

THE FREEDOM OF CHOICE ACT: WILL CONGRESS EVER EXERCISE SELF- RESTRAINT?

Prudence demands that the factual assumptions upon which a law rests be tested. In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹ the Supreme Court said that “[t]he effectiveness of the federal political process in preserving the States’ interests is apparent even today in the course of federal legislation.”² This has proven untrue when, on an issue which could not be more traditionally within the sovereignty of a state, the federal government is attempting to pass a national law that conflicts with a majority of state statutes. Purporting only to codify *Roe v. Wade*,³ the proposed Freedom of Choice Act⁴ touches every abortion statute of every state and mandates: “a state may not restrict the right of a woman to choose to terminate a pregnancy.”⁵

If Congress waits for limitation from the Court over federalistic principles, it will not come. In *Garcia*,⁶ Justice Blackmun announced the Court’s intention to abandon judicial review on the Tenth Amendment and issues of federalism.⁷ The case involved the San Antonio Metropolitan Transit Authority, a publicly operated mass transit system, which asserted that its service was a traditional governmental function and thereby exempt from obligations imposed by the federal Fair Labor Standards Act.⁸ Rather than following the test laid by precedent that state functions enjoy immunity from national encroachment in areas of “traditional governmental functions,”⁹ the Court rejected as “unsound in principle and unworkable in practice” such a rule.¹⁰

1. 469 U.S. 528 (1985).

2. *Id.* at 552.

3. 410 U.S. 113 (1973). *See also* Letter from Don Edwards, U.S. House of Representatives, to congressional colleagues (Jan. 13, 1993)(on file with *Regent University Law Review*).

4. H.R. 25, 103d Cong., 1st Sess. (1993); S. 25, 103d Cong., 1st Sess. (1993).

5. H.R. 25, 103d Cong., 1st Sess. § 2(a) (1993).

6. 469 U.S. 528 (1985).

7. *Id.* at 552.

8. *Id.* at 530.

9. *National League of Cities v. Usury*, 426 U.S. 833, 852 (1976).

10. *Garcia*, 469 U.S. at 546-47.

The five to four majority developed the theory that

the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.¹¹

The Court held that "[t]he political process ensures that laws that unduly burden the states will not be promulgated."¹² In other words, the Court decided that the Tenth Amendment and state sovereignty would be adequately protected by members of the federal government because they are participants from the individual states.¹³

Justice Powell's apt response was: "One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are

11. *Id.* at 552.

12. *Id.* at 556.

13. If the founding fathers had thought the states' rights would be adequately protected by the members of the federal government, why did so many insist on the protection of the Tenth Amendment? After all, the national government already had authority to exercise only those powers plainly granted to it in the Constitution; on all other matters the states retained the plenary powers of sovereignty. THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). However, the fear that the national government would consume the states persisted with sufficient magnitude that it forced the proponents of the Constitution to make assurances that a Bill of Rights would be considered. KENNETH R. BOWLING, VIRGINIA COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES, A TUB TO THE WHALE: THE FOUNDING FATHERS AND ADOPTION OF THE FEDERAL BILL OF RIGHTS 3 (1988). Variations of the Tenth Amendment were proposed repeatedly. THE STATUS OF FEDERALISM IN AMERICA 10 (REPORT OF THE WORKING GROUP ON THE FEDERALISM OF THE DOMESTIC POLICY COUNCIL) November 1986. And, in fact, eight of the thirteen States voted for the Constitution only after proposing this amendment. *Id.* at 10.

Ratified in 1791, the Bill of Rights contained the guarantee that the states desired. The Tenth Amendment provides that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X.

Chief Justice Waite wrote, "The people within the United States resident within any State are subject to two governments: one State, and the other national; but *there need be no conflict between the two*. The powers which one possesses, the other does not. They are established for different purposes and have separate jurisdictions." *United States v. Cruikshank*, 92 U.S. 542, 550 (1875) (emphasis added). The existence of such conflict between the two governments illustrates that something has gone awry in the federalistic structure.

amply protected by the political process."¹⁴ The members of Congress are elected from the states and once they are in office they become members of the federal government.¹⁵ "In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted."¹⁶ Congress is becoming less responsive to local concerns and is more likely to answer to national constituents.¹⁷ In fact, "a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values."¹⁸ Justice Powell criticized the majority's abandonment of the states to "the mercy of the Federal Government, without recourse to judicial review."¹⁹ Because of the Court's abrogation of judicial review on the Tenth Amendment, "all that stands between the remaining essentials of State sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."²⁰

The validity of the proposition that the federal political process adequately safeguards state sovereignty has been weighed in the balance and found wanting.²¹ The introduction of the Freedom of Choice Act demonstrates that the political process is only meagerly responsive to issues of state sovereignty. Most congressmen, the guardians of state sovereignty since *Garcia*,²² are strangely silent on the issue of federalism; in fact, many congressmen sponsoring the Freedom of Choice Act represent

14. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.8 (1985) (Powell, Rehnquist, and O'Connor, JJ., dissenting).

15. *Id.* at 564-67.

16. *Id.* at 576.

17. *Id.* at 565 n.9.

18. *Id.*

19. *Id.* at 567 n.13.

20. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting). In the Court's most recent case touching on the Tenth Amendment, *New York v. United States*, 112 S.Ct. 2408 (1992) (White, Blackmun, Stevens, JJ., concurring in part and dissenting in part) White argued that "the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself." *Id.* at 2444 n.3 (White, J., dissenting). Yet, this "assuming" government is the one to which the *Garcia* majority entrusted the safeguarding of state sovereignty.

21. See *EEOC v. Wyoming*, 460 U.S. 226, 235-44 (1983) (holding that the Federal government may tell the States the age at which they may retire their law enforcement officers); *FREC v. Mississippi*, 456 U.S. 742, 758-71 (1982) (allowing the Public Utility Regulatory Policies Act of 1978 to directly address the regulatory standards and procedures of State utility commissions).

22. 469 U.S. 528 (1985).

states which have legislated to protect fetal life.²³ While at least thirty-two states have legislation protecting the life of the fetus or child born of an abortion,²⁴ Congress still threatens to pass the Freedom of Choice Act.

