

Interest Creep: The Constitution, Common Law, and Politics

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ABSTRACT

Professor Fox's article, Interest Creep, offers an important contribution to the literature on constitutional analysis and reproductive jurisprudence. This Response begins by suggesting that the problem of interest creep that Fox describes is not so much a problem of the courts conflating and treating as fungible and indistinct the different strands of interests the state has in potential life. Instead, the problem is their failure to explore and distinguish the relative strengths of these different interests. In other words, Justices seem to realize they are describing different kinds of interests in potential life, but they fail to explain what role these separate interests might play when considering whether government infringement of a particular interest is unconstitutional. The second part of this Response suggests that interest creep is not merely conceptual sloppiness or an attempt to accommodate conflicting views over contentious matters. Rather, it is a result of the common law aspects of constitutional analysis, which require judges to evaluate constitutional notions incrementally, one controversy at a time, often leaving the reach of some of these interests undefined. In addition, it reflects the fact that politics play a role in the evolution of constitutional meaning by not only influencing, but also by becoming part of the meaning. Together these features of constitutional interpretation help explain the source and indeterminacy of interest creep. Given the subtle ways that political influences may lead to interest creep, scholarship like Fox's article is an invaluable contribution to our understanding of constitutional meaning generally and in the specific context of controversies over reproduction.

INTRODUCTION

Professor Dov Fox's important piece, *Interest Creep*,¹ will undoubtedly be relied upon by courts and scholars as they try to make sense of the complex and evolving legal issues surrounding reproduction. He has masterfully disentangled a concept—the state interest in potential life—to offer clarity about the different strands of interests it encompasses. As he notes, much of the analysis in this area “treats as a single, uniformly strong source of government concern what are actually altogether distinct kinds of reasons that apply under different conditions and with varying levels of strength.”² Fox offers an elegant, positive, and normative account

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¹ Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273 (2014).

² *Id.* at 278.

of the problem of interest creep and persuasively calls for us to prune the thicket of confusion regarding the state interest in potential life.

There is much to agree with in Fox's work. Perhaps its greatest strength is the way that Fox's analysis, much like the sun clearing away the haze of fog, brings into sharp focus concepts that have previously been hinted at only somewhat blurrily. Fox's contribution is not so much the recognition of new interests with respect to potential life—for courts and commentators have hinted at them for a while—as it is the clear illumination of the edges of these interests. Fox shows how precise articulation of the different state interests regarding controversies concerning embryos and fetuses, such as whether states can and should criminalize drug use during pregnancy, can reveal hidden agendas or ulterior motives in legislation based on vague assertions of an interest in potential life.³ Even before Fox provided the sharp lens of his analysis, however, commentators had uncovered many of these ulterior motives.⁴ Even so, the clarity and crispness of Fox's discussion of the relevance and varied strength of these different state interests helps to further uncover confusion and subterfuge and can only foster thoughtful legal and ethical analysis.

The goal of this Response, however, is not to address the role of interest creep in disguising a pernicious agenda. Instead, its goal, in Part I, is to sort out the nature of interest creep and conflation of state interests, and to consider, in Part II, what might explain this phenomenon. The discussion of the first point is related to, and directly results from, the discussion of the second: the nature of the conflation of state interests reflects the messy process of a constitutional system in which common law features and politics can shape constitutional meaning.

I. THE NATURE OF INTEREST CREEP

Fox describes the problem of interest creep with respect to potential life as a conflation of multiple distinct state interests under the heading of an interest in potential life.⁵ He argues that the phenomenon “produces a seemingly monolithic justification that admits of multiple meanings”⁶ and

³ *Id.* at 316–42.

⁴ See, e.g., Michele Bratcher Goodwin, *Precarious Moorings: Tying Fetal Drug Policy to Social Profiling*, 42 RUTGERS L.J. 659, 660–61 (2011); Sonia M. Suter, *Bad Mothers or Struggling Mothers?*, 42 RUTGERS L.J. 695, 695 (2011).

⁵ Fox, *supra* note 1, at 293.

⁶ *Id.* at 285; see also *id.* at 283 (noting the danger of mistaking one aspect of this interest for other “distinct categories of government concern”); *id.* at 287 (describing interest creep as treating as “an umbrella interest what are in fact very different sources of

that has resulted in the “indeterminacy of the interest in potential life.”⁷ One understanding of this interest is the interest in prenatal welfare, i.e., an interest in “‘protecting prenatal life’ from conduct that would extinguish it,”⁸ which he believes courts and legislators have largely conflated with the other, distinct strands of government concerns, such as postnatal welfare, social values, and social effects.⁹ Through interest creep, he argues, all four interests have been subsumed under the general heading of an “interest in potential life.”¹⁰

