pollsters asked whether people approved or disapproved of the decision.² The question was inapt, for Webster could elicit both approving and disapproving responses from persons on both sides of the abortion debate. Webster clearly indicated a new direction in abortion law, but it stopped short on the journey and left uncertainty about the precise path to be followed. The new direction set by Webster is evident in one powerful symbol: Justice Harry Blackmun, the author of Roe v. Wade,³ dis­sent­ed in Webster.⁴ The new direction is also evident from the fact that the Webster Court upheld⁵ all of Missouri’s restrictions on abortion, thereby reversing the lower courts, which had found nu­-

² The New York Times/CBS NEWS Poll, “Abortion: A Wide Range of Views”, N.Y. Times, Aug. 3, 1989, at A18. This sort of approve/disapprove poll on a complex case such as Webster is entirely without merit for its failure to focus on the specific object of approval or disapproval. Thus, the fact that 14% approved and 23% disapproved of Webster is meaningless, e.g., some of the polled parties might have disapproved of Webster for failure to explicitly overturn the right to abortion and some may have disapproved it for allowing the states more power to regulate abortion.
³ 410 U.S. 113 (1973)(which made unconstitutional the abortion laws of all the States).
⁴ Justice Blackmun has twice predicted the demise of Roe, claiming that there now exist sufficient votes on the Court to overrule Roe. Blackmun says high court has votes to overturn Roe, Davenport Catholic Messenger, Sept. 28, 1989, at 7; Blackmun Sees Switch on Abortion, USA Today, Sept. 14, 1988, at A1.
⁵ Certain provisions were not considered as either moot or not ripe, but nothing was found unconstitutional.
numerous constitutional flaws. This signals a dramatic change from the days when a pro-Roe majority struck down any meaningful efforts by the states to regulate abortion. Most importantly, the opinions in Webster revealed that a majority of the Justices on the Court no longer approve key elements of the framework constructed in Roe v. Wade. The result is a de facto alteration of abortion law which reaches far beyond the actual holding of Webster. Indeed, Webster was a de facto reversal of Roe v. Wade.

But by failing to expressly state in a single opinion what a majority of the Justices have stated in separate opinions, the Court left abortion law unsettled. Until the new working majority expressly articulates together what its members have said separately, many courts and state legislatures will hesitate to recognize and act upon the demise of Roe v. Wade. Roe is dead but awaits its post-mortem formalities. Webster left abortion jurisprudence in limbo.

Although Webster was unsatisfactory, it set the stage for the eventual express reconsideration and reversal of Roe. All the key elements were dealt with—in varying degrees of resolution by members of the Court—(1) the degree of implication of precedent necessary for reconsideration to occur,7 (2) whether stare decisis prevents reconsideration of Roe v. Wade,8 and (3) whether, under a proper substantive due process analysis, there is a fundamental right to abortion.9 These three themes swirled through the briefs, arguments, and opinions of Webster.10

However, while Webster signalled a rejection of Roe v. Wade, it did not do so by rejecting substantive due process analysis or the right of privacy. Webster, together with other opinions of the Court from last term, reveal that both substantive due process and the right of privacy enjoy broad support.

6. This de facto transformation of abortion jurisprudence is discussed in greater detail in Bopp & Coleson, What Does Webster Mean?, 138 U. Pa. L. Rev. 157 (1989) (setting forth the changes in abortion jurisprudence, noted briefly infra, and demonstrating that Webster poses no threat to contraceptive rights and civil rights, nor does it sanction undue burdens on the liberty of pregnant women).

7. See infra notes 14-31 and accompanying text.

8. The question of stare decisis presented no apparent problem to any of the new working majority on abortion. See, Webster, 109 S. Ct. at 3056 (plurality opinion). It will not be dealt with herein.

9. See infra sections II(B), III, and IV.

10. Another theme present in the briefs, oral arguments, media accounts, and various commentaries was a concern that Webster portends dire consequences for other rights. Such alarms are unfounded, however. See Bopp & Coleson, What Does Webster Mean?, supra note 6.
This support is of special interest in light of the concerns expressed by Robert Bork, nominated by President Reagan to the Supreme Court, about substantive due process analysis in general and the right of privacy in particular. These concerns figured largely in the refusal of the Senate to confirm Bork as a Justice of the Supreme Court.

However, while the two newest Justices support substantive due process, the analysis has undergone fundamental changes. These changes make the application of substantive due process more objective and narrow its potential scope. Thus, some of the problems often perceived with substantive due process are ameliorated, and the analysis is retained as a vehicle for protection of family-related matters. Moreover, under this new analysis, it has become even more apparent that there is no fundamental right to abortion.

This article will focus first on the ways in which Webster unsettled abortion law by rejecting the key elements of Roe and why the Court was unable to articulate this in a single opinion. Then it will turn to the implications of Webster, and other decisions from last term, for the future of substantive due process in general and abortion in particular.

II. Webster Revealed Disagreement on Reconsideration Standards but Substantial Agreement on Abortion

While the Webster majority has shown substantial unanimity on the subject of abortion in separate opinions, it was unable to state its consensus in Webster because of concerns that Roe was not sufficiently implicated for reconsideration to occur.

A. Disagreement: When Is Precedent Sufficiently Implicated for Purposes of Reconsideration?

Justice Scalia called for plenary reversal of Roe in the Webster case. However, the plurality, consisting of Chief Justice Rehnquist and Justices White and Kennedy, declared that only the tri-
mester scheme was sufficiently implicated for reconsideration. F
Justice O'Connor thought that nothing of Roe was implicated, preventing any express reconsideration of Roe in Webster.6

Justice O'Connor relied on the "avoidance" principle employed by the Court in Rescue Army v. Court of Los Angeles to "avoid[] passing upon a large part of all the constitutional questions pressed upon it for decision (footnote omitted) . . . , notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty."17 Such employment of the avoidance principle to escape reconsideration of Roe in Webster was misplaced. This is so for several reasons.18

First, the Supreme Court early recognized its duty to decide matters properly before it: "It is emphatically the province and duty of the judicial department to say what the law is."19 Any self-imposed limitations created by the Court must be exercised in light of the Court's duty to resolve even matters it would rather avoid.20 As Justice Marshall wrote in Cohens v. Virginia,21: "Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment and conscientiously to perform our duty."22 Rather than declaring what the law is, the Webster Court elected reticence, leaving abortion jurisprudence in chaos, with courts,23 and legislatures uncertain of the

15. Id. at 3056 (plurality opinion).
16. Id. at 3060-64 (O'Connor, J., concurring in part and concurring in the judgment).