I. FEDERALISM TODAY

In most areas the principles of federalism have been weakened beyond recognition. The report of the Working Group on Federalism²⁵ reads:

23. The 1993 House Bill, H.R. 25, was introduced in the House of Representatives on January 5, 1993 by Don Edwards (D-CA). Original cosponsors include Fazio (D-CA), Kennelly (D-CT), Morella (R-MD), Molinari, S. (R-NY), Sabo (D-MN), Collins, C. (D-IL), Harman (D-CA), Klein (D-NJ), Mineta (D-CA), Mink (D-HI), Schumer (D-NY), Shays (R-CT), Snowe (R-ME), and Nadler (D-NY). Additional cosponsors added, January 26, 1993: Abercrombie (D-HI), Ackerman (D-NY), Andrews, M. (D-TX), Andrews, R. (D-NJ), Andrews, T. (D-ME), Bacchus, J. (D-FL), Beilenson (D-CA), Boehlert (R-NY), Brown, G. (D-CA), Byrne (D-VA), Carr (D-MI), Clay W. (D-MO), Conyers (D-MI), Coppersmith (D-AZ), DeFazio (D-OR), Derrick (D-SC), Deutsch (D-FL), Dicks (D-WA), Dooley (D-CA), Engel (D-NY), Eshoo (D-CA), Filner (D-CA), Fingerhut (D-OH), Ford, H. (D-TN), Ford, W. (D-MI), Frank, Barney (D-MA), Frost (D-TX), Gibbons (D-FL), Green, G. (D-TX), Hinchey (D-NY), Hughes (D-NJ), Johnson, N. (R-CT), Kopetski (D-OR), Lehman (D-CA), Machtley (R-RI), Markey (D-MA), Matsui (D-CA), McDermott (D-WA), Meehan (D-MA), Meek (D-FL), Miller, G. (D-CA), Moran (D-VA), Olver (D-MA), Owens (D-NY), Pallone (D-NJ), Pastor (D-AZ), Pelosi (D-CA), Reynolds (D-IL), Rush (D-IL), Sanders (I-VT), Schenk (D-CA), Studds (D-MA), Wynn (D-MD), Swift (D-WA), Washington (D-TX), Watt (D-NC), Wheat (D-MO), Wilson (D-TX), Yates (D-IL). Additional cosponsors added, February 2, 1993: Blackwell (D-PA), Coleman (D-TX), Dellums (D-CA), Evans (D-IL), Greenwood, J. (R-PA), Hamburg (D-CA), Johnston, H. (D-FL), Levin (D-MI), Martinez (D-CA), Norton (D-DC), Payne, D. (D-NJ), Price, D. (D-NC), Roybal-Allard (D-CA), Scott (D-VA), Shepherd (D-UT), Skaggs (D-CO), Stark (D-CA), Velazquez (D-NY). Additional cosponsors added, February 4, 1993: Bryant (D-TX), Collins, B.R. (D-MI), Dixon, J. (D-CA), Franks, G. (R-CT), Gallo (R-NJ), Kridler (D-WA), Waxman (D-CA). Additional cosponsors added, February 24, 1993: Barrett, T. (D-WI), DeLauro (D-CT), English, K. (D-AZ), Gejdenson (D-CT), Hockbrueckner (D-NY), Hoyer (D-MD), Johnson, E.B. (D-TX), Lewis, John (D-GA), Peterson, P. (D-FL), Pickle (D-TX), Rangel (D-NY), Unsoeld (D-WA), Vento (D-MN), Williams (D-MT), Wyden (D-OR). Additional cosponsors added, March 24, 1993: Berman (D-CA), Cantwell (D-WA), Cardin (D-MD), Inslee (D-WA), Lantos (D-CA), LaRocco (D-ID), McCurdy (D-OK), Reed (R-RI), Stokes (D-OH), Torres (D-CA), Towns (D-NY), Woolsey (D-CA). Additional cosponsors added, May 12, 1993: Brown, C. (D-FL), Clayton, E. (D-NC), Furse (D-OR), Hastings (D-FL), McKinney (D-GA), Richardson (D-NM), Roukema (R-NJ), Serrano (D-NY), Thurman (D-FL). H.R. 25 BILL TRACKING REPORT, 103d Cong., 1st Sess. (1993). The 1993 Senate bill was introduced by Sen. Mitchell (D-ME). The original co-sponsors include Akaka, D. (D-HI), Baucus (D-MT), Biden (D-DE), Bingaman (D-NM), Boren (D-OK), Boxer (D-CA), Bradley (D-NJ), Bryan (D-NV), Campbell (D-CO), Chafee (R-RI), Cohen (R-ME), Dodd (D-CT), Feingold (D-WI), Feinstein (D-CA), Glenn (D-OH), Harkin (D-IA), Inouye (D-HI), Jeffords (R-VT), Kennedy (D-MA), Kerry J. (D-MA), Kerrey R. (D-NE), Kohl (D-WI), Lautenberg (D-NJ), Leahy (D-VT), Levin (D-MI), Lieberman (D-CT), Metzenbaum (D-OH), Mikulski (D-MD), Moseley-Braun (D-IL), Moynihan (D-NY), Murray (D-WA), Packwood (R-OR), Pell (D-RI), Riegle (D-MI), Robb (D-VA), Sarbanes (D-MD), Simon (D-IL), Specter (R-PA), Wellstone (D-MN), Krueger (D-TX), and Shelby (D-AL). S.25 BILL TRACKING REPORT, 103d Cong., 1st Sess. (1993).

24. See *infra* note 51 and accompanying text.

25. The Working Group on Federalism was established by the Domestic Policy

The predictions of the Anti-Federalists have come to pass. The Framers' vision of a limited national government of enumerated powers has gradually given way to a national government with virtually unlimited power to direct the public policy choices of the States in almost any area. States, once the hub of political activity and the very source of our political tradition, have been reduced—in significant part—to administrative units of the national government, their independent sovereign powers usurped by almost two centuries of centralization.²⁶

The impact of centralization has been severe on the states' regulation of abortion. For a century before *Roe v. Wade*²⁷ the states had heavily regulated abortion and for the most part proscribed it vehemently.²⁸

In 1973, the Supreme Court snatched the issue of abortion from the state legislatures.²⁹ *Roe v. Wade*³⁰ illustrates well the judicial callousness to the principles of federalism. In *Roe*, the Court addressed the constitutionality of a Texas abortion statute and for the first time found a constitutional right for a woman to end her pregnancy.³¹ Although neither "abortion" nor "pregnancy" is mentioned in the Constitution, the *Roe* majority contended that the right of privacy was broad enough to cover the abortion decision.³² This extension is troubling in itself, but even more so because the "right to privacy" upon which abortion is founded is not in the Constitution either. Instead, the right to

Council in 1985. It consisted of representatives from nine agencies and the White House and gathered to develop strategies to restore a proper balance in the American federation. THE STATUS OF FEDERALISM IN AMERICA 1 (REPORT OF THE WORKING GROUP ON THE FEDERALISM OF THE DOMESTIC POLICY COUNCIL) November 1986.

26. THE STATUS OF FEDERALISM IN AMERICA 2 (REPORT OF THE WORKING GROUP ON THE FEDERALISM OF THE DOMESTIC POLICY COUNCIL) November 1986.

27. 410 U.S. 113 (1973).

28. While the Supreme Court claimed in 1973 that abortion had been more legislatively favored throughout the nineteenth century than it was at that time, *Roe v. Wade*, 410 U.S. 113, 140 (1973), in truth state legislation was, at most, inconsistent. See James S. Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985).