Fox suggests that the problem of interest creep was limited in the 1970s and 1980s because, “before the ensuing influx of scientific and technological advances involving nascent human life,” the main reproductive battles concerned contraception and abortion.¹¹ As a result, the state’s primary interest in potential life was protecting this “valuable ‘entity in itself’” from destruction.¹² After this period, Fox argues, the courts began to conflate the interest in potential life (i.e., prenatal welfare) with the other, discrete governmental interests in postnatal welfare, social values, or social effects, thereby resulting in interest creep.¹³

Fox actually describes two kinds of conflation. One is the failure to distinguish the interest in prenatal welfare from three different governmental interests related to the fetus or embryo.¹⁴ The other related kind of conflation, which I believe to be the bigger problem, is the use of the umbrella heading of an interest in potential life to encompass distinct governmental interests without discussing the relevance and relative strengths of these different interests in different factual contexts.¹⁵

While many discussions of the state interest in potential life are hazy at times, jurists often consciously describe distinct state interests, even if they do not always provide sharp delineations. Fox cites Justice Stevens’s concurring and dissenting opinion in *Planned Parenthood of Southeastern*

government concern”).

⁷ *Id.* at 282; *see also id.* at 293 (noting that this indeterminacy remains even thirty-five years after *Roe v. Wade* in the Court’s decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

⁸ *See, e.g., id.* at 295 (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)).

⁹ *See id.* at 283.

¹⁰ *See id.* at 293.

¹¹ *Id.* at 279.

¹² *Id.* at 295 (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

¹³ *Id.* at 279–81.

¹⁴ *See id.* at 283.

¹⁵ *See id.* at 278.

Pennsylvania v. Casey,¹⁶ for example, as evidence of a conflation of the state interest in social effects—what Stevens calls the “‘pragmatic’ interest in ‘expanding the population’”¹⁷—with the state interest in potential life, which Fox seems to suggest is the interest in prenatal welfare.¹⁸

A closer look at the text suggests, however, that Justice Stevens explicitly understands the former interest to be distinct from the latter interest. Indeed, his opinion offers an emerging recognition that the state has different interests with respect to potential life. Stevens discusses not just interests in social effects (i.e., population expansion), but also social values interests. He notes that “[t]he State has a legitimate interest in minimizing [the] offense” of abortions for those who “believe that any abortion reflects an unacceptable disrespect for potential human life” and for whom “more than a million abortions each year is intolerable.”¹⁹ But then he goes on to declare that “the State may *also* have a broader interest in expanding the population.”²⁰ If any conflation of state interests occurs, in the sense of treating two distinct interests as one, it seems to be a conflation of the interest in prenatal welfare—so many abortions are “intolerable”—with the social values interest—abortions reflect an “unacceptable disrespect for potential life.”²¹ The social effects interest in population expansion, however, is treated as an *additional, distinct, and separate* state interest.²²

Interestingly, this discussion includes Stevens’s critique that “States rarely articulate with any precision . . . the kinds of concerns that comprise the State’s interest in potential human life.”²³ This statement is potentially ambiguous as to whether Stevens believes there is a monolithic interest in potential human life. Nevertheless, while lacking the rigor and clarity that Fox offers in disentangling the different interests the state has with respect to potential life, Stevens, in his own way, does seem to recognize multiple and distinct state interests. The fact that he lists the interests separately and additively suggests his belief that the state has multiple and discrete, rather than fungible, interests in potential life.

What *is* problematic with Stevens’s discussion of state interests is that

¹⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁷ Fox, *supra* note 1, at 312 (quoting *Casey*, 505 U.S. at 914–15 (Stevens, J., concurring in part and dissenting in part)).

¹⁸ *Id.* at 312–14.

¹⁹ *Casey*, 505 U.S. at 914–15 (Stevens, J., concurring in part and dissenting in part).

²⁰ *Id.* at 915 (emphasis added).

²¹ *See id.* at 914–15.

²² *See id.* at 915.

²³ *Id.* at 914–15.

even as he describes the additional strands of state interests beyond prenatal welfare (to use Fox's terminology), he fails to discuss the relative strength of these interests. Although the Court finds the state interest in prenatal welfare to be compelling,²⁴ Stevens does not consider whether the interests in *respect* for potential life (a social values interest) or the impact on population (a social effects interest) are also compelling. The problem is not his failure to recognize the distinct nature of these state interests, but rather his failure to examine what role these additional interests might play either independent of or in conjunction with the competing individual interests upon which government regulations infringe. Given that, as Fox shows, different state interests vary in strength and in "the kinds of evidence that are required to prove that a challenged regulation serves any particular" state interest,²⁵ Stevens's discussion is wanting in that respect.

But why does Stevens fail to examine those questions? The answer lies in the possible causes for the problem that Fox diagnoses, which the next Part addresses.