This article does not enter into the debate over the Court's discretion to decline the exercise of jurisdiction. It merely addresses the necessity of deciding all elements of a case which are required in giving a legal justification for the Court's decision when a case is decided by the Court. The standard of review is not an issue which may logically be avoided. It is different in kind from construing a statute to avoid constitutional difficulty or deciding a case on procedural grounds to avoid a constitutional issue.

21. 6 Wheat 264, 404 (1821)
22. Id. at 404.
23. See, e.g., In re T.W., No. 74,143, slip op. at 6 (Fla. Sup. Ct. Oct. 5, 1989) (wherein the Florida Supreme Court held that the right of privacy provision in the Florida Constitu-
standards to follow.

Second, in *Patterson v. McLean Credit Union*, Justice O'Connor joined a majority which logically resolved the issue of when precedent is implicated (for reconsideration purposes) in a way that would have allowed reconsideration of *Roe in Webster*. In *Patterson*, the plaintiff brought an action based upon a statutory right created by an interpretation of 42 U.S.C. § 1981 in *Runyon v. McCrary*, i.e., that section 1981 encompasses a private contract between an employer and employee.

Under the rule of *Patterson*, if a former case creates the right under which an action is brought, the former case is sufficiently implicated for purposes of reconsideration. Logic compels such a result both when a prior case establishes the right and when it creates the analysis to be employed in judicial review. The plaintiff in *Webster* relied on both the right and the analysis created in *Roe* when it brought suit, as did the lower courts in striking down the Missouri statutes.

The Supreme Court has acknowledged this principle in practice, by first deciding the standard of review in its cases before applying that standard to the statutes being reviewed. The *Webster* amalgam of opinions neglected this essential first step in constitu-

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26. It is a more difficult task where a prior case is not as directly implicated as to provide the right upon which the suit is founded. This is evident in *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989), decided by the Court last term. In *Gathers*, Justices O'Connor and Kennedy and Chief Justice Rehnquist, in dissent, decided that the holding of the prior case of *Booth v. Maryland*, 482 U.S. 496 (1987), was not sufficiently implicated for reconsideration of that case. *Gathers*, at 2212 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.). This was so because *Gathers* involved prosecutorial comments about a criminal victim's character in closing argument, not in the submission of evidence which *Booth* forbade. Thus, *Booth* was not sufficiently implicated for Justices O'Connor and Kennedy and Chief Justice Rehnquist to reconsider that case. *Id.* at 2211. Justice Scalia would have overruled *Booth*, *id.* at 2217-18, as, apparently, would have Justice White. *Id.* at 2211.


tional analysis, but it is logically unavoidable.\textsuperscript{29}

Even under the analysis apparently employed by Justice O'Connor in \textit{Webster},\textsuperscript{30} i.e., that a statute must directly contradict a prior holding of the Court in order for reconsideration to be proper,\textsuperscript{31} \textit{Roe} was implicated in \textit{Webster}. This is so because Justice O'Connor relied on the "unduly burdensome"\textsuperscript{32} test to uphold part of the statutory scheme in \textit{Webster}. This test was expressly rejected in \textit{Akron v. Akron Center for Reproductive Health} by the Court, which held that it was contradictory to \textit{Roe}.\textsuperscript{33}

Therefore, in \textit{Webster}, the constitutionality of \textit{Roe v. Wade}, was before the Court and reconsideration was appropriate. However, Justice O'Connor has already reconsidered \textit{Roe} herself, in her decisions in \textit{Akron} and \textit{Thornburgh v. American College of Obstetricians and Gynecologists}.

Reading her opinion in \textit{Thornburgh}...
with the opinions of four other Justices in *Webster* reveals substantial agreement by a majority of the Court that *Roe* was an unconstitutional decision.

**B. Agreement: Roe Was an Unconstitutional Decision**

In *Akron*, Justice O'Connor declared that the trimester framework constructed by *Roe* had "no justification in law or logic." On this point a majority has now agreed. The opinions of the newest Justices, Scalia and Kennedy, taken together with those of the *Roe* dissenters, Chief Justice Rehnquist and Justice White, and Justice O'Connor's opinions in *Thornburgh* and *Akron* reveal that a majority of the Court now believe that *Roe* was an unconstitutional decision.

Because of the lack of majority support for several key elements of *Roe*, that case is *de facto* overruled. This is apparent from a predictive analysis, i.e., determining what sort of restrictions on abortion will be upheld in the future. Based on what a majority of the Court has now said in separate opinions, it is clear that the express overruling of all or a substantial part of *Roe* awaits only the proper case. The elements of *Roe* which are *sub silentio* overruled go to the heart of the current abortion constitutional analysis.

First, support for the trimester scheme of *Roe* has disappeared. Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissents to *Akron* and *Thornburgh*. With Chief Justice Rehnquist and Justices White, Scalia, and Kennedy saying
the same thing in Webster, it is readily apparent that a majority of this Court has now recognized these two interests as existing throughout pregnancy—indicating the demise of the trimester scheme.39

Second, the very nature of a woman's interest in choosing abortion has changed. In Roe, the Court determined that a woman has a fundamental right to choose abortion, employing a substantive due process analysis. The Webster plurality declared that a woman has only a "liberty interest"40 in abortion under the Due Process Clause of the Fourteenth Amendment.41 Justice O'Connor, with her advocacy of the rational basis standard of review in most cases, agrees that there is no general, fundamental right to abortion.42 However, where there is an undue burden, she might find a fundamental right, evidenced by her requiring a compelling state interest to justify regulation of abortion in such cases.43 Thus, there is now a majority of the Court which no longer believes that there is a general fundamental right to abortion.