See S. REP. NO. 321, 102d Cong., 2d Sess. 7 (1992). The Senate Report reads that "[b]y 1910 every State had anti-abortion laws, except Kentucky whose courts judicially declared abortions to be illegal. In 1967, 49 of the States and the District of Columbia classified the crime of abortion as a felony." *Id.* See also JAMES C. MOHR, ABORTION IN AMERICA 262-263 (1978) ("By 1950 American public opinion considered abortion socially odious . . ."); See JOHN T. NOONAN, A PRIVATE CHOICE 5-6 (1979).

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

30. *Id.*

31. *Id.* at 163.

32. *Id.* at 153.

privacy was fashioned in recent years by the Supreme Court using "cases [that] suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations . . ." ³³ The theory is that the words of the Constitution gain content from the emanations of other guarantees or from experience. ³⁴ However, with nothing more legally solid than "emanations" to build on, the Court decriminalized the termination of life in the womb.

Some members of the Court predicted the collision of *Roe* with the important issue of federalism. Justice White wrote:

The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. ³⁵

Even while taking from the states the ability to legislate on abortion, the Supreme Court acknowledged the duty of the states to protect life. ³⁶ The Court held that the states have important interests in protecting even *potential* life. ³⁷ "At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." ³⁸ The Court reiterated in *Roe* that:

[t]he State does have an important and legitimate interest in protecting . . . the potentiality of human life . . . State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother. ³⁹

In 1981, the Supreme Court reaffirmed that the Constitution does not require a state to facilitate abortions. ⁴⁰ "To the contrary,

33. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964).

34. *See Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

35. *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting).

36. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

37. *Id.* at 154 (emphasis added).

38. *Id.*

39. *Id.* at 162-64.

40. *H.L. v. Matheson*, 450 U.S. 398, 413 (1981).

state action encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life."⁴¹

But other cases following *Roe* seem to indicate that the Supreme Court was merely patronizing the states with this strong language—tossing them a placebo on which to legislate. Chief Justice Rehnquist noted in *Planned Parenthood of Southwestern Pennsylvania v. Casey* that “[w]hile the language and holdings of these cases [*Roe* and *Doe*] appeared to leave the States free to regulate abortion procedures in a variety of ways, later decisions based on them have found considerably less latitude for such regulations than might have been expected.”⁴²

To say that states took this intrusion lightly would be a distortion. Nebraska codified its displeasure as follows:

[T]he following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. [These statutes] are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but are rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible; (2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court decision on abortion of January 22, 1973 . . . (4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life.⁴³

Likewise, other states have voiced opposition against the advancing national government. Kentucky law, for instance, provides that as soon as the relevant judicial decisions are reversed,

41. *Id.* at 413 (quoting *Harris v. McRae*, 448 U.S. 297, 325 (1980)).

42. *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2856 (1992) (Rehnquist, White, Scalia, Thomas, JJ., concurring in the judgment in part and dissenting in part). On the issue of parental consent: *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1975); *Bellotti v. Baird*, 443 U.S. 622, 647 (1979); *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 440 (1983). On the issue of parental notice: *H.L. v. Matheson*, 450 U.S. 398, 411 (1981); *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990). On the issue of spousal consent: *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1975). On the issue of spousal notice: *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2830 (1992). On the issue of protection of fetal life: *Colautti v. Franklin*, 439 U.S. 379, 397-400 (1978); *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 768 (1986).

43. NEB. REV. STAT. § 28-325 (1989).

the protection of all human beings without regard to their biological development will be restored.⁴⁴ Recently, Illinois added the same provision as Kentucky and also a "reaffirmation of the long-standing policy of this State" that the unborn child is a legal person from conception and entitled to protection under the Constitution and laws of Illinois.⁴⁵

Louisiana has also declared its legislative purpose to be in favor of unborn life. It reads that

life begins at conception . . . [Louisiana] has a legitimate compelling interest in protecting . . . the life of the unborn from the time of conception until birth . . . In furtherance of this compelling interest we declare it to be a reasonable and proper exercise of the police power of the state to prohibit and otherwise regulate . . . the performance of abortions.⁴⁶

Other states which have also framed opposition to abortion include Idaho, Missouri, Montana, North Dakota, and Utah.⁴⁷ These states are evidence that "Roe v. Wade was never accepted by tens of millions of Americans who felt the court was arbitrarily overriding their own deeply held values . . ."⁴⁸

II. THE FREEDOM OF CHOICE ACT

With their fingers in their ears, proponents of the Freedom of Choice Act shove the bill forward. Reintroduced in the House and Senate in 1993, the provisions of the Freedom of Choice Act are few. "To protect the reproductive rights of women,"⁴⁹ the following is proposed:

SEC. 2. RIGHT TO CHOOSE.

(a) IN GENERAL.—Except as provided in subsection (b), a State may not restrict the right of a woman to choose to terminate a pregnancy—

44. KY. REV. STAT. ANN. § 311.710 (Michie/Bobbs-Merrill 1990). The legislative findings read "that it is in the interest of the people of the Commonwealth of Kentucky that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion." *Id.* at § 311.710(1).

45. ILL. ANN. STAT. ch. 720, para. 510/1 (Smith-Hurd 1993).

46. LA. REV. STAT. ANN. § 14:87 (West Supp. 1993) (see section entitled Legislative Findings and Purpose following the statute).

47. IDAHO CODE § 18-604 (1987) (see note entitled Legislative Intent following the statute); MO. ANN. STAT. § 188.010 (Vernon Supp. 1993); MONT. CODE ANN. § 50-20-102 (1991); N.D. CENT. CODE §§ 14-02.1-01, -02 (1991); UTAH CODE ANN. § 76-7-301.1 (Supp. 1992).

48. S. REP. NO. 321, 102d Cong., 2d Sess. 46 (1992).

49. H.R. 25, 103d Cong., 1st Sess. (1993).

- (1) before fetal viability; or
- (2) at any time, if such termination is necessary to protect the life or health of the woman.

(b) **MEDICALLY NECESSARY REQUIREMENTS.**—A State may impose requirements medically necessary to protect the life or health of women referred to in subsection (a).

(c) **RULES OF CONSTRUCTION.**—Nothing in this Act shall be construed to prevent a State—

- (1) from requiring a minor to involve a parent, guardian, or other responsible adult before terminating a pregnancy; or
- (2) from protecting unwilling individuals from having to participate in the performance of abortions to which they are conscientiously opposed.⁵⁰

III. IMPACT OF THE PROPOSED ACT

If enacted, the far-reaching impact of this bill would devastate the police power of each state and the already weakened structure of federalism. Nearly all states have passed legislation regulating abortion. Many of the current statutes reflect second

50. *Id.* at § 2. The Freedom of Choice Act of 1993, as introduced in the Senate provides:

SEC. 3. FREEDOM TO CHOOSE

(a) **IN GENERAL.** —A State—

- (1) may not restrict the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability;
- (2) may restrict the freedom of a woman to choose whether or not to terminate a pregnancy after fetal viability unless such a termination is necessary to preserve the life or health of the woman; and
- (3) may impose requirements on the performance of abortion procedures if such requirements are medically necessary to protect the health of women undergoing such procedures.

