Interest Creep

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ABSTRACT

Judicial review has a blind spot. Doctrinal and scholarly focus on individual rights has crowded out alertness to the way in which legislatures and courts characterize the state interests on the other side of the constitutional ledger. This Article introduces and interrogates a pervasive phenomenon of judicial decisionmaking that I call "interest creep." Interest creep is the uncritical expansion of underspecified interests like "national security" and "child protection" to capture multiple, distinct sources of government concern. By shielding such concerns from critical judicial appraisal, interest creep erodes the adjudicative duty to provide litigants, lawmakers, and lower courts with clear reasons for its decisions. Worse, interest creep generates incorrect legal outcomes when the discrete concerns that go by the name of a sweeping state interest cannot do the doctrinal work for which that shibboleth is enlisted. Only by disentangling the constellation of concerns that its reliance papers over will decisionmakers be able to assess the force with which those more particular concerns apply within diverse and dynamic contexts.

This Article examines interest creep through the illuminating lens of reproduction law in which it has thrived. Courts have resolved disputes including surrogacy contracts, genetic testing torts, and property claims for lost embryos by casual appeal to the state's interest in "potential life" that Roe v. Wade *designated as the canonical kind that can override rights. My analysis of every case and statute that has invoked this potential-life interest reveals its use to mean not one but four species of government concern. These distinct concerns for prenatal welfare, postnatal welfare, social values, and social effects operate under different conditions and with varying levels of strength. I apply this novel conceptual framework to live controversies involving fetal pain, sex selection, and stem cell research. These case studies demonstrate how ordinary interpretive methods equip courts to unravel the complexity of concerns that interests like "potential life" absorb over time amidst evolving facts and competing values. More broadly, this examination provides a model for how, in other areas of law from campaign finance to affirmative action,*

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judges and lawmakers can repair the confused decisionmaking that interest creep promotes.

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INTRODUCTION

It is easy to forget that the government needs a reason to restrict what its citizens do.[1] When a restriction is challenged on constitutional grounds, courts refer to the government's reasons for it as "state interests." The Constitution imparts no inventory of these interests that the state may or must pursue, and a particular such interest can be described in any number of ways. Courts therefore face a choice about how to characterize the interest(s) that a contested state action advances. A given characterization might convey a state interest that covers a broader or narrower span of regulatory contexts or that carries greater or lesser justificatory force.

Suppose a court that must determine, for example, the state's interest in a law that criminalizes gang recruitment.[2] Does the law serve

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1 *See, e.g.*, Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 135 (1987).

2 *See, e.g.*, Enoch v. State, 95 So. 3d 344, 351–52 (Fla. Dist. Ct. App. 2012), *review denied*, 108 So. 3d 654 (Fla. 2013).

an interest in addressing youth delinquency, or instead (or in addition) a wider-ranging and loftier interest in promoting domestic tranquility? Or consider a court tasked with identifying the state's interest in the way that it regulates voting machines.[3] Does the disputed regulation serve an interest no greater than the efficient administration of elections, or rather an interest as sprawling and grand as political equality?

The way in which courts describe the state interests at stake tend to matter most in the review of policies that burden rights, draw suspect classifications, or regulate the content of speech.[4] For policies that courts treat with less mistrust, however, the state still must demonstrate that the asserted interests are true and "real" and that a policy will serve those interests in a "direct and material way."[5] Even for the less restrictive kind of policies that are afforded the greatest measure of deference, courts require that they serve genuine, public-regarding interests that "find some footing in the realities of the subject" that such policies address.[6] The characterization of a state's interest as more or less pertinent or powerful can sometimes control whether that interest, so described, justifies the policy that it is claimed to vindicate.

Despite the central place of state interest definition in constitutional adjudication, "the Supreme Court has frequently adopted an astonishingly casual approach" to articulating or evaluating those sources of government concern that ambiguous interests comprise.[7] State interests like "national security" and "child protection" tend to emerge as rationales for restrictions that are uncontroversially reasonable: detaining a traveler found carrying a weapon, for example, or limiting the visitation rights of an abusive parent. Later, judges invoke that same valorized interest without argument or explanation to justify more questionable restrictions on constitutional remedies for foreign nationals,[8] for example, or adult programming on daytime tel-

3 *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 869–70 (6th Cir. 2006), *vacated by* 473 F.3d 692 (6th Cir. 2007).

4 *See* Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) (explaining that "[c]larity" about what such interests "mean" is "essential" in cases in which heightened scrutiny applies). The Supreme Court has "never set forth a general test to determine" what makes a state interest the kind that can justify these kinds of actions. Waters v. Churchill, 511 U.S. 661, 671 (1994).

5 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994).

6 Heller v. Doe, 509 U.S. 312, 321 (1993).

7 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007).

8 *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 574–76 (2d Cir. 2009) (invoking national secur-

evision.[9] Whether such interests expand unwittingly or by design,[10] their appropriation of broader meanings with greater force has become a familiar feature of the legal and political landscape.[11]

Yet there has been no sustained discussion of this phenomenon in the caselaw or academic discourse. In fact, we do not even have a name for it. I will use the term "interest creep." It comes from the concept of "mission creep" that journalists coined in the early 1990s to describe the escalation of a military campaign beyond its original objectives after it has achieved initial success and popularity.[12] "Mission creep" evokes decisionmakers' uncritical reliance on a celebrated ideal to broaden the ambitions that are pursued in its name.[13] A similar "creep" operates to enlarge the scope of state interests that courts invoke in private and public law adjudication.[14] This phenomenon is especially prominent in constitutional doctrine because it features the most developed framework for appraising those government reasons that it refers to as state interests.[15]

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ity concerns as the basis for refusing to recognize a *Bivens* remedy for constitutional violations against a foreign national subjected to "extraordinary rendition").

9 *See, e.g.*, Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (upholding FCC prohibition on the broadcast of "indecent" shows between 6 AM and midnight because "the Government has a compelling interest in protecting children").

10 I take no position on whether interest creep reflects inadvertency or dissembling. *Cf.* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1472–73 (2007) (arguing in the context of a distinct but potentially related phenomenon that when judges rely on inaccurate factual suppositions to justify a legal rule, they do so sometimes "based on a misunderstanding or misreading of empirical reality," and other times "to conceal that they are making normative choices").

11 *See generally* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *Reynolds* Case (2006); MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001).

12 *See, e.g.*, Jim Hoagland, *Beware 'Mission Creep' in Somalia*, WASH. POST, July 20, 1993, at A17.

13 For example, the U.S. campaign in Somalia began with relatively effective efforts to supply resources to citizens afflicted by famine and civil war. *Id.* But the more ambitious campaigns that followed, to disarm rebel forces and kill responsible warlords, led to the death of eighteen American soldiers. *See id.*; *cf.* Fletcher N. Baldwin, Jr. & Daniel Ryan Koslosky, *Mission Creep in National Security Law*, 114 W. VA. L. REV. 669, 671 (2012) (discussing "the application of anti-terrorism legislation . . . to non-terrorist related offenses and activities not contemplated in its original enactment").

14 The "state interests" that the Supreme Court announces in high-profile cases also get exported to other areas of law in the form of concerns about "social welfare" or "public policy." Nonconstitutional sites of interest creep include determinations about whether agency rules permissibly interpret ambiguous statutes, whether criminal conduct is excused or justified, whether a preliminary injunction should be granted, and which side should prevail in close private law cases in which the government is not even a party. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 466 (1991) (acknowledging that the resolution of many common law judgments requires resort to the "well-considered judgment of what is best for the community").

15 *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L.

Once a court of last resort designates an imprecise interest like national security or child protection as the canonical kind capable of overriding constitutional guarantees, agencies and legislatures predictably glom onto it the disparate kinds of concerns that arise in related controversies.[16] Lower court judges—who do not want their decisions reversed any more than lawmakers want their policies overturned—approve these varied concerns in the underspecified terms of that controlling authority without explaining why or how that interest applies in that new context.[17] Its contours thereby swell over time to encompass this wide swath of rubberstamped concerns.

Interest creep permeates our law and politics. By enlarging the scope of approved justifications for state action, it tends to favor the government over the individuals who challenge its policies. But this phenomenon does not always operate to support the kinds of censorship or surveillance policies that are more likely, roughly speaking, to give liberals pause. It also appears in service of policies more likely to trouble conservatives. One example of interest creep at work on behalf of liberal causes is when state universities justify race-conscious admissions programs by reference to the ill-defined interest in "educational diversity."[18] Another example is the enactment of campaign finance reforms in the name of the state interest against "political corruption."[19]

Interest creep has shaped controversies about these liberal policies too, at least until recently.[20] Consider, for instance, the anticor-

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REV. 297, 318 (1997); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 917–18 (1988).

16 That a state interest has been in this way designated paramount in a particular area of law, however, need not make it so in another doctrinal context. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 324 (1988) ("[T]he fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis.").

17 *See infra* Part I.B.1.

18 *See, e.g.*, Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201, 230–39 (2012) (distinguishing pluralism and antisubordination-based understandings of the state's interest in diversity).

19 *Cf.* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1402–03 (2013) (arguing that courts should refrain from defining the state's interest against political corruption to avoid "constitutionalizing a particular, contested conception of representative democracy").