II. EVOLVING CONSTITUTIONAL MEANING

After diagnosing the phenomenon of interest creep, Fox asks whether it is simply symptomatic of other problems, such as a lack of institutional competence on the part of courts to give full substance to what the legislatures mean by the state interest in potential life,²⁶ or whether it might actually be salutary as a means to accommodate conflicting religious moral views over contentious matters concerning reproduction.²⁷ Fox persuasively refutes these two explanations. He demonstrates that courts can, in fact, assess the sincerity of government reasons for enacting a particular statute,²⁸ and he shows that trying to prevent "cultural friction"²⁹ by treating the state interest in potential life as indeterminate is not likely to succeed.³⁰

What then explains the phenomenon of interest creep? Perhaps it is conceptual sloppiness, at least in part. As the following discussion suggests, however, it may instead largely reflect the combined effects of the common law method of constitutional interpretation and the role of the political process in the evolution of constitutional meaning.

²⁴ See *id.* at 882–83, 886–87 (plurality opinion).

²⁵ Fox, *supra* note 1, at 288.

²⁶ *Id.* at 343.

²⁷ *Id.* at 350.

²⁸ *Id.* at 343–50.

²⁹ *Id.* at 342.

³⁰ *Id.* at 350–55.

A. *Common Law Aspects of Constitutional Law*

One explanation for the indeterminacy of the nature of the state interest in potential life is that it reflects the common law method of interpreting constitutional law. That is, the meaning of constitutional concepts, such as the interest in potential life, evolves and becomes refined when the courts face “changes over time, and adapt[] to new circumstances.”³¹ Under the view of “living constitutionalists,” like Professor David Strauss, this evolution occurs because “[o]ur constitutional system . . . has become a common law system” that is “built out of precedents and traditions that accumulate over time . . . [and that] allow room for adaptation and change, but only within certain limits”³² Thus, courts must resolve the issue presently before them, not the many related controversies that might come before them in the future.³³ To be sure, courts are often mindful of these potential future cases and how principles they articulate in the case before them may impact future matters.³⁴ But, of course, courts do not resolve those future cases when resolving the particular one in front of them.

At other times, courts may have no sense of the future controversies that might arise. This may be especially true in areas with evolving technologies, such as reproduction, making it hard to envision future conflicts. In the early cases in reproductive jurisprudence, litigants, judges, and the society at large gave little thought to the legal issues that might arise as reproductive technologies began to allow for the *creation*, rather than the termination, of potential lives.³⁵ Nor did anyone contemplate stem cell research from the cells of early embryos or aborted fetuses. These possibilities were still decades away from scientific testing.³⁶

³¹ DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010); *see also, e.g.*, *United States v. Lopez*, 514 U.S. 549, 552–57 (1995) (discussing the evolution of Commerce Clause jurisprudence).

³² STRAUSS, *supra* note 31, at 3.

³³ *See* U.S. CONST. art. III, § 2, cl. 1 (defining jurisdictional authority of federal courts as limited to hearing cases and controversies).

³⁴ For example, although the Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act under Congress’s taxation powers, it avoided doing so under the Commerce Clause because it determined that allowing federal regulation of “inaction” would have the undesirable future effect of “bring[ing] countless decisions an individual could *potentially* make within the scope of federal regulation, and . . . empower Congress to make those decisions for him.” *Nat’l Fed’n of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012).

³⁵ *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153–62 (1973) (discussing the constitutionality of terminating pregnancies through abortions).

³⁶ *See* Press Release, The White House Office of the Press Sec’y, President Discusses Stem Cell Research (Aug. 9, 2001), *available at* <http://georgewbush->

As a result, a decision like *Roe v. Wade*³⁷ left many questions unanswered about the full scope and nature of the individual and state interests that came up against one another. Just as it was unnecessary to articulate precisely the scope of individual reproductive interests, it was also unnecessary to consider the full spectrum of interests the state might have regarding potential life.³⁸ The development of new technologies like artificial insemination, surrogacy, in vitro fertilization, and the use of gamete or embryo donations, however, began to illuminate the idea that reproduction encompasses diverse interests that are not necessarily of equal strengths, such as the interests in *preventing* or *pursuing* genetic parenthood, gestation, or child rearing.³⁹ Similarly, new controversies and technologies that have yet to develop will further help to illuminate the full spectrum and nature of interests the state has in potential life.