(b) **RULES OF CONSTRUCTION.**— Nothing in this Act shall be construed to —

- (1) prevent a State from protecting unwilling individuals or private health care institutions from having to participate in the performance of abortions to which they are conscientiously opposed;
- (2) prevent a State from declining to pay for the performance of abortions;
- (3) prevent a State from requiring a minor to involve a parent, guardian, or other responsible adult before terminating a pregnancy.

S.25, 103d Cong., 1st Sess. § 3 (1993).

and third attempts to draft provisions which fit within constitutional limits. The state laws discussed below are those laws remaining codified without repeal. Some of the provisions in these statutes have previously been challenged in the Supreme Court; however, the statutes remain in the state codes and demonstrate what the will of the states is on abortion.

A. *Protecting Life*

The desire to protect unborn life is not limited to a minority of contentious states. Thirty-two states have enacted legislation protecting human life while in the womb or human life outside the womb when it exists as the product of a failed abortion.⁵¹

Protection takes varying forms. One manner is for the state to require the performing physician to utilize the method of abortion most likely to preserve the life and health of the viable fetus.⁵² Another manner requires that after a certain time, whether it be viability or the first or second trimester, an additional physician must be immediately present to take control of and provide immediate medical care for any child born alive as the result of an abortion.⁵³

51. ARIZ. REV. STAT. ANN. § 36-2301 (1986); ARK. CODE ANN. §§ 20-16-706, 2016-707 (Michie 1991); CAL. HEALTH & SAFETY CODE § 25955.9 (West 1984); DEL. CODE ANN. tit. 24, § 1795 (1987); FLA. STAT. ANN. § 390.001 (West 1986 & Supp. 1993); GA. CODE ANN. § 26-1202 (Harrison 1988); IDAHO CODE § 18-608 (1987); ILL. ANN. STAT. ch. 220, para. 510/6 (Smith-Hurd 1993); IND. CODE ANN. § 35-1-58.5-7 (Burns 1985); IOWA CODE ANN. § 707.7 (West 1979); KY. REV. STAT. ANN. §§ 311.710, .770 to 780 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:87.5 (West 1986); LA. REV. STAT. ANN. § 40:1299.35.4 (West 1992); ME. REV. STAT. ANN. tit. 22 § 1594 (West 1992); MASS. ANN. LAWS ch. 112, §§ 12o, 12p (Law. Co-op. 1991); MINN. STAT. ANN. §§ 145.412, .415, .423 (West 1989); MO. ANN. STAT. §§ 188.030, .035 (Vernon 1983); MONT. CODE ANN. § 50-20-108 (1991); NEB. REV. STAT. §§ 28-330, -331 (1989); NEV. REV. STAT. § 442.270 (1991); N.Y. EXEC. LAW § 291(3) (McKinney 1982); N.Y. PUB. HEALTH LAW § 4164 (McKinney 1985); N.D. CENT. CODE §§ 14-02.1-05, -08 (1991); OHIO REV. CODE ANN. § 2919.13 (Anderson 1987); OKLA. STAT. ANN. tit. 63 §§ 1-732, -734 (West 1984); OKLA. STAT. ANN. tit. 59 § 524 (West 1989); PA. CONS. STAT. tit. 18, §§ 3211, 3212 (Supp. 1992); R.I. GEN. LAWS § 11-9-18 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 34-23A-16.1 (1986); TENN. CODE ANN. § 39-15-206 (1991); TEX. FAM. CODE ANN. § 12.05 (West 1986); UTAH CODE ANN. §§ 76-7-307, -308 (1990 & Supp. 1992); VA. CODE ANN § 18.2-74 (Michie 1988); WASH. REV. CODE ANN. § 18.71.240 (West 1989); WYO. STAT. §§ 35-6-103, -104 (1977).

52. IDAHO CODE § 18-608 (1987); ILL. ANN. STAT. ch. 721, para. 510/6 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 40:1299.35.4 (West 1992); MINN. STAT. ANN. §§ 145.412, .415 (West 1989); OKLA. STAT. ANN. tit. 63, § 1-732 (West 1984); PA. STAT. ANN. tit. 18, § 3211 (Supp. 1992); UTAH CODE ANN. § 76-7-307 (1990 & Supp. 1992).

53. Illustrative statutes include ARK. CODE ANN. § 20-16-707 (Michie 1991); ILL. ANN. STAT. ch. 721, para. 510/6 (Smith-Hurd 1993); LA. REV. STAT. ANN. 40:1299.35.4 (West 1992); MINN. STAT. ANN. § 145.423 (West 1989); MO. ANN. STAT. § 188.030 (Vernon 1983); OKLA. STAT. ANN. tit. 63, § 1-732(E) (West 1984); PA. STAT. ANN. tit. 18, § 3211 (Supp. 1992).

Twenty-three states also require that when a viable aborted child is born alive, the physician must take all reasonable measures to preserve its life and health.⁵⁴ In Nebraska, the measure applies to any fetus regardless of gestational age if such child shows any sign of life evidenced by breath, muscle movement or the beating of the heart.⁵⁵

None of these thirty-three state laws would survive the Freedom of Choice Act, for two reasons. First, the only restrictions permissible are those to protect the health of the mother and not to protect the life of the fetus.⁵⁶ Second, state requirements for protection of the life of the fetus would add cost to the abortion procedure constructing a "restriction" to abortion.⁵⁷

The Act allows for only one objective in any abortion legislation—protection of the life or health of the mother.⁵⁸ Because the Act singles out one permissible purpose for state legislation and is silent as to any other, it limits "[s]tate interests in restricting abortions *solely* to that of protecting the life or health of the pregnant woman."⁵⁹ Case law supports this: "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."⁶⁰ There are no other exceptions enumerated in the Act, and thus protection of the fetus would be an unacceptable goal. This conclusion is strengthened by the fact that when an amendment was proposed to H.R. 3700, an earlier version of the Act, which would have allowed the states to require the use of the abortion method best calcu-