20 *Compare, e.g.*, Hopwood v. Texas, 78 F.3d 932, 965 (5th Cir. 1996) (Wiener, J., concurring) (arguing that the meaning of the educational diversity interest designated compelling in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), is "suspended somewhere in the interstices of constitutional interpretation"), *with* Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 218–20 (5th Cir. 2011) (distinguishing multiple understandings of the diversity interest as seeking to promote "increased perspectives," "professionalism," or "civic engagement"), *vacated on other grounds*, 133 S. Ct. 2411 (2013).

ruption interest that the Supreme Court introduced in *Buckley v. Valeo*[21] as a concern for "corruption or its appearance."[22] The Court initially construed this interest in parsimonious terms of "dollars for political favors."[23] But that interest's meaning soon drifted out to capture "the corrosive and distorting effects of immense aggregations of wealth" on the political system,[24] such as "the danger that officeholders will decide issues . . . according to the wishes of those who have made large financial contributions."[25] And then, of course, the Court reined it back in with a vengeance in *Citizens United v. FEC*.[26]

The majority's cramped depiction of the anticorruption interest in that case was made possible by the indeterminacy that interest creep invites. Appeal to anticorruption simpliciter cannot determine whether a limit on corporate expenditures serves that interest in the constitutionally required way.[27] It depends whether the scope of the anticorruption interest is as the majority insisted "limited to *quid pro quo*" exchanges like bribery and vote buying,[28] or instead assumes the more muscular meaning that the dissent urged to combat the "undue influence" of money in politics.[29] Courts cannot resolve such questions without choosing, even if implicitly, between competing understandings of the interest that the state invokes to explain the policy under review.

This Article argues that interest creep is pernicious because it obscures and distorts legal decisions. It 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. I argue that courts of last resort can and should correct interest creep by unbundling the multiplicity of reasons that it papers over and assessing those reasons on their own terms. Disentangling those more particular sources of concern enables litigants, lower courts, agencies, legislatures, and citizens to debate and mediate legal controversies in more principled and sound ways. This Article theorizes the phenomenon of interest creep through the illuminating lens of "potential life."

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21 Buckley v. Valeo, 424 U.S. 1 (1976).

22 *Id.* at 81.

23 FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

24 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

25 McConnell v. FEC, 540 U.S. 93, 153 (2003).

26 Citizens United v. FEC, 558 U.S. 310 (2010).

27 *See, e.g., id.* at 338–40.

28 *Id.* at 359–61.

29 *Id.* at 447 (Stevens, J., concurring in part and dissenting in part).

Potential life is the state interest that the Supreme Court has since *Roe v. Wade*[30] declared "important and legitimate" anytime lawmakers regulate conduct in which "at least *potential* life is involved."[31] The Court has even "overruled the holdings in two [of its] cases because they undervalued the State's interest in potential life."[32] "Potential life" is the term the Court uses to refer to humans between conception and birth.[33] But it has never said what exactly the *state's interest in* those embryos and fetuses might be. As Justice Stevens has observed, lawmakers (and judges) "rarely articulate with any precision . . . . the kinds of concerns that comprise the State's interest in potential human life."[34] Nor does the Court's thin discussion of the state's interest in *actual* life inform what it means when it invokes the state's interest in *potential* life.[35]

The ambiguity of that interest caused less confusion in the 1970s and 1980s, before the ensuing influx of scientific and technological advances involving nascent human life.[36] When abortion and birth control were the principal objects of reproductive controversy, courts invoked the potential-life interest in the context of pregnancy alone to capture a concern for preserving the existence of a developing fetus.[37] In the decades since, courts have resorted to that interest in potential life (interchangeably referred to as the state's interest in "the potential for human life"[38] or "the unborn"[39]) to resolve disputes as diverse

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

31 *Id.* at 162, 150 (1973).

32 Gonzales v. Carhart, 550 U.S. 124, 146 (2007).

33 *See infra* notes 122–23 and accompanying text.

34 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 914–15 (1992) (Stevens, J., concurring in part and dissenting in part).

35 The Supreme Court's fullest discussion of the state's interest in actual life comes in its most recent right-to-die case, *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Justices in *Glucksberg* declined, however, to explain the bare assertion that an "'unqualified interest in the preservation of human life'" comprises both "practical" concerns for protecting vulnerable people and deterring the social and economic costs of lost life, *id.* at 728 (quoting Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 282 (1990)), and also "symbolic and aspirational" ones to "shore[ ] up the notion of limits in human relationships" and "reflect[ ] the gravity with which we view the decision to take one's own life or the life of another." *Id.* at 728–29 (internal quotation marks omitted) (quoting N.Y. STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 131–32 (1994)).

36 *See, e.g.*, Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 844 (2007) ("[I]n vitro fertilization has become commonplace and we are on the cusp of new technological advances involving the manipulation of human genetic material.").

37 Because the state's interest in potential life is not "implicated" by conduct that takes place before the union of sperm and egg, the Court has held, it "cannot be invoked to justify" the "regulation of contraceptives." Carey v. Population Servs. Int'l, 431 U.S. 678, 690 (1977).

38 *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

as whether state governments are permitted to ban medical experimentation on fetal tissue,[40] whether federal agencies are enjoined from funding stem cell research on human embryos,[41] and whose preferences govern when a divorced couple disagrees about whether to implant, destroy, or donate the frozen embryos that they created.[42]

Three actual examples help to illustrate the subtle creep through which the state's interest in potential life comes to assume divergent meanings across new contexts:

- The state brings neglect proceedings against a woman for having given birth to a baby who exhibits symptoms of cocaine withdrawal. A family court terminates the mother's custody of the child, explaining that her parental rights "must yield to the compelling state interest in" potential life.[43]
- Three couples sue a fertility clinic that destroyed the embryos they had cryopreserved for loss of property. The court denies recovery on the ground that treating the lost embryos as "personal property" would controvert the state's significant interest in the "'potential for human life.'"[44]
- The parents of a child born with spina bifida bring a malpractice suit for medical expenses against a doctor whose negligent failure to diagnose the disease in utero deprived them of information that they say would have led them to terminate the pregnancy rather than bring the child to term. A court dismisses their tort claim on the ground that "[t]he protection of fetal life has been recognized to be an important state interest."[45]

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39 *See, e.g.*, *Casey*, 505 U.S. at 869 (plurality opinion).

40 *See, e.g.*, Forbes v. Napolitano, 236 F.3d 1009, 1014 (9th Cir. 2000) (Sneed, J., concurring) (explaining that Arizona's prohibition on research with fetal tissue was not justified by the state's interest in "protecting the potential life of the fetus"); Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) (finding "no compelling state interest" to justify restriction on medical procedures during the first trimester of a pregnancy).

41 *See, e.g.*, Sherley v. Sebelius, 704 F. Supp. 2d 63, 73 (D.D.C. 2010) (finding that Congress sought to further the public interest when it passed an amendment limiting research using embryonic stem cells), *vacated*, 644 F.3d 388 (D.C. Cir. 2011).

42 *See, e.g.*, *Davis*, 842 S.W.2d at 602 (discussing the low weight of the state's prenatal welfare interest in a divorce dispute over the disposition of frozen embryos).

43 *In re* Fathima Ashanti K.J., 558 N.Y.S.2d 447, 447, 449 (N.Y. Fam. Ct. 1990).

44 Frisina v. Women & Infants Hosp. of R.I., Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *4 (R.I. Super. Ct. May 30, 2002) (quoting *Davis*, 842 S.W.2d at 597).

45 Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 821 (Pa. Super. Ct. 1993).

All three decisions rely on the same potential-life interest as if it had a single meaning too obvious to need explaining. Yet each uses that ostensibly monolithic interest to capture what are in fact several different kinds of government concerns.

In the parental custody case, the potential-life interest reflects a concern, not that the drug-exposed fetus be saved from destruction, but that the child it becomes be born healthy.[46] In the fertility clinic case, that interest represents a concern, not about rescuing the destroyed embryos, but about promoting respect for that early human life.[47] Only in the prenatal misdiagnosis case could the way in which the court invokes the state's interest in potential life be thought to resemble the concern about fetal preservation that *Roe* held capable of trumping fundamental rights.[48] That courts collapse all of these very different concerns within the shibboleth of "potential life" exemplifies what I have called interest creep.

As with that phenomenon more broadly,[49] the creep of potential life tends to favor rightward leaning policies, but spans the political spectrum.[50] That the state can call upon a constitutionally ratified interest "as long as *at least* potential life is involved,"[51] helps to explain why it can legitimately restrict medical research that destroys embryos or fetuses, for example, whether or not they might otherwise be brought to term.[52] That unborn humans "represent[ ] only the *potentiality* of life,"[53] on the other hand, and accordingly lack any individual rights of their own, explains why states may not protect the unborn in ways that override the rights of women.[54]

Interest creep has gone unexamined in the doctrine or scholarship. Both the general phenomenon and its more particular expression in the law of reproduction have been crowded out by enduring debates about the origin,[55] content,[56] and balancing[57] of rights on the

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46 For discussion, see *infra* text accompanying notes 152–54.

47 For discussion, see *infra* text accompanying notes 187–92.

48 For discussion, see *infra* text accompanying notes 122–26.

49 *See supra* text accompanying notes 17–18.

50 *See infra* text accompanying notes 491–93.

51 Roe v. Wade, 410 U.S. 113, 150 (1973) (emphasis added and removed).

52 *See infra* Part III.C.

53 *Roe*, 410 U.S. at 162 (emphasis added).

54 *See infra* Part III.A–B.

55 *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1396 (2009) ("The preferred

other side of the constitutional ledger. The meaning of the interest in potential life has, oddly, been ignored in the very same cases and commentary that vigorously contest the object and authority of the due process right to privacy.[58] Despite decades of intensive litigation and academic commentary about the metes and bounds of reproductive privacy, scholars have paid startlingly little attention to the indeterminacy of the interest in potential life that it is most often found to implicate.[59]

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moral foundations of the abortion right . . . continue to shift, from marital and medical privacy, to women's equality, to individual liberty or dignity . . . ." (footnotes omitted)).