Third, the unduly burdensome test is now the de facto threshold standard of review for abortion statutes. It is the lowest common denominator of the current majority on abortion issues. Under this new test, some abortion restrictions already found unconstitutional, such as those rejected in Akron and Thornburgh, will now be found constitutional.

Fourth, substantive due process analysis is de facto modified in abortion cases to exclude the necessity that an abortion restriction be narrowly tailored to effect only the compelling interest supporting it. This is so, again, because Justice O'Connor's views are now the lowest common denominator among the working majority on abortion issues. It has been generally thought since Roe that the fundamental rights analysis required the showing (1) that the state has a compelling interest and (2) that the legislation enacted is

39. Webster, 109 S. Ct. at 3057.
40. Id. at 3058. See infra. notes 47-48 and accompanying text.
41. Webster, 109 S. Ct. at 3058.
42. Akron, 462 U.S. at 453 (O'Connor, J., dissenting).
43. Id. The scope of this constitutional protection has not been made clear, but it encompasses "absolute obstacles" and "severe restrictions." Thornburg, 476 U.S. at 828. It remains to be seen whether Justice O'Connor intends constitutional protection against absolute obstacles for any particular pregnant woman or only against absolute obstacles to abortion in general. Even in cases of absolute obstacle, however, where Justice O'Connor might recognize a fundamental right to abortion, she notes that state's compelling interests might yet justify the state-created obstacle.
narrowly tailored to effect only the compelling interest. But Justice O'Connor wrote in *Akron*:

The Court has never required that state regulation that burdens the abortion decision be "narrowly drawn" to express only the relevant state interest. In *Roe*, the Court mentioned "narrowly drawn" legislative enactments, but the Court never actually adopted this standard in the *Roe* analysis. In its decision today, the Court fully endorsed the *Roe* requirement that a burdensome health regulation, or as the Court appears to call it, a "significant obstacle" be "reasonably related" to the state compelling interest. The Court recognizes that "[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area."

Thus, it is clear that *Webster* substantially altered abortion jurisprudence by revealing the opinions on abortion of Justices Scalia and Kennedy and, thereby, revealing that majority support for the *Roe* standard of review has dissolved.

III. **SUBSTANTIVE DUE PROCESS ANALYSIS HAS BEEN REFINED**

In addition to the changes in substantive due process analysis as it relates to abortion noted above, generally applicable changes have been made in substantive due process analysis.

A. **All Members of the Court Have Approved Substantive Due Process By Use**

It should be first noted that substantive due process enjoys broad support on the Court. The newest members, Justices Scalia and Kennedy, have authored or joined opinions employing the methodology. In *Michael H. v. Gerald D.*, Justice Scalia wrote a plurality opinion which employed substantive due process analysis to promote and protect very traditional views of the "unitary" family. Justice Kennedy concurred in all but one footnote of that opinion. All nine Justices in *Michael H.* approved substantive

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46. 109 S. Ct. 2333 (1989). Here, Michael H., the putative father of a child, Victoria D., born to Carol D. and held out by her husband, Gerald D., as his daughter, filed a filiation action to establish paternity and obtain visitation rights, after a blood test indicated a 98.07% probability of paternity, in the Superior Court of Los Angeles County. The Superior Court granted summary judgment for Gerald D., who, under California law was presumed to be Victoria's father because he was living with Carol D. at the time Victoria was born and desired to raise her as his own. The California Court of Appeals affirmed and the Supreme Court of California denied discretionary review.
47. Id. at 2341 (plurality opinion).
48. Id. at 2346 (O'Connor, J., concurring in part, joined by Kennedy, J.).
due process by use.

Although no voices are heard on the Court rejecting substantive due process, both the agenda and mode of the new majority using it seems different from that of the old majority. Justices Brennan, Marshall, Blackmun, and Stevens must be less sanguine about substantive due process when it is employed to protect traditional values\(^49\) rather than to expand abortion rights. However, the new working majority seems intent on making substantive due process more objective and less result-oriented, as noted below. Of special interest is the diverse terminology which has emerged for substantive due process analysis. It may reveal different conceptions of the analysis itself.

The common understanding of the terminology of substantive due process includes the following uses of key terms. "Liberty interests" include those activities which individuals would like to do without government regulation and which are constitutionally protected only under the rational-basis standard of review. "Fundamental liberty interests" and "fundamental rights" are those interests for which a compelling interest must be shown before narrowly tailored state restrictions may be enforced. Both levels of liberty interests are a part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.\(^50\)

However, in Michael H., Justice Scalia employed a different formulation when he said, "This is not the stuff of which fundamental rights qualifying as liberty interests are made."\(^51\) If Justice Scalia subscribes to the traditional analysis, the term "liberty interests" here must mean anything protected under the "liberty" term of the Fourteenth Amendment. Similarly, Justice Brennan, in Michael H., employed the term "liberty interest" as an interest re-

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49. Id. at 2350 (Brennan, J., dissenting) ("It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents."); cf. Id. at 2351 (Brennan, J., dissenting) (Michael H., the alleged biological father, has a constitutional right "not to conform") with Id. at 2345 (plurality opinion) ("If Michael has a 'freedom not to conform' (whatever that means), Gerald [the marital father] must equivalently have a 'freedom to conform.'").

50. Cf. Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("fundamental liberty interest" requires compelling interest); Thornburgh, 476 U.S. at 788-97 (White, J., dissenting) (abortion is a rational-basis type liberty); Roe, 410 U.S. at 172-73 (Rehnquist, J., dissenting) (abortion is a rational-basis level of liberty).