54. ARIZ. REV. STAT. ANN. § 36-2301 (1986); ARK. CODE ANN. § 20-16-707 (Michie 1991); CAL. HEALTH & SAFETY CODE § 25955.9 (West 1984); DEL. CODE ANN. tit. 24, § 1795 (1987); FLA. STAT. ANN. § 390.001(5) (West 1986); GA. CODE ANN. § 26-1202 (Harrison 1988); ILL. ANN. STAT. ch. 721, para. 510/6 (Smith-Hurd 1993); IOWA CODE ANN. § 707.7 (West 1979); KY. REV. STAT. ANN. § 311.780 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:87.5 (West 1986); ME. REV. STAT. ANN. tit. 22, § 1594 (West 1992); MASS. ANN. LAWS ch. 112, § 12p (Law. Co-op. 1991); MINN. STAT. ANN. § 145.412 (West 1989); NEB. REV. STAT. § 28-331 (1989); NEV. REV. STAT. § 442.270 (1991); N.Y. EXEC. LAW § 291(3) (McKinney 1982); OHIO REV. CODE ANN. § 2919.13(B) (Anderson 1993); R.I. GEN. LAWS § 11-9-18 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 34-23A-16.1 (1986); TENN. CODE ANN. § 39-15-206 (1991); UTAH CODE ANN. § 76-7-308 (1990 & Supp. 1992); WASH. REV. CODE ANN. § 18.71.240 (West 1989); WYO. STAT. § 35-6-104 (1977).

55. NEB. REV. STAT. § 28-331 (1989).

56. H.R. 25, 103d Cong., 1st Sess. § 2(b) (1993); S. 25, 103d Cong., 1st Sess. § 3(a)(3) (1993).

57. Memorandum of former Attorney General, William P. Barr, to Representative Henry J. Hyde 2 (March 2, 1992) (on file with *Regent University Law Review*).

58. H.R. 25, 103d Cong., 1st Sess. § 2(b) (1993); S. 25, 103d Cong., 1st Sess. § 3(a)(3) (1993).

59. BARR, *supra* note 57, at 4, 7 (emphasis added).

60. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

lated to preserve the life of the viable unborn, it was rejected.⁶¹

Should the Freedom of Choice Act pass, state statutes would be so strictly reviewed that the life-valuing laws would surely be found invalid. The Act allows state regulation only when the requirements are medically necessary to protect the health of the mother.⁶² The burden of demonstrating the medical necessity of the regulation will fall on the state.⁶³ And "even if a State regulation does have the requisite relationship to women's health, a State must show that the regulation is the least restrictive means of furthering that interest."⁶⁴

Because the state's regulation must be "designed to further the State's interest in protecting women's health,"⁶⁵ all state legislation will be run through a "pretext" test under the Act. "The State may not, under the guise of a health regulation, impose restrictions designed to discourage a woman from terminating her pregnancy."⁶⁶ For example, the sponsors of the Act cite approvingly the holding of *Thornburgh v. American College of Obstetricians and Gynecologists*, which characterized Pennsylvania's counseling provisions as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."⁶⁷ Clearly, under the Freedom of Choice Act a similar statute would not be allowed despite the Supreme Court's words that "encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life."⁶⁸

61. BARR, *supra* note 57, at 7.

62. S. REP. NO. 321, 102d Cong., 2d Sess. 41 (1992).

63. *Id.* at 41. For example in *Doe v. Bolton*, 410 U.S. 179 (1973), Georgia could not demonstrate that requiring abortions to be performed in a hospital was a medical necessity. *Id.* at 195. Georgia did not present "persuasive data" to show that only hospitals assured the quality of the operation and safety of the procedure. *Id.* Also, in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 450 (1983), the state's 24-hour waiting period was struck down because no legitimate state interest was demonstrated to be furthered.

64. S. Rep. No. 321, 102d Cong., 2d Sess. 42 (1992). In *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), the Supreme Court has given one illustration of how it will analyze whether a statute "restricts" abortion. Upon reviewing Pennsylvania's spousal notice requirement, Justice O'Connor asserted that a statute that may adversely affect less than one percent of abortion-seeking women was grounds enough to invalidate the statute. *Id.* at 2829-30. Under the Act, such a stringent review of state legislation will make it very difficult for any requirements to stand.

65. S. REP. NO. 321, 102d Cong., 2d Sess. 42 (1992).

66. *Id.*

67. 476 U.S. 747, 762 (1986).

68. *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (quoting *Harris v. McRae*, 448 U.S. 297, 325 (1980)).

The language of the Freedom of Choice Act appears to construct a balance between women's rights and the state's interest in protecting life. Before fetal viability the state is absolutely forbidden any action restricting a woman's right to choose abortion; after fetal viability, the state may regulate abortion if it is necessary to protect the life or health of the mother.⁶⁹ In reality, the distinction is a front because after the child could sustain life—even until the day before birth—no state will be able to halt an abortion if it is accomplished in the name of protecting the life or health of the mother. In *Doe v. Bolton*,⁷⁰ the Court said that the health of the mother includes physical or *mental* health.⁷¹

Thus, under the Freedom of Choice Act, as well as today, a woman may legally kill her unborn child if she is able to ferret out some disadvantage to her physical, emotional, psychological, or familial well-being.⁷² It seems doctors accept many common reasons cited by women for aborting their pregnancies. For example, seventy-five percent of women having an abortion do so out of concern that the child would interfere with their schooling, employment, career or ability to care for other family members.⁷³ Two-thirds of the women said that they could not afford the child; half cited that relational problems existed; at least one quarter said they had already had enough children, or they felt too immature or they did not want anyone to know that they had had sex.⁷⁴ These are the reasons that the Supreme Court heralds as adequate "trade-offs" for the very life of the fetus.⁷⁵ Under the Freedom of Choice Act, states will be denied any regulation of abortion as soon as the woman cites a possible disadvantage.⁷⁶

69. H.R. 25, 103d Cong., 1st Sess. § 2(a) & (b) (1993); S.25, 103d Cong., 1st Sess. § 3(a) (1993).

70. 410 U.S. 179 (1973).

71. *Id.* at 192.

72. *Id.*

73. *The Freedom of Choice Act of 1989: Hearings on S. 1912 Before the Committee on Labor and Human Resources*, 101st Cong., 2d Sess., 112-13 (1990) (statement of Jacqueline Darroch Forrest).

74. *Id.* at 112-113.

75. *Colautti v. Franklin*, 439 U.S. 379, 400 (1978).

76. See BARR, *supra* note 57, at 3. Upon introduction of the Freedom of Choice Act in 1991, Senator Packwood asserted that "[f]etal viability is a medical determination which only a trained medical professional is capable of making." 137 CONG. REC. S640, S643 (daily ed. Jan. 14, 1991) (statement of Sen. Packwood). This indicates that fetal viability remains in the judgment of the attending physician, and that whenever a "trained

In not allowing a state to pass regulations that protect unborn life, the Act implicitly says that unborn children are not "life"—there exists no compelling interest to protect them. Any attempt to protect fetal life would not be a valid objective and would violate federal law. It is likely that under the Freedom of Choice Act all state fetal protection measures would be invalidated.