Fox is right that, prior to his piece, the scholarly discussion had focused on disentangling the individual's reproductive interests, as illustrated so nicely by Professor Glenn Cohen's work.⁴⁰ Indeed, Fox's project is reminiscent of Cohen's scholarship; just as Cohen disentangles the individual's reproductive interests, Fox disentangles the disparate state interests related to potential life.⁴¹ The kind of conceptual ordering that Fox calls for can only come with time or the emergence of circumstances that highlight the different strands of interests. It can, of course, be aided by scholarship, such as Fox's article, that examines the jurisprudential landscape to note conceptual muddiness or gaps,⁴² or that imagines the implications of this landscape for future controversies that might arise as technology evolves.⁴³

whitehouse.archives.gov/news/releases/2001/08/20010809-2.html ("In recent weeks, we learned that scientists have created human embryos in test tubes solely to experiment on them.").

³⁷ *Roe v. Wade*, 410 U.S. 113 (1975).

³⁸ See *id.* at 163–64 (recognizing, without discussion of its scope, "the State's important and legitimate interest in potential life").

³⁹ See Fox, *supra* note 1, at 279–80.

⁴⁰ See generally Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008).

⁴¹ Fox, *supra* note 1, at 292–316.

⁴² *Id.* at 283, 356.

⁴³ See, e.g., Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1590 (2008) [hereinafter Suter, *Repugnance*] ("[T]he combination of *Gonzales*'s repugnance approach and vision of relational privacy gives the legislative body a firmer footing for declaring more amorphous concerns about the way in which the advanced reproductive technologies threaten social attitudes toward reproduction

Turning again to Stevens's opinion in *Casey*, I would argue that his failure to specify the nature and reach of the distinct state interests he identifies with respect to potential life partially reflects this common law process. Stevens writes in part to concur with the plurality's decision to uphold the central premise of *Roe* that the state may ban only postviability abortions.⁴⁴ Regarding that issue, the state interest in potential life—understood as prenatal welfare—had already been established as a compelling interest.⁴⁵ Stevens therefore did not need to establish whether the additional state interests in promoting respect for fetal life or social effects were more or less weighty.

Stevens also writes to dissent from the plurality decision to uphold informed consent requirements and a twenty-four hour waiting period.⁴⁶ Here, too, he did not need to evaluate the strength of the additional state interests concerning potential life because he believed the restrictions at issue could only be (but were not) justified by “the State's interest in maternal health,” as opposed to interests concerning potential life.⁴⁷ While state interests in social effects might be relevant to other reproductive controversies, such as abortion bans based on one's reasons for the abortion (e.g., gender or race of the child)⁴⁸ or criminal sanctions for maternal drug use during pregnancy,⁴⁹ such questions were simply not before the Court, and Stevens therefore did not need to, and should not have had to, offer that kind of clarification.

B. *Politics and Constitutional Meaning*

But there is another element of constitutional interpretation that also plays a role in interest creep. The evolution of constitutional understanding is not merely a “cloistered . . . and slow process”⁵⁰ of “steady elaboration through case-by-case adjudication”⁵¹ that is relegated primarily to the courts, and especially to the Supreme Court.⁵² Instead, it is a process “of

and the relationship between parent and child.”).

⁴⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 912 (1992) (Stevens, J., concurring in part and dissenting in part).

⁴⁵ *See Roe v. Wade*, 410 U.S. 113, 163 (1973).

⁴⁶ *Casey*, 505 U.S. at 917–20 (Stevens, J., concurring in part and dissenting in part).

⁴⁷ *Id.* at 916 (emphasis omitted).

⁴⁸ Fox, *supra* note 1, at 325–35.

⁴⁹ *Id.* at 317–25.

⁵⁰ Abigail R. Moncrieff, *Common-Law Constitutionalism, the Constitutional Common Law, and the Validity of the Individual Mandate*, 92 B.U. L. REV. 1245, 1247 (2012).

⁵¹ *Id.* at 1250.

⁵² *See* Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1134 (2012) [hereinafter Balkin, *Living Constitution*].

continual interaction between the judiciary and the political branches as judges . . . leav[e] significant room for the political process to shape constitutional meaning.”⁵³ Professor Jack Balkin suggests that the evolution of constitutional meaning includes not only the work of the courts, but also the work of other branches of the government⁵⁴ and the “constitution-making power of the people . . . exercised through politics.”⁵⁵ As Professor Balkin describes them, these forces are part of the constitutional regime—the “range of beliefs about constitutional meaning together with a set of accepted, customs, practices, and institutions.”⁵⁶ While courts must be responsive to precedents, Balkin argues, precedents are “much more flexible over time than most people imagine” because “[c]ourts are often able to come up with new distinctions within doctrine that reshape its direction and its effects over time.”⁵⁷ Indeed, even the “repeatedly reaffirmed . . . ‘superprecedent’” of *Roe v. Wade* has been transformed through this process over the decades.⁵⁸ As Professor Abigail Moncrieff notes, for example, the Court’s standard of review shifted from strict scrutiny to undue burden in *Casey*, largely in response to changing norms and political views surrounding abortion.⁵⁹ The politics surrounding reproduction therefore not only influences constitutional meaning but also becomes “*part of the constitutional meaning itself*.”⁶⁰

This understanding of constitutional interpretation suggests that politics explains some of the interest creep we observe with respect to potential life. While Fox correctly rejects the notion that interest creep works to appease both sides in these controversies,⁶¹ I suspect that, instead, it sometimes results from a response to, and accommodation of, *a particular side* of the debate. One example in which this seems to occur is in *Gonzales v. Carhart*,⁶² as discussed below.