56 *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992) (seeking to reconcile competing rights to accept or avoid genetic, gestational, legal parenthood in a divorce dispute over the disposition of frozen embryos); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 342–43 (2007) (distinguishing a woman's right "not to be forced by the state to bear children at risk to her life or health" from the right to decide whether "to become a mother and assume the obligations of parenthood"); I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1144–45, 1154 (2008) [hereinafter Cohen, *Rights Not to Procreate*] (analyzing the distinct rights at stake in *Davis* and other embryo disposition cases).

57 *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987) (criticizing the *Roe* opinion as "radically underwritten" for declining to identify the metric it used to determine that a woman's right to abortion outweighs, before fetal viability, the state's interest in potential life); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 11 (1987) (chiding the plurality decision in *Bellotti v. Baird*, 443 U.S. 622 (1979), for its failure to "rely on, or even refer to, objective legal resources" in attempting to balance a minor's abortion rights against competing state and parental interests).

58 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973) (discussing personal, marital, familial, and sexual privacy rights, while treating the interest in potential life as a unitary concern); John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1492, 1495 (2008) (distinguishing "reproductive autonomy" rights to have and not to have children, and characterizing concern for the "protection of[ ] prenatal life" as "[a]n important consideration that does deserve more discussion"); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1739, 1746 (2008) [hereinafter Siegel, *Dignity*] (drawing a distinction between "decisional autonomy" and "social standing" justifications for the abortion right, and observing that "[r]emarkably little attention has been devoted to clarifying the character of government's interest in . . . potential life").

59 Reva Siegel and Jed Rubenfeld are to my knowledge the only scholars who have addressed what the state's interest in potential life might mean, and each has done so in just a single paragraph. Siegel has written that this interest "[c]onceivably" pertains to "increasing" or "improving" the population, or to promoting the "role [of] morality associated with family or medical relationships" or "cohesion and government authority under conditions of social conflict." Siegel, *Dignity*, *supra* note 58, at 1746–47. Jed Rubenfeld suggested (before *Casey* was decided) that the "putative state interests surrounding the fetus" might signify concerns about the "size of its population," the "health of delivered infants," the "preserv[ation of] women's traditional roles as wife and mother," or "the genetic make-up of . . . offspring." Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 610–11 (1991). Professor Siegel's and Professor Rubenfeld's accounts of the possible meanings that the interest in potential life might assume in the abortion context helpfully prefigure my

This Article systematically examines the operation of that potential-life interest in over forty years of statutory and case law. My analysis makes four principal contributions. First, it develops a new conceptual framework that equips judges to resolve reproductive disputes, present and future, in more legitimate and transparent ways. Second, this clarifying vocabulary equips advocates and scholars to more convincingly explain and criticize the puzzling jurisprudence of potential life. Third, it provides lawmakers with guidance to find facts and hold hearings in more informed and informing ways on matters of human reproduction. Finally, the Article provides a generalizable paradigm for how to unravel interest creep in other areas of law and politics.[60]

My argument unfolds in four Parts. Part I defines interest creep and explains why that phenomenon muddles judicial reasoning and results. Namely, it supplies grounds for legal judgment that are too vague to satisfy losing litigants that an adverse decision is not arbitrary or illegitimate. Moreover, interest creep begets judicial reliance on interests that are too weak to do the work for which they are enlisted. Courts can and should displace interest creep, this first Part argues, by articulating and evaluating the implicit sources of concern that interests like national security and child protection submerge.

Part II examines interest creep by reference to the doctrine of potential life in which it has thrived. It shows how the potential-life interest began in the abortion context as what I refer to as a "prenatal welfare" interest in preserving unborn life from destruction. That interest has since been mistaken, in related but distinct contexts, for three distinct categories of government concern. I call these "postnatal welfare" interests in protecting individual children from harmful conduct that took place before they were born, "social values" interests in promoting secular moral ideals such as respect for the unborn, and "social effects" interests in preventing tangible harms like gender imbalance and population depletion. Through close analysis of the potential-life doctrine, this Part demonstrates that each of these concerns varies in the conditions under and the authority with which it applies.

Part III applies this framework of potential life interests to live controversies about prenatal drug use, selective abortion, and embryonic stem cell research. Analysis of this representative array of exam-

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inquiry into the way in which courts should reason about the concerns that do actually animate that interest in contexts that span from reproductive technologies to biomedical research.

60 *See infra* Part III.

ples reveals that dressing up postnatal welfare, social values, and social effects interests in the cloak of potential life fosters obscure rationales and distorted outcomes. It also shows how indiscriminate appeals to potential life can mask illicit purposes. These include entrenching gender norms to preserve a woman's traditional role as wife and mother,[61] restricting the reproductive lives of certain classes of citizens regarded as less desirable parents,[62] or enacting genetic blueprints that encourage the birth of offspring with particular traits.[63] These case studies demonstrate in practical terms how courts can and should unpack the interest in potential life into the actual sources of government concern that it papers over.

Part IV responds to arguments in favor of interest creep. The first is that interest creep supplies valued placeholders for the difficult-to-articulate concerns that accompany public disputes in the face of incomplete facts or evolving norms. Another is that reliance on bland if equivocal interests saves courts from having to take sides on the contentious moral questions that underlie matters about which society is deeply divided. A third is that multimember courts can, in especially controversial cases, obtain the majority of votes required to reach a decision only by shading over disagreement among judges about the government concerns at stake. In Part IV, I explain why each of these objections is misguided. A brief conclusion shores up the case for why courts should uproot rather than abide interest creep.

I. THE PHENOMENON OF INTEREST CREEP

This Part explains why interest creep is worth resisting and how it is different from other forms of indeterminacy in the law. Interest creep is the uncritical expansion of a government reason that courts

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61 *See, e.g.*, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 334 (1992) [hereinafter Siegel, *Reasoning*] (arguing that reliance on the state's potential-life interest to justify restrictions on abortion might mask an "interest in making women who are resisting motherhood carry a pregnancy to term").

62 *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1423–24 (1991) (arguing that determinations about whether "the state's interest in preventing harm to the fetus justifies criminal sanctions against the mother" tend to overlook the reality that "[p]oor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status").

63 *Cf.* I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 426, 500 (2011) [hereinafter Cohen, *Regulating Reproduction*] (arguing that the asserted justifications for restrictions on reproductive conduct, when they are cast in the equivocal terms of "best interests," can risk disguising "objectionable eugenic premises").

have endowed with justificatory force to swallow discrete sources of concern over time. This phenomenon produces a seemingly monolithic justification that admits of multiple meanings, with little if any apparent basis upon which to distinguish which among them that justification is meant to impart in a particular dispute. Yet each of these distinct and plausible meanings of that justification drives the resolution of such disputes toward different conclusions.

An analogy will help. Imagine you are in a cab and the driver asks "Should I turn left up here?" If you simply reply, "right," there is a reasonable chance that you will end up in the wrong place. Unless you explain to the driver whether you used "right" in the sense of "direction" or "affirmation," that ambiguity risks steering your ride off course. So, too, with those sources of government concern that interest creep confounds. When a court of last resort invokes an underspecified interest without clarifying which among the more particular meanings it plausibly conveys, litigants, lawmakers, lower courts, and others who rely on it are, like the cab driver, left only to guess at what that instruction means. In law as in life, these seemingly trivial equivocations can take us afield of our destination.

A. What Makes It Distinctive

Even people who disagree about how creeping state interests apply tend to talk about them as if each comprises a single, self-evident government concern. That "the various actors involved in a dispute all believe a [particular source of authority] to be clear," even as they might tacitly "assign different meanings to it," can deepen the ambiguity of that authority, Lawrence Solan explained in another context, as the distinct ways in which people "use the term" go altogether "unnoticed."[64] The creep of state interests makes this phenomenon more elusive than other kinds of indeterminacy in the law. What judges mean by a "seizure" in the Fourth Amendment context is obvious, for example, as between a physical taking and a medical condition. By contrast, the meaning of an interest like national security or child protection cannot be ascertained without a contextual inquiry into the more particular concerns at stake. I begin, however, by distinguishing interest creep from two related ideas.

The first is the "levels of generality" problem that Laurence Tribe and Michael Dorf enlightened on the rights side of substantive due

64 Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 859 (2004).

process analysis.[65] Paul Brest, elaborating on arguments about precedent first made by Jerome Hall, observed that much if not "all adjudication requires making choices among the levels of generality," or the degrees of abstractness, "on which to articulate principles" of law.[66] It was Tribe and Dorf, however, who brought this insight to bear on the identification of fundamental rights.[67] They explained that when courts define a right in a more precise way—as a right "to engage in homosexual sodomy" rather than as a broader privacy right "to be let alone,"[68] for instance, or as a "natural father's rights vis-à-vis a child whose mother is married to another man," rather than as an expansive right to "parenthood"[69]—they make that right seem less worthy of protection and its restriction seem more reasonable.[70] Rights like privacy and parenthood operate at a higher level of generality, on this account, than any number of more specific expressions of those overarching concepts.[71]

Interest creep does not in this same way use national security or child protection as a catch-all that funnels more specific or concrete instantiations of those abstract ideas. The multiple meanings that interest creep runs together are not just specialized subsets of that amorphous category, but a conceptual departure from it. These more particular meanings are contiguous to the source of government concern with which courts might have endowed it. They appear to derive from or be proximate to that boilerplate, yet their meaning shares no analytic convergence. This Article will show that judges and lawmakers have used the state's interest in potential life, for example,

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65 *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

66 Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091–92 (1981); *see also* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 173 (1937) (arguing that "[u]pon the level of generality selected for the criteria of likeness or dissimilarity [between binding principles and the question presented] depends the outcome").