51. 109 S. Ct. at 2344 (plurality opinion). Consider also the Webster plurality's comment that "there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion, . . . a 'limited fundamental constitutional right,' . . . or a liberty interest protected by the Due Process Clause. . . ." 109 S. Ct. at 3058 (plurality opinion).
quiring a compelling interest to regulate.\(^{52}\) Without further commentary by Members of the Court, it is impossible to determine whether these different uses indicate merely imprecise use of terms or a different analytical structure.\(^{53}\)

B. *The Test for Fundamentality Is Increasingly Historical and Objective*

The new working majority on the Supreme Court is concerned about the danger of constitutionally illegitimate decisions, resulting from a failure to supply a firm grounding for a decision in the history and text of the Constitution.

This concern has its roots in respect for the rule of law, adopted by the People as a cornerstone of our constitutional republic.\(^{54}\) The result of this decision by the People to enshrine the rule of law in the Constitution of our Nation is that decisions of the judiciary are only legitimate if they can demonstrate by reasoned opinion that they are firmly grounded in the Constitution. As stated by Justice White:

> The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause

\(^{52}\) Id. at 2352 (Brennan, J., dissenting).

\(^{53}\) For example, such language could imply constitutional protection for fundamental rights (requiring a showing of compelling interest) but none for lower-level rights traditionally protected under the older substantive due process formula requiring a rational basis for justification.

\(^{54}\) This danger is not only to the integrity of the court making the decision but also to the principle of the rule of law itself. If “the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court,” Moore v. East Cleveland, 431 U.S. 494, 502 (1977), the rule of law has been supplanted by the rule of man. While rule by Platonic guardians or a monarch has certain advantages over governance by law under “a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past,” Michael H., 109 S. Ct. at 2351 (Brennan, J., dissenting), it was the considered opinion of the Framers of our Constitution and the People of the United States that the advantages of a constitutional rule-of-law regime outweighed its disadvantages. They established this Nation as a rule-of-law regime par excellence, with the Constitution as the supreme law of the land. For a fuller discussion of this point, see Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 194-98 (1989). The Framers of the Constitution did allow for changes in the Constitution by means of amendment, as occurred after the Civil War with regard to slavery, and by the use of general language in the formulation of its express protections. However, some textual indeterminacy is not a license to abandon the rule of law by rejecting the Constitution in favor of unbridled discretion for any branch of the government. The danger is especially acute when the judiciary deals with penumbral rights, which are already derived from general formulations.
represents a major judicial gloss on its terms, as well as on the anticipation of the Framers... the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause...5

As a result, the Court has relied increasingly on the historical, and more objective, formulation of the measure for fundamentality, i.e., "so rooted in the traditions and conscience of our people as to be ranked as fundamental."56 For example, in Bowers v. Hardwick, the Court's reliance on the historical test for fundamentality over the more abstract formulation, i.e., "implicit in the concept of ordered liberty,"59 is evident.60 In setting forth the rule in Michael H., Justice Scalia emphasized especially the dangers of illegitimate decisions61 and the need to contain these by employment of an historical/traditional value test.62 This is in marked contrast to Justice Brennan's assertion that an historical test makes substantive due process redundant and the Court should not so limit itself.63 The result of this objective, historical focus is to limit the danger of constitutionally illegitimate decisions, which has been recognized by the Court.

A second danger, recognized by Members of the Court, is that of result-oriented formulations of issues or rules. Often the very formulation of a rule or an issue dictates the outcome of a judicial decision. To prevent such decision-by-definition, the new working majority on the Court has endeavored to establish neutral principles to govern its decisions.64 These neutral principles, equally applicable to all cases no matter what their subject, must then be applied in an equally neutral manner to all cases. This principle applies especially to the formulation of proposed fundamental rights to be tested against the history of our Nation.

The neutrality principle means that the proposed fundamental right must be formulated without regard to the decisional outcome.65 Rather, the formulation of the proposed fundamental right

58. Id. at 192-94 (plurality opinion).
60. Bowers, 478 U.S. at 192 nn.5-7.
62. Id. at 2341-42.
63. Id. at 2351 (Brennan, J., dissenting); cf. Id. at 2344 n.6 (plurality opinion).
65. That establishing neutral principles is difficult at times may be seen in the collo-
must be governed by the principles established by precedents of the Supreme Court.

In brief, these precedents show that the formulation must not be a generalized abstraction countenancing innumerable protections under the rubric of a fundamental right. Employing a sufficiently broad characterization of proposed constitutional rights, one could arguably encompass nearly anything within the pale of the Constitution. But such a practice is self-evidently illegitimate as constitutional law, because it places no limits on the discretion of the judiciary. The result would be the rule of man rather than the rule of law.

Narrow formulation of a proposed fundamental right also avoids another danger recognized by the Court, that of overbroad decisions in violation of its constitutionally allotted power under Article III of the Constitution and in violation of sound principles of adjudication. As applied to the formulation of a proposed fundamental right, this danger may be avoided by confining consideration of fundamental rights protection to the actual case at bar. To define the proposed fundamental right overbroadly is to decide matters not before the Court. To avoid such dangers, the Supreme Court, in prior formulations of proposed fundamental rights, has agreed on certain basic principles which may be distilled into the following rule.

C. A Proposed Fundamental Right Must Be Formulated In A Concrete, Fact-Sensitive Manner

It is not sufficient for constitutional adjudication of asserted fundamental rights to ask whether the asserted right is fundamental in the history and tradition of our Nation. One must first ask whether the asserted right is the properly formulated one.

For example, suppose a person asserted constitutional protection for the ancient custom of sacrificing one's child to a deity. Of course, while the practice might be common in the history and tradition of the ancient world, it would not be a common liberty in the history and tradition of this Nation. Reason dictates that no fundamental right be recognized, despite the hoary roots of the practice.