Justice Kennedy’s majority opinion expands the interests surrounding

⁵³ Moncrieff, *supra* note 50, at 1250.

⁵⁴ Balkin, *Living Constitution*, *supra* note 52, at 1134.

⁵⁵ JACK M. BALKIN, *LIVING ORIGINALISM* 114 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]. Balkin argues that this process is “a condition of our Constitution’s democratic legitimacy.” *Id.*

⁵⁶ Balkin, *Living Constitution*, *supra* note 52, at 1136.

⁵⁷ *Id.* at 122. I do not weigh in as to whether this common law evolutionary process is consistent with originalism or not. Compare *id.* at 121–25 (arguing that it is consistent), with STRAUSS, *supra* note 31, at 33–49 (arguing that it is not consistent).

⁵⁸ BALKIN, *LIVING ORIGINALISM*, *supra* note 55, at 124.

⁵⁹ See Moncrieff, *supra* note 50, at 1247–48.

⁶⁰ *Id.* at 1248.

⁶¹ Fox, *supra* note 1, at 277–78.

⁶² *Gonzales v. Carhart*, 550 U.S. 124 (2007).

fetal life with a strong emphasis on social values, such as respecting fetal life and avoiding moral coarsening.⁶³ Kennedy's majority opinion mentions several state interests in banning the late-term abortion procedure, including interests in (1) preventing the coarsening of society, (2) protecting the integrity of the medical profession, (3) distinguishing infanticide from abortion, and (4) ensuring that the decision to seek these late-term abortions is "well informed."⁶⁴ Virtually all of these interests seem to be linked to "[t]he State's interest in *respect for life*,"⁶⁵ i.e., an interest in "social values," to use Fox's terminology.⁶⁶ Justice Kennedy argues, for example, that "[t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."⁶⁷ He also ties the concerns regarding moral coarsening, expressed in the statute banning late-term abortions, to "*respect for the dignity of human life*."⁶⁸ And, finally, he notes that the "undervalued" state interest in "protecting the life of the fetus" cannot be undone by a health exception that allows doctors simply to choose whatever procedure they prefer.⁶⁹ Instead, he argues, the congressional ban on the late-term abortion procedure is "all in furtherance of its legitimate interests in regulating the medical profession in order to *promote respect for life, including life of the unborn*."⁷⁰

In a previous discussion of *Gonzales*, I critiqued Kennedy for trying to tie the "altogether" different interest in moral coarsening to the state interest in protecting life.⁷¹ It appeared that Kennedy thought the many interests he listed, including enhancing informed consent and protecting the integrity of the medical profession, were primarily about *protecting life*⁷²—i.e., prenatal welfare. As Fox points out, Kennedy did, after all, frame the issue as whether the ban furthered the "legitimate interest . . . in protecting the life of the fetus."⁷³ While this is an example of the conflation of

⁶³ Fox, *supra* note 1, at 307–08; Suter, *Repugnance*, *supra* note 43, at 1580–83.

⁶⁴ *Gonzales*, 550 U.S. at 156–60.

⁶⁵ *Id.* at 160 (emphasis added).

⁶⁶ See Fox, *supra* note 1, at 307.

⁶⁷ *Gonzales*, 550 U.S. at 160. For a critique of these justifications, see Suter, *Repugnance*, *supra* note 43, at 1576–79.

⁶⁸ *Gonzales*, 550 U.S. at 156–57 (emphasis added).

⁶⁹ *Id.* at 146, 158.

⁷⁰ *Id.* at 158 (emphasis added).

⁷¹ Suter, *Repugnance*, *supra* note 43, at 1580.

⁷² See *id.* at 1579–80.

⁷³ Fox, *supra* note 1, at 307 (quoting *Gonzales*, 550 U.S. at 146).

interests that Fox critiques, Fox notes that Kennedy may have meant instead to emphasize the *additional* social values interest in showing *respect* for life regardless of whether that life was actually protected.⁷⁴ Intentional or not, the *Gonzales* opinion expands the scope of the state's interests regarding potential life from limited concerns for prenatal welfare to a more robust interest in social values.⁷⁵ The opinion suggests that preventing the destruction of the fetus is not the only way to express respect for potential life;⁷⁶ additional means include legislation that bans "moral coarsening" procedures and that draws clear lines between infanticide and abortion.