67 *See generally* Tribe & Dorf, *supra* note 65.

68 *Id.* at 1065 (quoting Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting)) (internal quotation marks omitted).

69 *Id.* at 1086 (quoting Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989)) (internal quotation marks omitted).

70 *See id.* at 1065–69, 1086–87.

71 *See, e.g.*, *id.* at 1068, 1108 (discussing, among lower-level brands of the general right to reproductive freedom, a "woman's asserted right to utilize a sperm bank or to make a surrogate motherhood contract"); *see also* Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 BYU L. REV. 715, 733 ("'[A]t a high enough rung on the ladder of abstraction, disparate things become the same . . . .'" (quoting JACQUES BARZUN, A STROLL WITH WILLIAM JAMES 65 (1983))).

to capture altogether distinct sources of government concern that arrive at a tangent to the concern that the Supreme Court invoked that interest to reflect in *Roe*.[72] Trying to determine whether that potential-life interest is more or less general than its interest in preserving postnatal welfare or in promoting social values would be, to borrow Justice Scalia's analogy from another context, "like judging whether a particular line is longer than a particular rock is heavy."[73]

Interest creep is also different from what Cass Sunstein refers to as "incompletely theorized agreements."[74] These are opinions that people share about legal outcomes or low-level norms, even when they disagree about the more comprehensive explanations for why they agree.[75] Interest creep involves no such underlying agreement, shallow or otherwise, about the meaning of those underspecified interests to which lawmakers and judges appeal without elaboration or explanation. It simply treats as an umbrella interest what are in fact very different sources of government concern.

The difference between these concepts can be illustrated using an example from contract law. Incompletely theorized agreements would advise courts to enforce promises as a low-level norm that many people agree on despite their disagreement as to whether it is utilitarian or Kantian principles that make the enforcement of promises desirable.[76] Interest creep, by contrast, would counsel promise enforcement even when the parties meant entirely different things by the terms of that promise, as in the nineteenth century English shipping case involving two separate ships, both called "Peerless."[77] Interest creep reflects not cultural compromise, but analytic pretense.

B. What Makes It Pernicious

Nor is interest creep a matter of semantics. The sources of government concern that it papers over tend to vary not just in terms of the strength with which they apply. Certainly some are more com-

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72 *See infra* Part II.

73 Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

74 *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

75 *See id.* at 1746.

76 *See id.* at 1740, 1750.

77 *See* Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (EWHC Exch.) 375; *see also* A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships* Peerless, 11 CARDOZO L. REV. 287, 288–92 (1989) (discussing the controversy in which the buyer and seller of a cotton shipment from Bombay waited in England on the arrival of two different ships).

manding than others. Those concerns also vary, however, in terms of the kinds of evidence that are required to prove that a challenged regulation serves any particular one among these justifications rather than another. Interest creep does not just erode adjudicative norms of clear reasongiving. It also promotes mistaken results when the concerns that it conceals are illegitimate, or too weak or remotely related to support the policy in question. This section focuses on interests like national security and child protection that the U.S. Supreme Court has invoked in conflicts that implicate freedoms that are guaranteed by the federal Constitution. But the case that it develops against interest creep applies equally to judicial analysis of such interests by state supreme courts in justifying restrictions that are contested under state constitutions.

1. Obscure Rationales

The first reason that courts should unravel inchoate state interests is that the professional craft of sound adjudication requires, at least in those published opinions with precedential authority, that courts give legitimate reasons for having reached a particular result.[78] Judging is about more than settling disputes. Diverse conceptions of adjudication all agree that, at the least, judges should not decide cases arbitrarily.[79] It matters that courts render verdicts in a reasoned way, and that they communicate those reasons clearly, especially to the parties. What distinguishes judicial decisionmaking from other forms of social ordering is that the coercive authority that courts invoke to resolve disputes responds to litigants' claims in ways that they can be expected to understand.[80]

Lon Fuller taught that this adjudicative norm of responsive explanation for binding judgments is necessary to clarify the rules of law that judges and others apply to the similar cases that they confront in the future.[81] More importantly, comprehensible reasons help to sat-

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78 For objections to the nonpublication of judicial opinions based on professional responsibility and the quality of outcomes, see generally William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

79 *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 139–55 (2005) (canvassing formalist, realist, textualist, purposivist, pragmatist, and process theorist accounts of legitimate adjudication).

80 *See* Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 221 (1985); David Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178, 192–93 (1984).

81 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388–89 (1978).

isfy a losing litigant that a decision that might, as Robert Cover reminds us, deny him of "his freedom, his property, his children, even his life," is not arbitrary or illegitimate.[82] The demand for legal justification requires that courts give reasons that are adequate to justify their judgments and sufficiently accessible to afford "the parties to a case, and all others whose interests might be affected by its outcome" the bona fide "opportunity to evaluate" those reasons and "if necessary, to challenge or appeal them."[83]

The shadowy rationales that interest creep perpetuates frustrate this judicial duty of clear reasongiving in three ways that scholars have elaborated on in other contexts. First, interest creep deprives losing litigants of the intelligible explanation that submitting to the court's judgment entitles them.[84] Second, it deprives dissenting judges and opposing advocates of a ground for that judgment that is concrete enough for them to meaningfully debate or criticize it.[85] Third, it deprives lower courts and other institutions bound by judicial opinions of guidance about how to resolve similar disputes in similar ways.[86]

Consider the state's interest in child protection, the "surpassing importance" and expansive application of which the Supreme Court has held "evident beyond the need for elaboration."[87] It should come as no surprise that this interest is the one that federal agencies claim they are promoting when, for example, they impose sanctions on radio or television operators that broadcast expletives "when there is a reasonable risk that children may be in the audience."[88] As the reason for why it is legitimate for government to censor those speakers, however, this child-protection concern is so nebulous that it tells them very little.[89] Is that state interest limited to concern about children's health, as the Court has at times seemed to suggest?[90] Does that inter-

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82 *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

83 *See* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 999–1001, 1005, 1010 (2008).

84 *See, e.g.*, David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737–38 (1987).

85 *See, e.g.*, Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 933–34.

86 *See, e.g.*, Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 671 (1983).

87 New York v. Ferber, 458 U.S. 747, 756–57 (1982).

88 FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2312 (2012) (quoting FCC v. Pacifica Found., 438 U.S. 726, 732 (1978)) (internal quotation marks omitted).

89 *See* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 431 (2000) (arguing that courts "fail[ ] to analyze the state's asserted compelling interest" in preventing harm to children).

90 *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

est instead, or in addition, reflect a government concern about their "moral development"?[91] Or is it a concern about children's tendency to "mimic the behavior they observe"?[92]

Whether the interest in child protection constitutes one or another among these concerns matters for the kind of argument that the broadcasters need to make to explain why censoring their programs does not serve that putatively compelling interest. If the interest in child protection turns exclusively on mental health effects, for example, then they would do well to marshal evidence about the effect that exposure to adult speech has on children's emotional wellbeing. By contrast, if that interest is about adolescent morals, then they should try to demonstrate that the censored speech does not characteristically cultivate any deviation from conventional social norms. And if child protection is a concern that children are prone to emulate what they see, then the censored speakers must show why that interest goes unserved by the broadcast of nonliteral words that imply no nonverbal behavior for children to imitate.

The failure to disambiguate these distinct concerns makes it difficult for losing litigants to understand the actual basis for judgment in the case, for dissenting judges to contest that justification, for lawyers to appeal it, for lower courts to follow it, for agencies and lawmakers to respond to it, and for advocates and citizens to debate it. It is not that interest creep yields the right results for the wrong reasons—by obfuscating the logic of their legal decisions, courts enervate the adjudicative norm of clear reasongiving that lies at the heart of the judicial enterprise. Worse still is that interest creep leaves the equivocation that it trades on susceptible to misappropriation for purposes that are illegitimate or otherwise insufficient to justify the policy in question.

2. *Distorted Outcomes*

The abstracting rhetoric of interests like child protection and national security unmoors judicial inquiry into whether the means of a government restriction plausibly furthers the ends of those interests in the way that the doctrine requires. Where the connection between these means and ends is speculative or tenuous, interest creep makes it easy for lawmakers and judges to smuggle in, deliberately or not, weak or even illicit sources of concern that assume the inflated force of those constitutional argots.

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91 Ginsberg v. New York, 390 U.S. 629, 641 (1968).

92 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009).

The Supreme Court's reliance on the national security interest in the case of *Minersville School District v. Gobitis*[93] is instructive. The Court has held that it is "obvious and unarguable that no governmental interest is more compelling than the security of the Nation."[94] Yet it has never explained the more particular sources of concern that this interest comprises, or whether those concerns are distinguishable when courts invoke the bare interest in national security as a justification, for example, to raise armed forces, detain enemy combatants, or surveil citizens.[95] In *Gobitis*, the Court invoked that interest to uphold a law requiring that public school students salute the American flag on pain of expulsion.[96] The eight-Justice majority explained only that "[n]ational unity is the basis of national security," and that the "flag is the symbol of our national unity."[97]

The problem with *Gobitis* is not just that the standard of review the Court applied was too permissive. To be sure, a deferential means-end analysis pushes further beneath the surface the necessary judicial inquiry into the connection between compulsory patriotic gestures, sentiments of national solidarity, and protection against foreign threats. But even the least exacting standard of review requires that a contested regulation respond to a clearly articulable public interest.[98]

An interest as imprecise as national security shields from critical appraisal the speculative or specious purposes that animate a law. In *Gobitis*, the unquestioned force of that hazy interest disguised religious persecution against the Jehovah's Witness children who were expelled because their disfavored beliefs forbade them from saluting the flag.[99] Only after the Justices articulated with greater precision the concerns at stake in mandatory flag salute did they have convincing reason to overrule the *Gobitis* decision that all but one of them had

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93 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

94 Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)) (internal quotation marks omitted).