But this result, which seems so obvious, rests entirely upon the quys among members of this Court in the cases discussed infra. However, the difficulty of the endeavor neither vitiates the importance and need to establish neutral principles nor counsels abandonment of the effort.
expectation, both logical and intuitive, that the proposed right would be formulated to describe the activity of a parent killing a child rather than as the abstract right of parents to control their children.66 The latter formulation would certainly find historical support in this Nation, but would be an incorrect formulation of the activity advanced for constitutional protection.

Because of the problem illustrated by this example, the Supreme Court has established principles governing the formulation of a proposed fundamental right. Proper formulation of the right is a necessary threshold step before the proposed right is measured for fundamentality against the history and tradition of our Nation.

The basic principle governing the formulation of a proposed fundamental right is that a proposed right must be expressed in a concrete, fact-sensitive manner. This principle, in turn, may be expressed in a three-prong rule.

First, the formulation of a proposed fundamental right should focus on the activity proposed to be protected by taking into account all the relevant facts. This first prong requires that the formulation of a proposed fundamental right focus upon the activity actually involved in the case at bar, rather than upon broad, abstract formulations of general historical rights. This assures the concreteness which is appropriate when the expansion of recognized constitutional protections is contemplated into areas without express protection in the text of the Constitution.

The level of factual specificity should be that governed by all facts relevant to the activity sought to be protected. It is evident that certain facts of a case are only incidental to the activity for which constitutional protection is sought. Inclusion of these irrelevant facts in the formulation of a proposed right would be the equivalent of limiting a holding to its facts. By such a practice, no principles relevant to other cases could ever be established. Reason precludes such specificity just as it precludes broad, sweeping, abstract formulations of a proposed right.

In practice then, satisfaction of this prong is attained by careful formulation of the proposed right to be certain that it is a concrete and fact-sensitive statement of the activity sought to be protected, but that it is not so fact-sensitive as to include matters irrelevant to the activity. Thus, a balance between overly narrow and overly

66. Likewise, the formulation of the alleged fundamental right as the right to control the makeup of one's family would logically encompass infanticide, although the authors of such a formula mean to encompass only contraception and abortion. Cf 12. L. Tribe, AMERICAN CONSTITUTIONAL LAW 1339 (2d ed. 1988).
broad formulations is obtained by an emphasis on relevant facts and upon the actual activity advanced before the Court.

For example, in a case where a person of one race desires to marry a person of another race, the fact that a man and woman are of different races is irrelevant to the activity of entering into a marriage, which involves a state-sanctioned covenant between a man and a woman to live in an historically recognized relationship. Likewise, the fact that one of the parties is incarcerated at the time he or she wishes to enter into a marriage relationship is irrelevant to the act of entering into a marriage relationship. Certain facts would be relevant to the activity of marriage, which would necessarily be included in the formulation of a proposed marriage relationship. For example, marriage between persons of the same sex would be relevant, as altering radically the notion of marriage. Likewise, a proposed marriage between a person and a member of another species, e.g., a horse, or between a person and an inanimate object, e.g., a computer, would certainly require incorporation of those facts into the proposed fundamental right.

The proper formulation of a proposed fundamental right should begin with the facts presented by case, by which a court is governed under Article III, and then remove those that are irrelevant. So, for example, Bowers began with the fact that the case involved two males, which eliminated the need to consider heterosexual sodomy, but whether the sodomy was oral or anal was irrelevant. See infra, notes 73-84 and accompanying text. Similarly, in Turner, the Supreme Court was presented with the fact that a person incarcerated sought to enter into a marriage without state interference. The Court found that incarceration was not relevant to the formulation of the proposed protected activity, marriage. Turner, 107 S. Ct. at 96.

The analysis of Turner also reveals that, before the Court considers whether a state has a compelling interest for burdening a fundamental right, it must consider whether the restriction passes the rational basis test, which the prison restriction on marriage, in Turner, failed. 482 U.S. at 98. Many state regulations considered by the Court under heightened substantive due process scrutiny also fail a rational basis test. Cf., e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972). There is no rational basis for withholding contraception from unmarried couples engaging in copulation despite legal restrictions. Indeed, the state's interest in having such couples employ contraceptive measures could logically be greater than not having them do so. Moreover, for purposes of framing the proposed fundamental right, a focus on the activity being engaged in, sexual intercourse with contraceptive measures, reveals that whether the couple is married is irrelevant to the activity.


68. Cf. Turner v. Safley, 482 U.S. 78 (1987) (striking down prison regulations of marriage and noting that marriage of a prisoner retained enough of the incidents of marriage to make the fact that one of the parties was in prison irrelevant to the exercise of the constitutionally protected right to marry).

69. See Baker v. Nelson, 291 Minn. 310, 315, 191 N.W.2d 185, 187 (1971) ("[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.").
Second, the formulation of a proposed fundamental right should not be overbroad so as to encompass other activities which are logically distinct and involve separate considerations. The second prong provides another, conceptually distinct, check on an overbroad formulation of a proposed fundamental right. It excludes matters logically distinct and separate.

For example, suppose that a person sought constitutional protection for a polygamous relationship. While the practice has venerable roots elsewhere, the fundamentality of this proposed fundamental right in the history and tradition of this Nation would turn on the formulation of the proposed fundamental right to be historically tested. If the proposed right were styled simply the right to marry, encompassing by its terms both monogamous and polygamous marriages, the outcome would be doubtless, for a fundamental right to marriage has already been established. If, however, the proposed right were formulated in a more concrete, fact-sensitive manner, i.e., the right of a person to have multiple, concurrent spouses, then the outcome is also doubtless, for polygamy has been rejected in the history and tradition of our people.