While Fox is right that this line-drawing argument reflects a social effects interest—i.e., it aims to prevent a slippery slope toward infanticide⁷⁷—I believe it most strongly articulates the interest in expressing certain social values about respect for life generally, not just fetal life. The banned procedure too closely resembles infanticide, in Kennedy's view, and is therefore symbolically problematic.⁷⁸ Not only does he fear it can coarsen society to the point that it might feel less discomfort with infanticide (a social effects interest), but he also suggests there is something unseemly in ending fetal life in that particular manner (a social values interest).⁷⁹ While reasonable minds might disagree as to whether the banned or other late-term procedure is unseemly or symbolically troubling,⁸⁰ Kennedy seems more concerned about the symbolic effect (a social values interest) of "partially delivering" a fetus and then terminating its life.⁸¹ One senses that his discomfort stems from the fact that the procedure makes blatantly visible what he seems to think is better kept hidden.⁸²

That *Gonzales* brought into sharp relief new kinds of state interests

⁷⁴ See *id.*

⁷⁵ See Suter, *Repugnance*, *supra* note 43, at 1583–87, for a critique of this use of social values. Fox himself also offers a compelling account of the weakness of the social values interest. See Fox, *supra* note 1, at 308–09.

⁷⁶ See *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007). Justice Ginsburg and others, including myself, have argued that the statute did not achieve the goal of respecting potential life. See Fox, *supra* note 1, at 307.

⁷⁷ *Id.* at 142–43.

⁷⁸ Suter, *Repugnance*, *supra* note 43, at 1580–81.

⁷⁹ See *Gonzales*, 550 U.S. at 156–58.

⁸⁰ See Suter, *Repugnance*, *supra* note 43, at 1580 n.377.

⁸¹ See *Gonzales*, 550 U.S. at 158.

⁸² See William Saletan, *Window to the Womb*, WASH. POST, Apr. 29, 2007, at B2 ("Kennedy note[s] that . . . [k]illing the fetus inside the womb is okay, because the public won't see it.").

concerning abortion—what Fox calls social values and social effects interests⁸³—is a function of the nature of the controversy as well as important political shifts regarding abortion. The controversy at issue in *Gonzales* concerned the propriety of banning a particular late-term abortion procedure,⁸⁴ a very different kind of controversy from those raised in *Roe* and *Casey*, which concerned the propriety of global bans or regulations of abortion generally.⁸⁵ As Fox notes, *Gonzales* addressed whether the government could decide the *manner* in which, not *whether*, an abortion was performed.⁸⁶ Because banning this particular kind of abortion was not likely to save many fetal lives, as the dissenters noted,⁸⁷ the interest in prenatal welfare was not a particularly persuasive basis on which to uphold the statute.⁸⁸ Instead, Kennedy focused largely on the symbolic implications of the banned abortion procedure and what upholding the ban expresses about our society—essentially a social values interest—as well as the need to avoid a slippery slope into infanticide—a social effects interest.⁸⁹ Thus, the nature of the controversy before the Court offered Kennedy the opportunity to add additional state interests regarding potential life, rather than merely relying on the heretofore predominant interest in prenatal welfare.

In addition, one can see the influence of politics on constitutional meaning in the subtle shift in how Kennedy articulates (and expands) the social value interest in showing respect for the fetus. In *Casey*, the plurality opinion focused primarily on respect for “potential life,”⁹⁰ but Kennedy’s opinion in *Gonzales* repeatedly speaks of the interest in respecting *life*, not merely *potential* life.⁹¹ The shift from a discussion of

⁸³ Fox, *supra* note 1, at 303–15.

⁸⁴ *Gonzales*, 550 U.S. at 132.

⁸⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–52 (1992); *Roe v. Wade*, 410 U.S. 113, 152–56 (1973).

⁸⁶ Fox, *supra* note 1, at 307–08.

⁸⁷ *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting) (“The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion.”).

⁸⁸ Fox, *supra* note 1, at 307–08.

⁸⁹ See *Gonzales*, 550 U.S. at 157–58.

⁹⁰ *Casey*, 505 U.S. at 852 (“depending on one’s beliefs, for the life or potential life that is aborted”); *id.* at 853 (“legitimate interests in protecting prenatal life”); *id.* at 860 (“the State’s interest in fetal life”); *id.* at 869 (the state’s “concern for the life of the unborn”); *id.* at 870 (“the State has a legitimate interest in promoting the life or potential life of the unborn”); *id.* at 871 (“the interest of the State in the protection of potential life”); *id.* at 876 (“the State has an interest in protecting fetal life or potential life”); *id.* at 877 (laws that “express profound respect for the life of the unborn are permitted”); *id.* at 878 (“the State’s profound interest in potential life”).