B. Parental Consent or Notice

Thirty-three states require an unemancipated minor to either gain consent for abortion from a parent or guardian or to give give them advanced notice before undergoing the procedure.⁷⁷ The congressional sponsors of the Act, however, clearly desire for minors to have the same freedom of choice as adult women.⁷⁸

Previous versions of the Act had refused to give the states any option whether to require parental consent or notice before allowing minors to have abortions.⁷⁹ The 1993 version, however, will not prevent a state from "requiring a minor to involve a

medical professional—who may not be a licensed physician—is prepared to provide an opinion that a fetus is not viable, the state may have absolutely no regulations preventing the abortion of that fetus.

77. *Consent*: ALA. CODE § 26-21-3 (1992); ALASKA STAT. § 18.16.010 (1991); ARIZ. REV. STAT. ANN. § 36-2152 (1986 & Supp. 1992); CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1993); COLO. REV. STAT. ANN. § 18-6-101 (West 1990); DEL. CODE ANN. tit. 24, § 1790 (1987); ILL. ANN. STAT. ch. 720, para. 515/4 (Smith-Hurd 1993); IND. CODE ANN. § 35-1-58.5-2.5 (Burns 1985 & Supp. 1992); KY. REV. STAT. ANN. § 311.732 (Michie/Bobbs-Merrill 1990); ME. REV. STAT. ANN. tit. 22 § 1597-A (West 1992); MASS. ANN. LAWS ch. 112, § 12 S (Law. Co-op 1991); MICH. STAT. ANN. § 25.248(103) (1992); MISS. CODE ANN. § 41-41-53 (Supp. 1992); MO. ANN. STAT. § 188.028 (Vernon 1983 & Supp. 1993); N.M. STAT. ANN. § 30-5-1 (Michie 1984); N.D. CENT. CODE § 14-02.1-03.1 (1991); OHIO REV. CODE ANN. § 2919.12 (Anderson 1993); PA. CONS. STAT. ANN. tit. 18, § 3206 (Supp. 1992); R.I. GEN. LAWS § 23-4.7-6 (1989); S.C. CODE ANN. § 44-41-31 (Law. Co-op Supp. 1992); TENN. CODE ANN. § 37-10-303 (1991); TEX. FAM. CODE ANN. § 35.03 (West 1986) (only minor's consent necessary for all pregnancy related treatment but abortion); WYO. STAT. § 35-6-118 (Supp. 1992). *Notice*: ARK. CODE ANN. § 20-16-801, -803 (Michie 1991); IDAHO CODE § 18-609 (1987); ME. REV. STAT. ANN. tit. 22, § 1597 (West 1992); MD. HEALTH-GEN. CODE ANN. § 20-103 (1990); MINN. STAT. ANN. § 144.343 (West 1989); MONT. CODE ANN. § 50-20-107 (1991); NEV. REV. STAT. § 442.255 (1991); N.D. CENT. CODE § 14-02.1-03.1 (1991); TENN. CODE ANN. § 39-15-202 (1991); UTAH CODE ANN. § 76-7-304 (1990); W.VA. CODE § 16-2F-3 (1991); WYO. STAT. § 35-6-118 (Supp. 1992).

78. Fact Sheet entitled Freedom of Choice Act of 1991, enclosure in a letter from Don Edwards to congressional colleagues (Jan 13, 1993) (on file with *Regent University Law Review*) (Mr. Edwards enclosed the Fact Sheet that had been published for the 1991 bill with his letter of 1993).

79. H.R. 25, 102d Cong., 1st Sess. (1991).

parent, guardian, or other responsible adult before terminating a pregnancy.”⁸⁰

The manner in which the Act is drafted suggests that the exception is mere rhetoric. The term “involve” is highly ambiguous. The authors of the Act could have chosen a truly meaningful word such as “consent” or “notify” or defined the word “involve”; instead, they left the minor’s responsibility vague.⁸¹ Because the meaning of “involve” is not defined in the statute, courts are likely to look to congressional intent as a determining factor and will find that parental consent or notice are not *specifically* addressed by the Act. The courts will instead find that the congressional position is that “carving out an exception which would result in denying minors access to abortion would be unacceptable . . . [a]ccess to safe, legal abortions for all women who make that choice ought to remain an over-riding goal.”⁸²

The issue is further obscured when the Act provides for the involvement of some “other responsible adult.”⁸³ Again, the term is not defined.⁸⁴ Thus, based on the vague wording of the Act, a minor could involve a nurse at the abortion clinic, a teacher or school counselor, an older friend, or the performing physician himself.⁸⁵ If the Committee truly desired to allow states to require parental notice or approval, it could have done so with clarity.⁸⁶ Despite any protests to the contrary,

merely asserting a purported purpose in preserving pre-1989 Supreme Court decisions does not achieve that purpose unless

80. H.R. 25, 103d Cong., 1st Sess. § 2(c)(1) (1993); S. 25, 103d Cong., 1st Sess. § 3(b)(3).

81. If a word that should be defined in a statute is not, its common law meaning is applied. *United States v. Headspeth*, 852 F.2d 753, 757 (4th Cir. 1988). Whether “consent” or “notice” is the accepted meaning of “involve” is unlikely when the authors could have simply used those terms.

82. 137 CONG. REC. S640, S642 (daily ed. Jan. 14, 1991) (statement of Sen. Cranston).

83. H.R. 25, 103d Cong., 1st Sess. § 2(c)(1) (1993); S. 25, 103d Cong., 1st Sess. § 3(b)(3) (1993).

84. “Other responsible adult” is not defined in the Act, but under the Public Health Service Act, dealing with Adolescent Family Life, “adult” means an adult as defined by state law.” 42 U.S.C. § 300z-5(d)(2) (West 1991). “Responsible” is not defined by Congress either, and thus, the dictionary definition or common usage meaning must be used by the courts. *See United States v. Headspeth*, 852 F.2d 753, 757 (4th Cir. 1988) and *Michael v. State*, 767 P.2d 193, 197 (Alaska Ct. App. 1988). In WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE 1543 (Encyclopedic ed. 1979), “responsible” is defined as “(a) trustworthy; dependable; reliable . . . (b) able to pay debts or meet business obligations.” In sum, “other responsible adult” could mean anyone who meets the state’s definition of adult, which is typically eighteen years of age and older, and is dependable.

85. S. REP. NO. 321, 102d Cong., 2d Sess. 50n2 (1992).

86. *Id.*

the operative language of the bill does so. The rule of construction regarding adult involvement in a minor's abortion decision is, at the very least, ambiguous, and runs a very serious risk of being construed as precluding parental consent . . .⁸⁷

At present thirty states require an unemancipated minor seeking an abortion to gain either the written consent of a guardian or parent or to give the parent or guardian advanced notice of an abortion.⁸⁸ No matter how it is construed, the Act does not accomplish the purposes of the states, which include (a) fostering the family structure and preserving it as a viable social unit, and (b) protecting the rights of parents to rear children who are members of their household.⁸⁹

If this bill passes it will be improper for any state to legislate on abortion in an attempt to strengthen the family, reinforce parental authority, protect minors from their immaturity, or even facilitate a woman's informed consent on whether to abort.⁹⁰ Even though all of these purposes are well established within the plenary powers of a sovereignty and are the essence of the states' traditional authority, the Freedom of Choice Act denies the states the opportunity to provide for these goals when the abortion right is advanced.