Third, the formulation of a proposed fundamental right should reasonably accommodate all the interests at stake in a case. This third prong assures that, in pruning away relevant facts, the formulator has not pruned away other interests at stake in the case. These may not be lopped off as irrelevant, but are per se relevant and must be included in the formulation. If interests are at stake in a case, i.e., will be affected by the proposed declaration of fundamental right, they are relevant to an activity advanced for constitutional protection and must be reasonably accommodated by inclusion in the formulation of the proposed fundamental right.

Logically, of course, other interests must also be considered in

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70. This illustration assumes, of course, that the Supreme Court would not simply invoke stare decisis to decide a case challenging laws prohibiting polygamy. Cf. Reynolds v. United States, 98 U.S. 145 (1878) (upholding anti-polygamy laws against constitutional attack) with New York Times, October 9, 1977, at 1, col. (estimating that twenty to thirty thousand people in the United States live in polygamous families).


72. Reynolds, 98 U.S. 145. The fact that ours is "not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice," Michael H., 109 S. Ct. at 2351 (Brennan, J., dissenting), and in which "'liberty' must include the freedom not to conform," Id., has not caused the Court to reject all of our culture's traditional values. Indeed, the very concept of a culture presupposes some commonly held values which to some unavoidable extent are imposed upon non-conformists. Thus, in Reynolds, the Supreme Court forbade to Mormons the right not to conform by taking multiple wives.
determining whether one may exercise a right declared fundamental or is denied this liberty by the compelling interests of others. However, the presence of other relevant interests must also be considered in the formulation of the proposed fundamental right to prevent abstract formulations and to prevent declaration of fundamental rights which are not properly so— with the result that all state regulation of such activities must be supported by a compelling interest and narrowly tailored to effect only that interest.\textsuperscript{73}

For example, a proposed fundamental right to discharge firearms, the possession of which is expressly protected in the Constitution, is logically distinct from a right to discharge a firearm into an innocent person.\textsuperscript{74} The latter's interests logically must be included in the very formulation of the proposed fundamental right. Similarly, fatherhood by rape puts at stake the interests of others (the rape victim) in a way different from fatherhood by consensual sexual intercourse, so that the rape victim's interest should be incorporated in a proposed right relating to visitation of the father with the child so conceived.\textsuperscript{75} In other words, the formulation should not ask whether the father-child relationship is fundamental but whether the rapist father-child relationship is fundamental.

This tri-partite rule for the correct formulation of proposed fundamental rights may be seen in several of the Court's cases. In \textit{Bowers v. Hardwick},\textsuperscript{76} the Court applied the principles underlying the rule presented herein by formulating the proposed fundamental right as the right to engage in “consensual homosexual sodomy.”\textsuperscript{77} By so doing, it dealt with the statute as applied, focusing on the specific activity for which constitutional protection was sought. In its formulation, the Court did not include facts which were irrelevant, e.g., whether the homosexual sodomy sought to be protected involved oral or anal genital contact. Reason precludes separate consideration of each possible form of sodomy between homosexuals.

The Court also excluded nonconsensual sodomy, which was not in the facts of the case. Likewise, the Court excluded heterosexual

\textsuperscript{73} The abortion cases demonstrate that virtually no regulation survives the compelling state interest/narrowly tailored filter for state restrictions on fundamental rights. This standard is too high for judicial review in areas traditionally governed by the police powers of the states.

\textsuperscript{74} \textit{Michael H.}, 109 S. Ct. at 2342 n.4 (plurality opinion).

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} 478 U.S. 186 (1986).

\textsuperscript{77} \textit{Id.} at 188 n.2.
sodomy from its formulation, because it was not a part of the activity for which constitutional protection was sought.\textsuperscript{78} Such a formulation, in addition to being beyond the facts of the case, would have involved logically distinct and separate considerations, e.g., whether, if the couple were married, the principle underlying \textit{Griswold v. Connecticut},\textsuperscript{79} would preclude regulation of their activities. Because no marriage partner or other identifiable party with a relevant interest was presented by the facts, the Court discussed no interests of third parties.

The \textit{Bowers} Court discussed and rejected several proposed abstract formulations, noting their overbroad sweep. The Court first noted that simply declaring the right to homosexual sodomy to be encompassed by the right of privacy was improper, because none of the activities to which that right had been extended, e.g., "family, marriage, or procreation,"\textsuperscript{80} bore any logical "connection" to homosexual sodomy.\textsuperscript{81} Second, the Court rejected the broad formulation of a right to engage in "any kind of private sexual conduct between consenting adults," noting that precedent had determined that the privacy right established by \textit{Griswold} "did not reach so far."\textsuperscript{82} Third, the \textit{Bowers} Court rejected a formulation of the proposed fundamental right as the right do what one wishes "in the privacy of the home."\textsuperscript{83} The Court noted that numerous activities, such as possession of drugs and illegal weapons are not constitutionally protected although they occur in the home.\textsuperscript{84} The Court further noted that narrowing the formulation by considering only "voluntary sexual conduct between consenting adults" in the privacy of the home would include within its scope "adultery, incest, and other sexual crimes" committed in the home.\textsuperscript{85}

By contrast, the \textit{Bowers} dissenters formulated the proposed fundamental right in broad, abstract terms. Nor did they focus on the

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} 381 U.S. 479 (1965).
\textsuperscript{80} \textit{Bowers}, 478 U.S. at 190.
\textsuperscript{81} \textit{Id.} This comparative sort of analysis is favored by Justice Brennan, \textit{Michael H.}, 109 S. Ct. at 2351, who would prefer a methodology which first establishes "more generalized interests" as fundamental and then examines "the concrete limitation under consideration" to see whether it "impermissibly impinges" on the "generalized interest." However, such an analysis shifts the locus of power from the People, as established in the Constitution, to the judiciary.
\textsuperscript{82} \textit{Id.} at 191 (citing \textit{Carey v. Population Services International}, 431 U.S. 678, 688 n.5, 694 n.17 (1977)).
\textsuperscript{83} \textit{Bowers}, 478 U.S. at 195.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} at 195-96.
specific activity. Indeed, they proposed ten different abstract formulations of a right which would encompass and protect homosexual sodomy. But by the abstractness of these dissenting formulations, the dissenters cast a wide net, snaring numerous activities within their confines. For example, many of these formulations would enclose the practice of polygamy, discussed above, as well as adultery and incest. In sum, the Bowers Court carefully followed the principles of the rule set forth in this article, rejecting the broad, abstract formulations of the proposed right urged by the dissenters.