95 *See, e.g.*, Wayte v. United States, 470 U.S. 598, 611–13 (1985) (military registration); Zemel v. Rusk, 381 U.S. 1, 15–18 (1965) (travel restrictions); *see also* Farrakhan v. Reagan, 669 F. Supp. 506, 510–12 (D.D.C. 1987) (sanctions on countries that sponsor terrorism), *aff'd without opinion*, 851 F.2d 1500 (D.C. Cir. 1988).

96 *Gobitis*, 310 U.S. at 595.

97 *Id.* at 595, 596.

98 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

99 *See* SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 8–9, 64–65, 124, 238 (2000) (describing anti-Witness persecution that swept the country in the years surrounding *Gobitis*).

joined just three years earlier.[100] In that later case, *West Virginia v. Barnette*,[101] the Court distinguished the state's legitimate interest in "territorial security" from its illicit aspiration for "[c]ompulsory unification of opinion."[102]

Interest creep is more likely to generate wrong results under a standard that demands a strong justification or close fit between state action and the interest it serves. But the way in which courts characterize those interests matters independent of whatever standard applies. "[E]ven 'the most rigid scrutiny' can . . . fail to detect an illegitimate" policy if courts probe its connection to a sufficiently open-ended interest.[103] Displacing such interests with the concerns they stand in for is of course no guarantee that futile or forbidden purposes will be discovered and discredited, for judges might misidentify even those interests that they spell out in precise terms or misapply properly identified ones under an unduly forgiving standard of review. Because even the most lenient such standard "is not a toothless one,"[104] however, assessing the actual concerns at stake will tend, if not to discipline interest creep, then at least to make judicial reliance on deficient government reasons less likely to escape detection.[105] Enabling illicit purposes to pass as legitimate or even compelling sources of public concern "makes the influence of such norms less salient," as Dan Kahan has argued in another context, "and thus deprives norm reformers of opportunities to expose and critique them."[106]

II. THE STATE'S INTEREST IN POTENTIAL LIFE

Part I defined interest creep and argued that it promotes unsound judicial decisionmaking. This Part recommends that courts combat this troubling phenomenon by unpacking the sources of government concern at stake in particular cases. By developing and implementing an interpretive process through which courts can identify and evaluate those concerns, it provides a model with which to disentangle the

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100 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

101 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

102 *Id.* at 640–41. Other regulations that courts adjudicate by reference to the national security interest might of course be distinguished by independent separation of powers concerns under conditions in which constitutional deference is owed to executive authority.

103 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995).

104 *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976).

105 *See supra* notes 7, 14–15, and 55–59 and accompanying text.

106 Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 499 (1999).

spectrum of concerns that find cover under other, similarly underspecified state interests.

This Part applies that process to unravel the creep of the state's interest in "potential life." That expression does not import any plain or preexisting meaning from medicine, religion, culture, or philosophy.[107] In the law, it surfaced just once before *Roe*, in a district court decision that took "for granted" that the state has a legitimate interest of unspecified strength in "protect[ing] a fertilized egg or embryo or fetus" that has "the potential to become a person."[108] Almost four decades of interest creep later, the indeterminacy of the interest in potential life appeared full-blown in the Supreme Court's reliance on that interest to uphold the Partial-Birth Abortion Ban Act[109] in *Gonzales v. Carhart*.[110]

Justice Kennedy's opinion for the Court subsumed within that undifferentiated interest in "potential life" government concerns as varied as "confus[ing]" the responsibility of physicians "to preserve" life, blurring the practice of abortion with infanticide, and "coarsen[ing] society" to the meaning or significance of "vulnerable and innocent human life."[111] That opinion altogether neglected, however, to examine the application or strength of those concerns about clouding professional roles, sliding from legal to illegal practices, and corrupting social mores.[112] By folding them within the blanket of potential life, *Carhart* obscures important features of those concerns: whether they constitute a uniformly weighty interest, for example, as opposed to several different ones, and, if they differ, which among them, whether alone or together, is what the majority held was capable of justifying the abortion restriction as a constitutional matter.

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107 Perhaps the closest analog is Aristotle's concept of "potentiality" that distinguishes active from inactive states of possible being. The potentiality for sight, on this account, can be active (the seeing man whose eyes are closed) or inactive (the man who is blind). Aristotle used this concept not in the context of the biological life sciences, however, but instead in the context of physics; namely, to define *motion* as the actuality of a potentiality. *See generally* ARISTOTLE, METAPHYSICS (Joe Sachs trans., 1999).

108 Corkey v. Edwards, 322 F. Supp. 1248, 1253 (W.D.N.C. 1971), *vacated by* 410 U.S. 950 (1973). The term potential life appeared in a single brief in *Roe*. *See* Brief for Appellants, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054, at *123 & n.97 (defining "potential life" as a living organism's "'potential' in the future which may or may not be realized").

109 Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2012).

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

111 *Id.* at 157–58 (internal quotation marks omitted).

112 *See* 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, 1576–81 (2008).

Implicit in such sweeping appeals to potential life, there are four discrete classes of state interests: *prenatal welfare*, *postnatal welfare*, *social values*, and *social effects*. This Part's analysis of every case and statute that has invoked the potential-life interest reveals that only the first of these interests is the kind that *Roe* approved as "compelling" at viability.[113] The other three sources of concern that assume the moniker of potential life, this Part shows, vary in the logic and strength with which they apply in related but distinct contexts involving human reproduction and research. Judges shirk their duty to appraise the interests that support a contested intervention when they bundle them under a slogan whose force goes unquestioned "as long as at least potential life is involved."[114]

A. Prenatal Welfare

The potential-life interest is "separate and distinct," *Roe* held, from the state's other interests—about "medical standards" and women's "health and safety"—that the Court also approved as legitimate reasons to regulate reproductive conduct.[115] That *state* interest in potential life is independent, too, of the *individual* interest that Texas argued the fetus has in itself.[116] This putative individual interest of the unborn is the same kind asserted by those states that have more recently sought (without success) to accord the legal status of personhood to human life beginning at conception.[117]

The majority in *Roe* rejected such individual, personhood interests on the ground that "the unborn have never been recognized in the law as persons" or "accord[ed] legal rights."[118] That an embryo or fetus "represents only the potentiality of life," the Court declared, disqualifies that entity from having any individual interests before it is born.[119] Its possible acquisition of such interests in the future, the Court explained, is "contingent upon [its] live birth."[120] Accordingly,

113 *See* Roe v. Wade, 410 U.S. 113, 163 (1973). "Viability" refers to "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb." Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 870 (1992) (citing *Roe*, 410 U.S. at 163).

114 *See Roe*, 410 U.S. at 150 (emphasis omitted).

115 *Id.* at 150, 154, 162.

116 *Id.* at 150 (explaining that the attribution of individual rights "extends, it is argued, to prenatal life").

117 *See, e.g.*, *Personhood Bills and Ballot Initiatives*, RESOLVE, http://www.resolve.org/get-involved/personhood-bills-and-ballot-initiativeshtml (last visited Mar. 2, 2014) (cataloging failed personhood proposals).

118 *Roe*, 410 U.S. at 156, 161–62.

119 *Id.* at 162.

120 *Id.*

not even a fully developed fetus has protectable interests of its own, apart from the interest in potential life that the *state* has in *it*.[121]

The Court has clarified that the state's potential-life interest does not extend to sperm or eggs, considered separately, before they are combined.[122] The interest's reach is limited to the unborn organism that those cells form together "postconception."[123] Notably, the strength of that interest in the life of the embryo or "fetus that may become a child" does not remain constant from the "outset of the pregnancy" until birth.[124] Instead, it "grows in substantiality as the woman approaches term"[125] until "at a later point in fetal development . . . [it] has sufficient force so that" even a fundamental right like that "of the woman to terminate the pregnancy can be restricted" if it serves that interest.[126]

Yet courts "rarely articulate with any precision . . . . [t]he kinds of concerns that comprise the State's interest in potential human life."[127] How can we make sense of this peculiarly dynamic interest in a way that coheres with its essential features that we can glean from the controlling case law? The most doctrinally faithful way to understand the state's growing interest in potential life is as a concern for "protecting prenatal life" from conduct that would extinguish it.[128] "[T]he State may assert" its interest in what I call prenatal welfare "as long as at least *potential* life is involved."[129] This prenatal welfare interest is present whether or not the unborn is ultimately brought to term, or even expected to be.[130] That interest is a government's concern for preserving a live embryo or fetus as a valuable "entity in itself."[131]

This prenatal welfare interest resembles those interests that the state has in certain plant species, animals, landscapes, culture, art, and

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121 *Id.* at 163 (affirming that it is "*the State* [that] is interested in protecting fetal life" (emphasis added)).

122 For discussion of the biological process through which sperm and egg become a single organism, as well as the statutory law that elides the complexity of this process, see Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199, 203–18 (2006).