C. Spousal Consent or Notice

To further the objective of promoting the family and protecting its structure, eleven states have enacted statutes requiring that married women seeking an abortion at least consult if not gain the approval of their husbands.⁹¹ While the bill does not address the issue of spousal notification, the sponsor of the Act, Don Edwards, explained that unless a state could demonstrate that a spousal notification requirement was necessary to protect the life and health of the mother, spousal notification require-

87. *Id.*

88. See statutes cited *supra* note 77.

89. ALA. CODE § 26-21-1 (1992).

90. BARR, *supra* note 57, at 4.

91. COLO. REV. STAT. ANN. § 18-6-101 (West 1990); FLA. STAT. ch. 390.001 (1986 & Supp. 1993); ILL. ANN. STAT. ch. 735, § 5/11-107.1 (Smith-Hurd 1993) (father may get injunctive relief); KY. REV. STAT. ANN. § 311.735 (Michie/Bobbs-Merrill 1990); MONT. CODE ANN. § 50-20-107 (1991); N.D. CENT. CODE § 14-02.1-03 (1991); PA. CONS. STAT. ANN. tit. 18, § 3209 (Supp. 1992); R.I. GEN LAWS § 23-4.8-2 (1989); S.C. CODE ANN. § 44-41-20 (Law. Co-op 1976) (required for third trimester abortions); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986); UTAH CODE ANN. § 76-7-304 (1990).

ments would violate the Freedom of Choice Act.⁹² As these statutes for the most part seek to protect the family unit or the father's interest in the life of his child, they would not withstand scrutiny under the Act.⁹³

D. Conscience Clause

At present, at least forty-four states have exemptions commonly known as Conscience Clauses.⁹⁴ These provisions allow medical personnel and institutions to decline assisting or performing an abortion if it violates their religious beliefs or their conscience. Under the 1993 version of the Act, a state may protect an objector from participating in an abortion.⁹⁵

Whether someone could exempt themselves from performing abortions is called into question by a fact sheet accompanying the 1993 version of the Act sent out by Representative Don Edwards. The fact sheet reveals that a state could not enact legislation that had the *effect* of denying women access to abortions.⁹⁶ For example, during discussion of H.R. 3700 the proponents of the Act felt that barring the use of a public facility in

92. EDWARDS, *supra* note 78.

93. BARR, *supra* note 57, at 11.

94. ALASKA STAT. § 18.16.010 (1991); ARIZ. REV. STAT. ANN. § 36-2151 (1986); ARK. CODE ANN. § 20-16-601 (Michie 1991); CAL. HEALTH & SAFETY CODE § 25955 (West 1984 & Supp. 1993); COLO. REV. STAT. ANN. § 18-6-104 (West 1990); DEL. CODE ANN. tit. 24, § 1791 (1987); FLA. STAT. ANN. § 390.001 (West 1986); GA. CODE ANN. § 26-1202 (Harrison 1988); HAW. REV. STAT. § 453-16 (1985); IDAHO CODE § 18-612 (1987); ILL. ANN. STAT. ch. 720, para. 510/13 (Smith-Hurd 1993); IND. CODE ANN. § 16-10-3-2 (Burns 1990); IOWA CODE ANN. § 146.1 (West 1989); KAN. STAT. ANN. § 65-443, 444 (1992); KY. REV. STAT. ANN. § 311.800 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 40:1299.31 (West 1992); ME. REV. STAT. ANN. tit. 22, § 191 (West 1992); MD. HEALTH-GEN. CODE ANN. § 20-214 (1990 & Supp. 1992); MICH. STAT. ANN. § 14.15(20182) (Callaghan 1988); MINN. STAT. ANN. § 145.414 (1989); MASS. ANN. LAWS ch. 112, § 12 I (Law. Co-op 1991); MONT. CODE ANN. § 50-20-111 (1991); MO. ANN. STAT. § 197.032 (Vernon 1983); NEB. REV. STAT. § 28-337, -338 (1989); NEV. REV. STAT. § 632.475 (1991); N.J. STAT. ANN. § 2A:65a-1, -2 (1987); N.M. STAT. ANN. § 30-5-2 (Michie 1984); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992); N.C. GEN. STAT. § 14-45.1 (1986); N.D. CENT. CODE § 23-16-14 (1991); OHIO REV. CODE ANN. § 4731.91 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 63, § 1-741 (1981); OR. REV. STAT. § 435.475, 485 (1991); 18 PA. CONS. STAT. ANN. § 3213 (1983); R.I. GEN. LAWS § 23-17-11 (1989); S.C. CODE ANN. § 44-41-40, -50 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23a-12, -13, -14 (1986); TENN. CODE ANN. § 39-15-204, -205 (1991); TEX. REV. CIV. STAT. ANN. art. 4512.7 (West Supp. 1993); UTAH CODE ANN. § 76-7-306 (1990); VA. CODE ANN. § 18.2-75 (Michie 1988); WASH. REV. CODE ANN. § 9.02.150 (West Supp. 1993); W. VA. CODE § 16-2F-7 (1991); WYO. STAT. § 35-6-105. -106 (1988).

95. H.R. 25, 103d Cong., 1st Sess. § 2(c)(2) (1993); S. 25, 103d Cong., 1st Sess. § 3(b)(1) (1993).

96. EDWARDS, *supra* note 78.

localities where it was the only available facility for such services would be a "restriction."⁹⁷ If a restriction can be found when abortion is merely less accessible to some women than others, then it follows that a conscience clause provision resulting in a lack of medical personnel or facilities willing to perform abortions would constitute a "restriction" to abortion. The conscience clause would be unacceptable.⁹⁸

E. Informed Consent

Twenty-one states have enacted statutes seeking to ensure that a woman's decision to abort is truly an informed one.⁹⁹ Most of the statutes are similar to Idaho's¹⁰⁰ which provides that, at the expense of the physician or hospital, the woman shall receive printed materials easily comprehended including (a) descriptions of available services including adoption services with lists of names, addresses, and telephone numbers of public and private agencies that provide such services and financial aid;¹⁰¹ (b) descriptions and photographs of the fetus at two week intervals during the stages of development, including information about physiological characteristics such as brain and heart functions;¹⁰² (c) descriptions of the abortion procedure and any reasonable foreseeable complications;¹⁰³ and (d) the number of weeks that have elapsed in her pregnancy from the probable time of conception.¹⁰⁴