⁹¹ *Gonzales*, 550 U.S. at 157 (referring to “respect for the dignity of human life” and

respect for potential life to respect for life may not be particularly noticeable or seem all that consequential because the latter could be interpreted as merely shorthand for the former. But this rhetorical device has political import and exemplifies how the common law evolution of constitutional law responds to and absorbs the politics of the times. Justice Kennedy's language seems to tap into, and be responsive to, the view that the fetus is more than merely potential life (thus accommodating to some extent one side of the contentious debate). In contrast, in *Casey*, Stevens emphasized that the Court was reaffirming the holding in *Roe* that "an abortion is not the termination of life entitled to Fourteenth Amendment protection"⁹² because "as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.'"⁹³

But regardless of *Casey*'s affirmation of this principle, the status of the fetus remained (and still remains) highly contested. Many strong opponents of abortion view the fetus as not just a *potential* life, but rather a *human* life, fully deserving of protection.⁹⁴ The Court's holding in *Casey* and declaration of the importance of properly valuing fetal life from the point of conception was a response to the belief of many that *Roe* and its progeny had undervalued fetal life.⁹⁵ Kennedy's opinion in *Gonzales* works even harder to remedy the undervaluation of the state's interest in that life and to bolster respect for it. His language is even more aligned with the rhetoric of those who see the fetus, morally and juridically, as not just a *potential* life, but as an *actual* human life.⁹⁶ Kennedy, however, does not go so far as to accord the fetus Fourteenth Amendment protections; after all, he must still work within the strictures of the precedent of *Roe* and *Casey*.⁹⁷ But in emphasizing how undervalued and underrespected this life

"respect for the life within the woman"); *id.* at 158 (referring to "respect for life, including life of the unborn" and describing the procedure in question as "laden with the power to devalue human life"); *id.* at 159 ("[r]espect for human life"); *id.* at 160 ("respect for life"); *id.* at 163 ("respect for human life at all stages in the pregnancy").

⁹² *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

⁹³ *Id.* (citing Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 400–01 (1992)).

⁹⁴ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) ("Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child . . .").

⁹⁵ *Casey*, 505 U.S. at 875 (noting that the trimester approach of *Roe* "undervalues the State's interest in the potential life within the woman").

⁹⁶ See *supra* note 91.

⁹⁷ See *Gonzales v. Carhart*, 550 U.S. 124, 145–46 (2007) (acknowledging that the Court is operating under the principles set forth in *Roe* and *Casey*).

has been, his opinion seems to work hard to elevate the moral status of the “unborn” even further as he emphasizes the importance of the social value of respecting life.⁹⁸

In highlighting the distinct state interest in showing respect for life when upholding the ban on this late-term abortion procedure, Kennedy engages in the same kind of interest creep that Stevens exhibited in *Casey*.⁹⁹ That is, as Fox notes, he fails to assess the strength of this particular social value.¹⁰⁰ Again, because of the common law process, he does not have to.¹⁰¹ The ban on a particular method of abortion did not bar a woman from choosing to have an abortion, and therefore there was no need to show more than the legitimacy of this state interest.¹⁰² This is an example of common law reasoning offering no more than necessary in light of the controversy before the Court.

But, one might ask, why make so much of the social values interest? And why focus so much on respect for life? Here, Kennedy’s opinion reflects the complex interaction between judicial reasoning and politics. As Balkin notes, “[t]he Court’s . . . work . . . is not simply a mirror of national politics, but it is always affected by it.”¹⁰³ This seems particularly so when one compares *Gonzales* with the remarkably different analysis in *Stenberg v. Carhart*,¹⁰⁴ a decision that found unconstitutional virtually the same kind of ban that *Gonzales* upheld.¹⁰⁵ Not surprisingly, given its antithetical holding, *Stenberg* discusses state interests very differently from *Gonzales*. Whereas the *Gonzales* Court makes much of the interest in respect for life,¹⁰⁶ the *Stenberg* majority opinion barely attends to the state interest in potential life.¹⁰⁷ To the extent that it does, it focuses only on prenatal welfare, noting that banning a method of abortion “does not directly further an interest in the potentiality of human life” because it does not save “the fetus . . . from destruction.”¹⁰⁸ In other words, there is virtually no

⁹⁸ See *supra* note 91.

⁹⁹ See *supra* text accompanying notes 16–25.

¹⁰⁰ See Fox, *supra* note 1, at 308–09 (arguing that Kennedy “never reached the question of whether the state’s interest . . . could justify infringement of a fundamental right . . .”).

¹⁰¹ See STRAUSS, *supra* note 31, at 3 (discussing the flexibility of precedent in constitutional interpretation).

¹⁰² Fox, *supra* note 1, at 308–09.

¹⁰³ Balkin, *Living Constitution*, *supra* note 52, at 1149.