Last term, the rule of formulation set forth herein was also employed in the Court’s decision of Michael H. v. Gerald D., which involved substantive due process analysis. The proposed right, in Michael H., was formulated by the plurality as “the power of the natural father to assert parental rights over a child born into a woman’s existing marriage with another man.” This formulation

86. The Bowers dissenters formulated the proposed right as “the right to be let alone,” Michael H., 478 U.S. at 199 (Blackmun, J., dissenting) (quotation marks and citation omitted), the right to make “certain decisions” and do activities in “certain places,” Id. at 204 (emphasis in original), to do things which “form so central a part of an individual’s life,” id. at 204, “the ability independently to define one’s identity,” id. at 205 (quotation marks and citation omitted), “the freedom an individual has to choose the form and nature of these intensely personal bonds,” Id. (emphasis in original), “the fundamental interest all individuals have in controlling the nature of their intimate associations with others,” Id. at 206, “the right of an individual to conduct intimate relationships in the intimacy of his or her own home,” Id. at 208, and “the right to differ as to things that touch the heart of the existing order.” Id. at 211. In addition, three dissenters formulated the proposed right as “the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny.” Id. at 217 (Stevens, J., dissenting).

87. The Bowers dissent logically conceded the correctness of the methodological point urged herein—at the same time that it rejected it in practice—by recognizing “simple, analytically sound distinctions between certain private, consensual conduct, . . . and adultery and incest.” 478 U.S. at 209 n.4 (Blackmun, J., dissenting) (citation omitted).

However, the only reasonable place to make these distinctions is in the formulation of the proposed right. Otherwise, if a fundamental right to adultery and incest are found—based on a broad right to engage in “intimate relations in the intimacy of his or her home,” Id. at 208,—then a state would have to show a compelling interest and narrowly tailored restrictions to regulate these activities (a demanding, usually prohibitive task compared with traditional exercise of police powers).

Moreover, the Bowers dissenters want judges to have the power to recognize fundamental rights by definition, recognizing that distinctions exist among varieties of intimate activity, whereas the Bowers majority leaves the power to determine the extent of constitutional protection to the People, by employing neutral principles of formulation.


89. Id. at 2343 (plurality opinion). Justice White did not agree with the plurality concerning the formulation of the fundamental right in Michael H. He asserted that any interest of the third party, Gerald D., required no additional consideration in that case. (Gerald D. was already “well aware of the liaison.”) Id. at 2362. However, this disagreement over the
of the proposed rule is consistent with the rule advanced in this article. First, it is concrete, and fact-sensitive, including all relevant facts. Second, the formulation does not encompass other activities which are logically distinct and involve other considerations. Third, the formulation does not ignore the other interests involved in the case.

A third example may be found in the Court's formulation of the proposed fundamental right in *Roe v. Wade*.90 While the present authors do not concede the correctness of *Roe*'s holding, *Roe* did correctly formulate the proposed fundamental right as a right to abortion.91 This is especially evident in light of the efforts at oral arguments in *Webster v. Reproductive Health Services*92 to reformulate the right from a right to abortion to a right of procreative choice.93

In *Roe*, the Court formulated the proposed fundamental right in a concrete, fact-sensitive manner: the right to abortion. It did not include within its formulation matters such as contraception and sterilization—encompassed by a more general right of procreation—which are logically distinct and involve other considerations. Nor did the Court agree with the overbroad formulation proposed by some amici in *Roe* of "an unlimited right to do with one's body as one pleases."94 Further, the *Roe* Court formulated the proposed fundamental right to abortion in a manner which included the concept of terminating the existence of the unborn, thus encompassing application of the principles stated herein does not constitute rejection by Justice White of the principle of narrow, concrete, fact-sensitive formulation of proposed fundamental rights, which he employed in the opinion he authored for the Court in *Bowers*.

Furthermore, the agreement of Justice White with this analysis is shown in *Thornburgh*, where he argued that because the abortion decision involves the taking of fetal life, the very characterization of the liberty interest is changed from "the decision not to conceive in the first place"; the "difference does not merely go to the weight of the state interest in regulating abortion." By comparison, he noted that the fundamental right of parents to make decisions about childrearing does not protect the very different decision of some parents to harm their children. 476 U.S. at 792-93 & n.2 (White, J., dissenting).

While certain members of the Court have differed as to the rule governing the precise level of specificity for formulating proposed fundamental rights, cf. *Michael H.*, 109 S. Ct. at 2344 n.6 (plurality opinion), with (O'Connor, J., concurring in part), Id. at 2346, this debate does not affect the general principles established by the Court.

90. 410 U.S. 113 (1973).
91. *Roe* focused specifically on the practice of abortion in its historical sketch. However, as this historical sketch did not demonstrate what was desired, the majority resorted to the bare assertion that abortion was encompassed in a broader right of privacy. As demonstrated herein, this is a flawed mode of analysis.
94. 410 U.S. at 154.
all interests at stake from the facts before the Court.\(^9\) While the present authors believe that the interests of the unborn were not reasonably accommodated in the subsequent balancing of rights, the methodology of proposed rights formulation was sound.

IV. A RIGHT TO ABORTION FAILS THE NEW TEST FOR FUNDAMENTALITY, BUT A RIGHT TO CARRY A CHILD TO TERM WOULD BE FUNDAMENTAL

Under the revised analysis employed by the Court, it is apparent that no fundamental right to abortion can be found. However, substantive due process analysis remains a valuable tool for protecting truly fundamental rights—those actually enjoying specially protected status in this Nation's history and traditions—such as the right to carry an unborn child to term.