In the past the Court declared that the description of fetal characteristics is information that may serve only to "confuse

97. *Id.*

98. *Id.*

99. DEL. CODE ANN. tit. 24, § 1794 (1987); FLA. STAT. ANN. § 390.001 (West 1986 & Supp. 1993); IDAHO CODE § 18-609 (1987); KY. REV. STAT. ANN. § 311.726, .729 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 40:1299.35.6 (West 1992); ME. REV. STAT. ANN. tit. 22, § 1599 (West 1992); MD. HEALTH-GEN. CODE ANN. § 20-211 (1990); MASS. ANN. LAWS ch. 112, § 12 S (Law. Co-op. 1991); MO. ANN. STAT. § 188.039 (Vernon Supp. 1993); MONT. CODE ANN. § 50-20-104, -106 (1991); NEB. REV. STAT. § 28-327 (1989); NEV. REV. STAT. § 442.252 (1991); N.D. CENT. CODE § 14-02.1-03 (1991); 18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1992); R.I. GEN. LAWS §§ 23-4.7-2, -3, -5 (1989); S.C. CODE ANN. § 44-41-30 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 34-23A-10.1 (1986); TENN. CODE ANN. § 39-15-202 (1991); UTAH CODE ANN. § 76-7-305, -305.5 (1990); VA. CODE ANN. § 18.2-76 (Michie 1988); WIS. STAT. ANN. § 146.78 (West 1989 & Supp. 1992).

100. IDAHO CODE § 18-609 (1987).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* See also LA. REV. STAT. ANN. § 40:1299.35.6 (West 1992).

and punish [the woman] and heighten her anxiety."¹⁰⁵ In fact, the Supreme Court held that the "[s]tate may not require the delivery of information designed to influence the woman's informed choice between abortion or childbirth."¹⁰⁶ However, in the most recent abortion decision, the Supreme Court debated the constitutionality of informed consent and concluded that it did not place an undue burden on the abortion right.¹⁰⁷ The *Casey* decision overruled cases which held that requiring informed consent was unconstitutional.¹⁰⁸

The supporters of the Freedom of Choice Act believe that *Casey* granted the states too much regulatory power,¹⁰⁹ and they argue that, under the "undue burden" test of *Casey*, "a significant number of women will be prevented from obtaining an abortion."¹¹⁰ Senator Hatch addressed the issue of informed consent during the 1992 Senate hearings, questioning whether a state legislature would "have the authority to require that a woman be informed of alternatives to abortions, such as adoption, and the medical, social, and financial services that are available to her if she decides to keep her baby,"¹¹¹ John C. Harrison of the U.S. Department of Justice replied, "Senator, we think that such a requirement would create in a sense an obstacle to an abortion that again would be considered a restriction."¹¹² It is likely that if a party could show that the information that a state required to be given to women persuaded women to change their mind on whether to abort, it would be found "restrictive" of abortions and would not withstand scrutiny.¹¹³ Under this analysis, the Freedom of Choice Act would substitute the agenda of Congress for the legislation of twenty-two states.¹¹⁴

105. *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 762 (1986).

106. *Id.* at 760.

107. *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2823 (1992).

108. Federal courts had consistently stricken fetal-description requirements. *See Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1021-22 (1st Cir. 1981); *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980); *Planned Parenthood Assn. v. Ashcroft*, 655 F.2d 848, 868 (8th Cir. 1981); *Women's Medical Center v. Roberts*, 530 F.Supp. 1136, 1152-54 (RI 1982).

109. S. REP. No. 321, 102d Cong., 2d Sess. 12 (1992).

110. *Id.* at 13.

111. *Freedom of Choice Act of 1991: Hearings on S.25 Before the Subcomm. on Labor and Human Resources*, 102d Cong., 2d Sess. 20 (1992) (questioning following statement of John C. Harrison, Deputy Assistant Attorney General, U.S. Department of Justice).

112. *Id.*

113. *See Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2824 (1992).

114. *See supra* note 99.

IV. CONCLUSION

While state regulation of abortion fits squarely into the state sovereignty that once was protected from national encroachment by the Tenth Amendment and *National League of Cities v. Usury*,¹¹⁵ it today stands at the mercy of Congress "without recourse to judicial review."¹¹⁶

I respectfully submit that the Court was incorrect when it held that "[t]he political process ensures that laws that unduly burden the states will not be promulgated."¹¹⁷ The Freedom of Choice Act contradicts the majority of state abortion legislation and denies to all states any attempt to protect unborn life. The only interest states are left to protect are the choice, life and health of a pregnant woman. The Act is being promulgated by legislators who, instead of safeguarding their constituents' right to decide how the state should treat abortion, are deciding that issue for them.¹¹⁸ Because of the Court's abrogation of its constitutional duty to scrutinize congressional action against the Tenth Amendment, the members of Congress must face the challenge of self-restraint and take on the responsibility of upholding states' rights. Historically, this was the approach:

For about 150 years after the Founding, many political controversies at the federal level were apt to begin with debate about constitutional principle—whether the federal governments' enumerated powers entitled it to act in a particular field. Only after that came debate about the proper policy for that field. Today nobody—nobody—in either the legislative or executive branch believes that there is any subject, any sphere, from which the federal government is constitutionally excluded. However, the eclipse of the idea does not mean that prudence should not do what constitutional principle once did—restrain the federal government's itch to be active everywhere, in the process discrediting itself and making a mockery of federalism.¹¹⁹

The Freedom of Choice Act of 1993 contains an implicit challenge to Congress to enact principled legislation rooted in the Constitution rather than exercising power belonging to an-

115. 426 U.S. 833 (1976).

116. *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 567 n.13 (1985) (Powell, J., dissenting).

117. *Id.* at 556.

118. See *supra* note 23 and accompanying text.

119. George F. Will, *Agents of Change*, NEWSWEEK, Feb. 22, 1993, at 72.

other polity. With the introduction of the Act, the opportunity exists for Congress to admit its constitutional limitations of power and defer to state legislatures even on a matter of great controversy.¹²⁰

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120. In the words of Professor Laurence Tribe before the Senate in 1981 speaking on the abortion issue, "If these matters are divisive, if they are unclear, why try to resolve them nationally? Why not decentralize?" *Freedom of Choice Act of 1991: Hearings on S.25 Before the Subcomm. on Labor and Human Resources*, 102d Cong., 2d Sess. 15 (1992) (Statement of John C. Harrison, Deputy Assistant Attorney General, U.S. Department of Justice). The federal structure of the nation is exactly suited to reflect the diversity that exists in public opinion. *Id.* at 14. The states should be allowed to reflect in their laws the sentiment of their citizens. "The political outcomes of fifty distinct State processes would be far more likely to represent the genuine diversity of views that exists on this subject than would a uniform Federal code entrenching a more expansive regime than that of *Roe v. Wade*." *Id.*

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