123 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 859, 871 (1992).

124 *Id.* at 846.

125 *Roe*, 410 U.S. at 162–63.

126 *Casey*, 505 U.S. at 869.

127 *See id.* at 914–15 (Stevens, J., concurring in part and dissenting in part).

128 *Roe*, 410 U.S. at 150.

129 *Id.*

130 *Id.* at 150–51.

131 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting), *overruled by* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

history. These are things that, like embryos and fetuses, the state protects, even though they have no protectable interests of their own.[132] Consider the interest that California asserts "in preserving the integrity of cultural and artistic creations,"[133] declaring "protection of the state's natural and scenic resources "a matter of paramount concern."[134] Or take the city of New York's interest in "preserving structures . . . with special historic, architectural, or cultural significance."[135] This is the interest that the Supreme Court held strong enough to block the renovation of private property "without [it] effecting a [constitutional] 'taking' requiring the payment of 'just compensation.'"[136]

What animates these preservationist interests is not just the economic or aesthetic value that sequoia trees and Grand Central Station have *for people*.[137] Razing those grand trees or reducing that historic station to rubble, besides any loss it would incur to cultural education or the tourism industry, would also stamp out whatever distinctive value those entities have in themselves.[138] What makes their preservation a legitimate source of government concern, on this account, is whatever objective or inherent value lies in the "rare" size of California's redwoods,[139] for example, or the creative achievement that is

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132 *See, e.g.*, Tilikum v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1262 (S.D. Cal. 2012) (holding that orca whales, as nonpersons, lack standing to seek redress under the Thirteenth Amendment).

133 CAL. CIV. CODE § 989(a) (West 2007); *see also* MASS. GEN. LAWS ch. 231, § 85S (LexisNexis 2009) (containing same provision).

134 CAL. PUB. RES. CODE § 30001 (West 2014).

135 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978).

136 *Id.* at 107.

137 *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 68–69 (1993) (discussing interests in "animals, species as such, and perhaps even natural objects . . . for their own sake, and quite apart from their interactions with human beings"); Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking*, 2005 MICH. ST. L. REV. 1135, 1192 [hereinafter Fox, *Safety, Efficacy, and Authenticity*] (noting state interests in "the environment, animals, or human nature, even if the[ ] practices [at issue] do not cause any identifiable harm to the interests or desires of persons").

138 *See* Dov Fox, *Retracing Liberalism and Remaking Nature: Designer Children, Research Embryos, and Featherless Chickens*, 24 BIOETHICS 170, 172 (2010) [hereinafter Fox, *Retracing Liberalism*] (discussing the "familiar part of our moral experience that . . . certain things in nature confront us as a source of pre-existing value," by virtue of their grandeur or mystery, independent of whatever "substantive benefits" they "yield for us" or "psychological states they evoke in us"); Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1204 (2010) (discussing the emergence of environmental laws as, in part, a reflection of public concern for "the integrity of natural systems . . . [as] valuable in itself").

139 *California Natural Landmarks Program*, CAL. DEPARTMENTT OF PARKS & RECREATION, http://www.parks.cagov/?id=397&page_id=26149#criteria (last visited Mar. 2, 2014).

New York's landmark.[140] The state's prenatal welfare concern for potential life is a similar kind of preservationist interest, in unborn human life as an entity in itself.[141]

There are of course important differences between how the law treats the unborn, as opposed to other marvels of natural or human design. Conspicuous among these is that any prized species or architectural icon usually has as much value worth preserving as it ever will, unless it later becomes more exceptional, majestic, or otherwise distinctive. By contrast, human embryos or fetuses are, on this account, endowed with *increasing* value that corresponds to their gradual acquisition of certain mental and physical capacities. This distinction between static and emergent value helps to explain why the strength of the state's interest in sequoias or Grand Central is generally assumed to hold constant, while its interest in the unborn "grows"[142] over its course of prenatal "development."[143]

The growing strength of this interest in potential life cannot be a function of the biological *potential* that a fetus or embryo has, at birth, to acquire individual interests as a rights-bearing person.[144] The property of *potentiality* has operated in the doctrine as a dichotomous one that an embryo or fetus either *has* if it is alive or *lacks* if it is no longer.[145] It is true that the statistical probability that an embryo or fetus has of being born, like its temporal proximity to birth, increases as the risk of miscarriage declines and the date of delivery nears. But no Justice has ever construed that potential to become a person to mean the likelihood or imminence of birth.[146] They have instead treated potentiality as the either/or capacity to develop into a live born person.[147] That this property does not change between the stages of conception and birth disqualifies it from accounting for the prenatal

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140 *Penn Central*, 438 U.S. at 109.

141 My point is not that fetuses and embryos have the same *amount* of value as trees or train stations that likewise lack interests of their own. It is that they share with those other entities a similar *kind* of value that the state may seek to preserve by virtue of certain properties that the unborn have, whatever their more particular content. *Cf.* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 73–78 (1993).

142 *See* Roe v. Wade, 410 U.S. 113, 162 (1973).

143 *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 869 (1992).

144 *See supra* text accompanying notes 125–26.

145 *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting) ("[T]he fetus is an entity that bears in its cells all the genetic information that . . . distinguishes an individual member of th[e] [human] species from all others.").

146 *See, e.g.*, *id.* at 795 ("The substantiality of this interest [in potential life] is in no way dependent on the probability that the fetus may be capable of surviving outside the womb.").

147 *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 461 (1983)

welfare interest whose strength does change over that period. As such, it is a mistake to understand the potential for personhood in the sliding-scale kind of terms that might otherwise be able to explain why the state's interest in preserving the unborn grows.

What better explains the growing strength of that prenatal welfare interest is that the unborn acquires a range of mental and physical capacities as it develops over time.[148] For example, the Court has long identified the capacity for "meaningful life outside the mother's womb" at the particular stage in fetal development at which the state's interest becomes "compelling."[149] This developmental understanding of the state's interest in prenatal welfare, which need not presuppose any specific such capacity or bundle of capacities, supplies the missing account of the potential-life interest that grows from conception until it is strong enough to override fundamental rights.[150]

The state may of course have other valid reasons to regulate reproductive conduct that are related to that conduct's impact on embryos and fetuses. Indeed, the remaining sections in this Part identify three. But these respond to government concerns that differ from the prenatal welfare interest in preserving the unborn as an entity in itself. After the *Roe* Court designated the state's interest in potential life as the sort that could justify restrictions on the newly recognized constitutional right to abortion, those distinct rationales would all come to find support under that same hallowed cover.[151]

B. Postnatal Welfare

Four years after *Roe*, the Court transposed on the state's interest in potential life a discrete interest "honored over the centuries," as it described it, in "encouraging normal childbirth."[152] This interest in promoting healthy childbirth is a concern for the wellbeing of the baby that an embryo or fetus becomes after it is delivered alive. It is only at that point of live "childbirth" that a person acquires his own

(O'Connor, J., dissenting) (emphasizing that "potential life is no less *potential*" earlier in its development because "[a]t any stage in pregnancy, there is the *potential* for human life").

148 *See Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

149 Roe v. Wade, 410 U.S. 113, 163 (1973); *see also* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 869–70 (reaffirming the viability standard); Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (same).

150 *See, e.g.*, *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring) (listing among possible candidates that might explain the "progressive[ ]" growth of the potential-life interest the fact that "the organism's capacity to feel pain, to experience pleasure, to survive and to react to its surroundings increases day by day").

151 *See supra* text accompanying notes 16–17.

152 Maher v. Roe, 432 U.S. 464, 478 (1977) (internal quotation marks omitted).

individual interests, the vindication of which entitles him, as a vulnerable citizen, to special government protection.[153]

Whereas the prenatal welfare interest represents a concern for protecting the embryo or fetus that has no interests itself, the state's "postnatal welfare" interest is a *parens patriae* concern for protecting a child who has legally protectable interests of his own from certain kinds of conduct that took place before his birth. Although that prebirth conduct transpired when the embryo or fetus from which the child developed had no interests of its own, it impaired the interests that he came to have after he was born.[154] Postnatal welfare interests differ from prenatal welfare ones not only in time, but in kind. Those who would argue that the fetus has its own legally protected interest in *being* born fail to take seriously the Supreme Court's refusal to confer to the unborn itself the kinds of individual interests that children acquire only at birth.

This postnatal welfare interest has currency beyond constitutional law. Consider a 1924 torts dispute about a driver's liability for the congenital injury sustained, two weeks after the car accident caused by his reckless driving, to the right hand of a child born to the passenger who was pregnant at the time.[155] The court held that "an unborn child who receives injuries . . . due to the negligence of another, can, *if it survive*[*s*] maintain an action for the damages which it suffers *in life* as a result of such negligence."[156] Although the court cast the government's concern in terms of injury to the unborn, it was actually the born child's interest that the court was invoking to allow him to recover damages for "deprivation . . . of [his] right hand, and the loss by it in life."[157] After all, the state would have had no such *post*natal welfare interest had the fetus either not been born alive or had the

153 *See, e.g.*, I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1206 (2012) [hereinafter Cohen, *Best Interests*] (identifying child vulnerability and social planning rationales in the Supreme Court's parental rights jurisprudence for "subordinat[ing] family privacy when there are serious threats to child welfare").

154 *Cf.* State v. Courchesne, 998 A.2d 1, 51 n.47 (Conn. 2010) (construing born-alive rule as refusal to recognize the fetus as a separate legal entity with cognizable interests of its own).