A. The Right to Abortion Fails the New Test for Fundamentality

Under the refined fundamental due process analysis, when the Court finally does formally reconsider *Roe v. Wade*, it will have to begin with a proper formulation of the proposed fundamental right. Consistent with its own precedents, the Court will have to formulate the proposed right in the same way that it did in *Roe*—as a right to abortion—rather than as the right to procreate or some other abstract formulation. Then it will have to test that proposed right for fundamentality against the history and tradition of our Nation.

This time, however, two things will be different: (1) a more accurate account of the history will be employed, which demonstrates that the states have long restricted abortion, making it not a fundamental liberty, and (2) the Court will not proceed to ignore its historical analysis as it did in *Roe*,\(^9\) in favor of a "broad enough to encompass" test,\(^9\) conveniently bypassing the inconvenient

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\(^9\) The Court's formulation of the right as a right to abortion did logically encompass the terminating of the unborn child's life, thus taking into account the one other interest at stake on the facts of *Roe*. *Roe* expressly did not consider the rights of fathers of unborn children or parents of pregnant minors, which were not at issue in *Roe*. 410 U.S. at 165 n.67.

\(^9\) *Roe*’s historical survey demonstrated that the states regulated abortion by statute in the 19th and 20th centuries. *Roe*, 410 U.S. at 139.

\(^9\) Ignoring the historical evidence of state regulation of abortion, which belies the claim of an historical liberty, the Court slipped out of the historical trap and employed a new mode of analysis. Without logical explanation of its action, the Court baldly asserted, "This right of privacy . . . is broad enough to encompass a woman’s decision whether or not
(though badly twisted) history of Roe.

The reconsideration of Roe will feature a clash of the historians, but the burden of proof will be on those urging that abortion is a fundamental right. And the history according to Roe, relying alone on two articles by Cyril Means, has already been discredited by subsequent scholarship. Moreover, the Court already knows the history of abortion regulation, as it did even in 1973. Chief Justice Rehnquist observed, at Webster oral arguments, “[S]urely abortion was regulated in the 19th century and in the 20th century? . . . If you say there is a deeply rooted tradition of freedom in this area, that suggests that there had been no legislative intervention to me. . . . [t]hat simply is not the fact.” Similarly, at the same oral arguments, Justice Scalia responded to an assertion of the fundamentality of an abortion liberty, “I know that there was regulation in the 20th century of abortion. I mean, that is just common knowledge.”

The facts of history have not changed, but substantive due process has. The end result will be that there will be found no fundamental right to abortion.
B. The Right to Carry a Child to Term Passes the New Test for Fundamentality

Abortion advocates have argued that if a state has the power to forbid abortion it must logically also have the power to compel abortion. However, it is apparent that the Court's substantive due process analysis protects against state-sponsored, forced abortion.

A proper formulation of the proposed right against forced abortion would be the right of a pregnant woman to carry her unborn child to term. Testing this proposed right for fundamentality in the history and tradition of our Nation one finds that not only has the right of a woman to carry a child to term never been regulated by the states but that assistance and encouragement have been offered by the states to help women carry their pregnancies to term. Thus, the protection of a woman's right to carry her unborn child to term is a fundamental right, protected by the liberty clause of the fourteenth amendment. In sum, substantive due process analysis, once used by an activist Court to advance its own agenda, is also a valuable tool for protecting activities which his-

104. See, e.g., Respondent's Brief in Opposition [to Petition for a Writ of Certiorari] at 12-13, Conn v. Conn, 526 N.E.2d 959, cert. denied, 109 S. Ct. 391 (1988)(No. 88-347)(brief of the American Civil Liberties Union in a "fathers' rights in abortion" case)("a man who did not want a child would even have the right to seek a court order forcing a woman to submit to an unwanted abortion").

105. See, e.g., City of Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416, 423-24 n.5 (1983) (setting forth the provisions of a city ordinance requiring that a physician tell the women upon whom he intends to perform an abortion "[t]hat numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child").

106. See, e.g., Thornburgh v. American Coll. of Obst. & Gyn., 476 U.S. 747, 761 (1986) (discussing a state statute which provided for state-prepared literature to be distributed to women seeking an abortion describing public and private agencies offering assistance to help women carry a pregnancy to term and declared that "[t]he [state] strongly urges you to contact them before making a final decision about abortion"). Even the pro-Roe Court acknowledged that a state has a strong interest in preferring childbirth over abortion which it may legitimately assert in its funding decisions. Maher v. Roe, 432 U.S. 464, 474 (1977); Harris v. McRae, 448 U.S. 297, 314 (1980)(holding constitutional the decision of Congress to provide prenatal care for indigent women carrying their unborn children to term but refusing to fund abortions except to save the life of the mother or in cases of rape and incest).

107. In re Mary P., 111 Misc. 2d 532, 444 N.Y.S. 2d 545 (1981). Even the Webster dissenters would agree that there is a fundamental right to carry a pregnancy to term. Employing their preferred analysis, they would find that the issue has already been decided, because Carey v. Population Services International held that the Constitution protects the fundamental right to decide "whether or not to beget or bear a child," 431 U.S. 678, 685 (1977), which right is "broad enough to encompass," Roe, 410 U.S. at 153, the right to carry a child to term. Therefore, there can be little doubt that the right to carry a child to term enjoys unanimous support on the Court, precludes state ordered abortions.
tory and tradition show to have been valued and protected by the collective wisdom of successive generations.

V. CONCLUSION

Thus, Webster was a de facto overruling of Roe v. Wade. Webster announced Roe's coming, formal demise. But the Court has not rejected substantive due process, nor is it likely to do so soon. Rather, the new Justices, together with the older dissenters to Roe, seem determined to reform substantive due process, making it an increasingly objective and neutral tool of constitutional adjudication.