¹⁰⁴ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

¹⁰⁵ *Id.* at 929–30.

¹⁰⁶ See *supra* note 91.

¹⁰⁷ See *Stenberg*, 530 U.S. at 930.

¹⁰⁸ *Id.* (internal quotation marks omitted).

consideration by the *Stenberg* majority of any interest the state may have in the social values regarding potential life that the ban allegedly expresses.¹⁰⁹ Because of the different emphasis on state interests and the belief that the ban did not affect a woman's choice to terminate a pregnancy, however, the Court in *Gonzales* upheld the ban.¹¹⁰

Such a different conception of state interests regarding essentially the same issue only seven years after *Stenberg* is explained by the enormous political shifts in the debate over abortion and, more specifically, late-term abortions, over that period. When *Stenberg* was decided, the Administration at the time was sympathetic to more expansive reproductive rights.¹¹¹ Indeed, President Clinton vetoed a federal statute much like the one ultimately affirmed by the Court in *Gonzales*.¹¹² But the public was already uneasy about these late-term abortion procedures when *Stenberg* was decided, as reflected by the existence of similar bans at the time in more than half of the states.¹¹³ Afterwards, the strong public distaste for late-term abortions only increased as these procedures received more public attention; indeed, polls showed “[a]n overwhelming majority of Americans . . . support[ed] a ban.”¹¹⁴

By the time the case reached the *Gonzales* Court, President Bush was in office and had signed the federal ban act into law.¹¹⁵ In addition, President Bush had expressed the state's interest in life—not just potential life—by undoing the prior Administration's efforts to legitimize stem cell research on embryos.¹¹⁶ In announcing his decision to restrict federal funding for stem cell research, President Bush declared, “[a]t its core, this issue forces us to confront fundamental questions about the beginnings of life and the ends of science.”¹¹⁷ He went on to assert that his decision was shaped by his “deeply held” belief that “human life is a sacred gift from our

¹⁰⁹ *Id.* at 930–31 (explaining that the statute allegedly describes the state's interests as showing concern for the life of the unborn, preventing cruelty to partially born children, and preserving the integrity of the medical profession).

¹¹⁰ See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

¹¹¹ See, e.g., Julie Rovner, “Partial-Birth Abortion”: Separating Fact from Spin, NAT'L PUB. RADIO (Feb. 21, 2006, 9:44 PM), <http://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin>.

¹¹² *Id.*

¹¹³ Suter, *Repugnance*, *supra* note 43, at 1566 n.290.

¹¹⁴ Melinda Henneberger, *Why Pro-Choice Is a Bad Choice for Democrats*, N.Y. TIMES, June 22, 2007, at A21.

¹¹⁵ *Id.*

¹¹⁶ Press Release, *supra* note 36.

¹¹⁷ *Id.*

Creator.”¹¹⁸ And he emphasized his fears of “a culture that devalues life” and his sense of “obligation to foster and encourage respect for life.”¹¹⁹

As we can see, the articulation of state interests in potential life in *Gonzales* expresses the constitutional norms (and politics) of the constitutional regime—the “range of beliefs about constitutional meaning together with a set of accepted, customs, practices, and institutions”—in which it was decided.¹²⁰ Both the constitutional regime and the particular controversy in *Gonzales* (late-term abortions) help explain the phenomenon of interest creep that Fox describes.

CONCLUSION

In the end, the interest creep concerning potential life can be seen as an example of both the “constitution-making power of the people . . . exercised through politics”¹²¹ and the way in which this power influences how courts “come up with new distinctions within doctrine that reshape its direction and its effects over time.”¹²² If we take seriously the theory that constitutional meaning evolves through a common law process, with political influences playing a strong role in the court’s understanding and articulation of precedent, the need for the antidote that Fox’s article offers is especially great. Political influences can be strong, but the effects can sometimes be subtle as interest creep slowly expands the scope of the state’s interest, as we have seen it do over several decades with respect to potential life. This Response’s account of the explanation for interest creep does not answer the question of whether the condition is easily remedied. But I believe, as Fox does, that scholars should take on the job of conceptual pruning in the hopes that clear delineations of the precise limits and edges of these very different state interests will make their way to the judiciary.¹²³ To some extent, the common law process hamstring judges from resolving questions about the full strength and reach of these different state interests. Thus, the call for scholarship in this area is even more important because scholars are free to speculate and imagine, as Fox does, how the state interests should be weighted and applied in various scenarios. For this reason, his article is a very important start to this much-needed conversation.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Balkin, *Living Constitution*, *supra* note 52, at 1135–38.

¹²¹ BALKIN, *LIVING ORIGINALISM*, *supra* note 55, at 114.

¹²² *Id.* at 122.

¹²³ Fox, *supra* note 1, at 282–83, 356–57.