155 Kine v. Zuckerman, 4 Pa. D. & C. 227 (Ct. Com. Pl. 1924).

156 *Id.* at 230 (emphasis added). Noting that a fetus was at common law "capable of taking [property] under a will," *id.* at 227, the court reasoned that the state's interest in the unborn must, by comparison, be "stronger when we are dealing with the health of the individual, and his ability after birth to seek his complete happiness and perform his full duty as a citizen and member of society, than when we are dealing merely with his property rights." *Id.* at 228.

157 *Id.* at 231. Fifty years later, Alabama became the last state to allow a child to sue for negligent infliction of prenatal injury. *See generally* Huskey v. Smith, 265 So. 2d 596 (Ala. 1972).

injuries sustained as a fetus not resulted in any corresponding harm as a child.[158]

There are two kinds of justifications for the state's postnatal welfare interests. The first and more straightforward one applies to conduct that takes place after conception.[159] This postnatal welfare rationale lies in preventing harm to particular children who could have been born better off than they actually were (for example, without a preventable disease or disability). This justification for the state's postnatal welfare interest seeks to protect the child from having been wrongfully harmed at a time before he was born, but after he already existed in the form of an embryo or fetus.[160] An example comes from the federal government's interest in requiring that tobacco and alcohol vendors alert women who are pregnant to the health risks that their smoking or drinking would pose to already-conceived future offspring.[161] This postconception justification for the postnatal welfare interest aims to prevent conduct whose dangerous impact on a child could be traced back to his pre-birth existence as a particular embryo or fetus.

The second justification for postnatal welfare interests applies to *pre*conception conduct that takes place before a particular embryo or fetus comes into being. Consider a pregnancy discrimination case about the exclusion of all women of childbearing age, including those who were not pregnant but might have become so, from jobs involving lead exposure.[162] The Supreme Court misdescribed this postnatal welfare concern about children's health in terms of the harm that might "befall the *unborn*."[163] Justice White explained in his concurring opinion, joined by Chief Justice Rehnquist and Justice Kennedy, that "courts have recognized a right to recover even for prenatal injuries

158 Beyond the tort context, courts treat the postnatal welfare interest as if it were a prenatal welfare one in criminal and family law sanctions against prenatal conduct that harms children. *See, e.g.*, *In re* Ruiz, 500 N.E.2d 935, 938 (Ohio Ct. Com. Pl. 1986) (terminating custodial rights for in utero drug exposure for the sake of advancing "state interests in the unborn . . . through existing abuse and neglect statutes"); Whitner v. State, 492 S.E.2d 777, 785–86 (S.C. 1997) (holding that the government's "profound interest in . . . potential life" justified child neglect conviction for use of controlled substances during pregnancy).

159 *See, e.g.*, *Kine*, 4 Pa. D. & C. at 230.

160 In rare cases, a single embryo can divide into what becomes two or more people such that there is not one "he" but multiple. For discussion of this "twinning" process, see Davis v. Davis, 842 S.W.2d 588, 592–95 (Tenn. 1992); Peters, *supra* note 122, at 215–16, 221–22.

161 *See* Family Smoking Prevention and Tobacco Control Act § 201, 15 U.S.C. § 1333 (2012); 27 C.F.R. § 16.21 (2013) ("Mandatory label information").

162 *See* Int'l Union UAW v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991).

163 *Id.* at 198 (emphasis added).

caused by torts committed prior to conception."[164] For example, the Washington Supreme Court had a few years earlier allowed sisters who were born with serious congenital disorders to sue their mother's doctor for having negligently failed to inform her, before she became pregnant with them, that the medication he had prescribed for her epilepsy posed a high risk of causing such disorders in any children she might have.[165]

The object of concern in such *pre*conception cases is whichever child is born with an injury that is foreseeably caused by the negligent conduct, even though any *particular* such child could not, himself, have been born better off than he was. This is so because the same negligent preconception conduct that harmed him also accounts for the overall benefit of his existence. For that child, "with his particular biological composition, deriving from the unique pair of germ cells from which he, and not another person, was conceived," the only alternative to his having been exposed to the preconception conduct was never having existed at all.[166] For this reason, Glenn Cohen has argued, preconception conduct cannot harm a resulting child whose conception is an overall benefit to him.[167] Whatever claim an injured child might have, from his own perspective, against a tortfeasor whose preconception conduct is inseparable from the child's existence, however, the government, with its broader concern for the population-wide health of future citizens, should have a legitimate interest that the cohort of children born into the next generation suffer from fewer preventable diseases and disabilities.[168]

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164 *Id.* at 213 (White, J., concurring).

165 Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 495 (Wash. 1983) (extending a right to recover for prenatal injuries "to persons not yet conceived at the time of a negligent act or omission").

166 Dov Fox, *Luck, Genes, and Equality*, 35 J.L. MED. & ETHICS 712, 713 (2007) (emphasis removed).

167 *See* Cohen, *Best Interests*, *supra* note 153, at 1208–11. In this and a companion piece, Professor Cohen limits his analysis to those "cases where the State seeks to influence who will be *conceived* not who will be *born*." Cohen, *Regulating Reproduction*, *supra* note 63, at 441; Cohen, *Best Interests*, *supra* note 153, at 1211. He therefore brackets from examination the regulation of practices that affect the already existing embryos and fetuses that comprise potential life. Cohen, *Best Interests*, *supra* note 153, at 1211; Cohen, *Regulating Reproduction*, *supra* note 63, at 441;.

168 *But see* Cohen, *Best Interests*, *supra* note 153, at 1219–43 (arguing that even what the author regards as the most promising available "[r]eproductive [e]xternalities" rationale to regulate preconception conduct cannot justify such regulations whose intrusiveness requires a compelling justification); Cohen, *Regulating Reproduction*, *supra* note 63, at 481–512 (critically evaluating non-person-affecting accounts of reproductive harm);.

This second rationale helps to make sense of the postnatal welfare interest that is served by government requirements that food manufacturers add folic acid to grain products like rice, pasta, and cereal to help reduce the risk that not-yet-conceived children will be born with certain neurological disorders.[169] These requirements target not only consumers who are already pregnant, but also those who might become pregnant in the near future.[170] This preconception justification for postnatal welfare interests need not presuppose the existential insult that people who live with such diseases or disabilities have it worse than "not being born at all."[171] It must only recognize that debilitating congenital conditions generate pressing demands for medical treatment and special education on behalf of vulnerable rights-bearing persons.[172] This need for *parens patriae* protection is no less urgent under circumstances in which the conduct that caused a particular child to be born with some injury is also responsible for causing that child, rather than some genetically different one, to exist in the first place.[173]

Postnatal welfare interests, whether they apply to conduct that takes place before or after conception, are generally stronger, the common law establishes, than the prenatal welfare kind on behalf of early embryos to late fetuses. Rather than starting weak, postnatal welfare interests are immediately compelling when they vest at birth, at least anytime that they guard against nontrivial harm.[174] These interests apply more narrowly in the context of reproductive conduct, however, because they express concern only for the live born *child*

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169 *See* 21 C.F.R. § 101.79 (2013) (noting that folate consumption early in pregnancy may reduce development of neural tube defects).

170 *See, e.g.*, Lisa A Houghton et al., *Long-Term Effect of Low-Dose Folic Acid Intake: Potential Effect of Mandatory Fortification on the Prevention of Neural Tube Defects*, 94 AM. J. CLINICAL NUTRITION 136, 140–41 (2011).

171 Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 697 (Ill. 1987).

172 *See* Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (affirming that "[w]hatever logic inheres in . . . denying the child's own right to recover" for preconception "medical malpractice" that caused him to be born—in a way that he *himself* could not have been otherwise—with an injury whose treatment incurs the "crushing burden of extraordinary expenses" "must yield to the injustice of that result").

173 *Cf.* Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 119–20 (1999) (arguing that preconception conduct that imposes a genetic injury can still wrong the resulting child himself even if such conduct confers an overall benefit of existence). For insightful analysis, see Cohen, *Best Interests*, *supra* note 153, at 1244–64.

174 *See e.g.*, *In re* Valerie D., 595 A.2d 922, 925 (Conn. App. Ct. 1991) ("[T]hat [an infant] is at risk because of her mother's actions before birth in no way negates or dilutes this compelling state interest.").

that an embryo or fetus becomes and not for the unborn qua unborn. Conduct that harms an embryo or fetus does not always harm a born child. Postnatal welfare interests are absent if an embryo or fetus is never brought to term, for example, or if whatever adverse condition it is exposed to in the laboratory or womb subsides to the point of inconsequence by the time it is actually born.[175] When prenatal and postnatal welfare interests come apart in this way, the generic appeal to potential life confounds judicial reasoning and invites dubious outcomes in particular cases. The next Part illustrates these claims using the example of potential life justifications to punish drug use during pregnancy.[176]

C. *Social Values*

Prenatal and postnatal welfare interests do not exhaust the sources of government concern that go by the name of potential life. This same refrain has been used to capture a distinct strand of government concerns that might be called "social values" interests.[177] This is the category of interest that the government appeals to when it exercises its police power to "legislate morality," as distinct from health or safety.[178] The state's potential-life interest in promoting social values is its concern for certain widely shared, if still controversial, moral ideals or cultural attitudes that the regulation of reproductive conduct can reflect or reinforce.[179]

The social value that states most often wrap in potential life terms is a norm of respect for embryos and fetuses. Undercurrents of this interest in promoting respect for the unborn appeared in the post-*Roe* cases that approved selective funding for childbirth but not abortion.[180] *Planned Parenthood v. Casey*[181] was the first Supreme Court

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175 Take, for example, birth-conditional sanctions for prenatal drug use. It is commonly assumed that in utero drug exposure incurs postnatal harm. An emerging scientific consensus shows, however, that those adverse health outcomes suffered by some drug-exposed newborns owe less to illicit drugs than tobacco exposure and other confounds. *See infra* text accompanying notes 301–04.

176 *See also infra* text accompanying notes 297–314.

177 *See, e.g.*, *infra* text accompanying note 208.

178 *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639 & n.7 (1968) (discussing circumstances under which legislating morality is constitutionally legitimate in the design of "laws relating only to minors").

179 *See* Cohen, *Best Interests*, *supra* note 153, at 1265–69; *see also* 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW 27 (1984) (describing "legal moralism" as the use of criminal law to preserve traditional mores by deterring conduct that, though it neither harms nor offends, undermines public morality).

180 *See, e.g.*, Maher v. Roe, 432 U.S. 464, 474, 478 (1977) (citing "the State's strong interest in protecting the potential life of the fetus" as support for "the authority of a State to make a

case, however, to reason about the state's interest in potential life explicitly as a concern for "express[ing] profound respect for the life of the unborn."[182] Eight years after Justice Kennedy co-authored that three-judge plurality opinion in *Casey*, he designated as its "central premise" the "critical" status of the "State's constitutional authority" "to ensure respect for all human life and its potential."[183]

Recognition of a social norm such as "respect" presupposes more broadly that "certain modes of valuation" suit particular kinds of entities, as I have explained elsewhere, and that valuing those entities "in this way involves treating them in accordance with a normative standard of behaviour."[184] That standard might call for treating an entity, for example, in the way that a person should be treated, that is, as an end in himself, or instead more like property, as no more than a means to some other goal or practice.[185] Alternatively, an intermediate way of valuing something, such as "respect," suggests that an entity be treated, like the natural or architectural wonders discussed earlier, as something whose moral status lies between these extremes of inviolability and instrumentality.[186]

This social values interest is distinct, however, from the prenatal welfare one. The limits imposed by the promotion of respect for unborn life go beyond saving it from destruction. The norm of respect for early human life is a moral attitude or cultural value whose promotion is not confined to the unborn's continued existence.[187] To be sure, most regulations that are designed to protect a fetus from conduct that

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value judgment favoring childbirth over abortion"); Harris v. McRae, 448 U.S. 297, 314–16 (1980) (casting the state's interest in potential life in terms of its "value judgment favoring childbirth over abortion" (quoting *Maher*, 432 U.S. at 474)).

181 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

182 *Id.* at 877.

183 Stenberg v. Carhart, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting). Legal commentators have credited Justice Kennedy with writing the section of the joint opinion in *Casey* that shored up the state's interest in potential life. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 54 (2007). Justice Souter is thought to have authored the joint opinion's stare decisis section and Justice O'Connor the section striking down the spousal notification provision. *See id.*

184 Dov Fox, *Paying for Particulars in People-to-Be: Commercialisation, Commodification and Commensurability in Human Reproduction*, 34 J. MED. ETHICS 162, 164 (2008).

185 *See id.* For analysis of the Kantian distinction between treating entities as means only, and treating them also as ends in themselves, see G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 240 (1995).

186 *See supra* text accompanying notes 132–41.

187 *See, e.g.*, Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 853–55 (discussing the broad range of ways in which conduct and its regulation can express a social value such as respect for entities, groups, or practices).

destroys it will also tend to reinforce respect for the fetus. But conduct that would extinguish a fetus for so important a purpose as to save a woman's life, for example, plausibly respects it in a manner consistent with its constitutional status short of personhood.[188] If it seems strange that we could respect what we destroy, consider that many cultures permit killing for food the animals that they deeply revere.[189] Where an overriding purpose makes the destruction of human unborn life in this way compatible with the norm of respect for it, state action forbidding such destruction, though it serves a prenatal welfare interest, would not promote the social value of respect.

By the same token, state action that aims to foster respect for embryos and fetuses naturally tends to encourage their preservation. But the government can also promote that social value in ways that nonetheless rescue none. Consider restrictions on the use of embryos for unimportant purposes, such as genetically modifying them, if that became possible, to be born with a particular eye color.[190] Or consider limits on treating fetuses in callous ways, such as, perhaps, the recently reported use of fetal tissue to make beauty cream.[191] These kinds of nonpreservation restrictions, though they do not serve a prenatal welfare interest, plausibly serve the social values one that, as explained below, is usually weaker.[192]

I should first clarify, however, that the First Amendment limits the kinds of social values that the government may endorse by forbidding it from promoting moral ideals or cultural attitudes that take sides on religion.[193] State action can legitimately promote only those social values that qualify as duly secular under Establishment Clause

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188 The next Part argues that very worthy medical research which cannot be conducted without destroying embryos is similarly consistent with respecting those entities. *See infra* text accompanying notes 414–32.

189 *See, e.g.*, Michael J. Meyer & Lawrence J. Nelson, *Respecting What We Destroy: Reflections on Human Embryo Research*, HASTINGS CENTER REP., Jan.–Feb. 2001, at 16, 19, 22 (describing the respect with which certain cultures such as Native Americans treat the animals that they eat).

190 It is not implausible to think that hypothetical prenatal enhancement for the contribution to traits like physical strength and cognitive intelligence might fail to respect unborn life even at the same time that it enlarges its future scope of opportunity. *See* Fox, *Retracing Liberalism*, *supra* note 138, at 174.

191 *See* Valerie Richardson, *Aborted Fetus Cells Used in Anti-Aging Products*, WASH. TIMES, Nov. 3, 2009, at A1.

192 *See infra* text accompanying notes 208–37.

193 *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (condemning policies that do in fact favor, or are reasonably perceived as favoring a particular religion over others).

principles governing the separation of church and state.[194] In the context of potential life, *Roe* traced in part to people's "religious training" their "deep and seemingly absolute convictions" about the moral standing of the embryo or fetus as person, property, or something in between.[195] "[T]hat the intensely divisive character" of disagreement over its destruction "reflects the deeply held religious convictions of many" led Justice Stevens to conclude prior to *Casey* that "legislative declarations" about when "life begins" have an irreducibly "theological basis" with "no identifiable secular purpose."[196] Ronald Dworkin also has endorsed this view that efforts to protect the unborn necessarily "command[s] one essentially *religious*" "interpretation of the sanctity of life" over others.[197]

The social value of respect for embryos and fetuses is not inescapably religious in the way that Justice Stevens and Professor Dworkin maintain. It is true that this norm of respect for unborn life characteristically derives much of its meaning and force from religious, and especially Christian, orthodoxy and advocacy.[198] But "[o]ne need not harbour belief in a divine creator," or subscribe to any religion at all, I have argued, to think that the unborn are valuable in a way that warrants treating them with respect.[199] Many people believe, for example, that the embryo that each of us began as is, like our bodies after we die, a powerful symbol of the human narrative that commands a norm of respect.[200] The Supreme Court has thus done well to recognize that this social value of respect for the unborn is not exclusive to "any particular religion."[201] That value can also find expression in "tradi-

194 *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("[T]he clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878))); *see also* Engel v. Vitale, 370 U.S. 421, 424–25 (1962) (holding that organized prayer in public school violates the Establishment Clause prohibition on promoting religion).

195 Roe v. Wade, 410 U.S. 113, 116 (1973).

196 Webster v. Reprod. Health Servs., 492 U.S. 490, 571, 566–67 (1989) (Stevens, J., concurring in part and dissenting in part).

197 DWORKIN, *supra* note 141, at 165 (emphasis added).

198 *See, e.g.*, Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 807 (2006) (arguing that the "rhetorical value" of the argument that government should promote a "culture of life," although it "sounds secular enough . . . is much enhanced by its association with Christianity").

199 FOX, *Retracing Liberalism*, *supra* note 138, at 172.

200 *See* John A. Robertson, *Symbolic Issues in Embryo Research*, HASTINGS CENTER REP., Jan.–Feb. 1995, at 37. The unborn are entitled to treatment with respect, on this account, even though embryos, like cadavers, have no legally protectable interests of their own. *See supra* notes 116–21, 184–86 and accompanying text.

201 Harris v. McRae, 448 U.S. 297, 319 (1980).

tionalist" beliefs whose secular credentials are sufficient for the state to promote respect by imposing certain kinds of limits on the treatment of embryos and fetuses.[202]

Chief among the underlying disputes that divided the Justices in *Gonzales v. Carhart* is whether the potential-life interest advanced by Congress's "ban on abortions that involve partial delivery of a living fetus" should be understood as a concern for prenatal welfare or social values.[203] Writing for the majority, Justice Kennedy framed the question in distinctly prenatal-welfare terms as "whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."[204] Yet "[t]he law saves not a single fetus from destruction," Justice Ginsburg observed in a dissent joined by three other Justices, "for it targets only a [particular] *method* of performing abortion," while leaving available other such methods that no less destroy the fetus.[205] Thereby "untethered" to the government's "interest in preserving . . . life," the congressional ban "scarcely furthers that interest," Justice Ginsburg pointed out, in "'protecting the life of the fetus.'"[206] The dissenting Justices were accordingly on solid ground to reject the majority's appeal to a prenatal welfare interest that the law "scarcely furthers."[207]

But *Carhart* did not limit the government's justification for the law to this prenatal welfare interest. The majority added a separate, social values rationale, though it framed that concern within the same "interest in potential life."[208] Congress's description of the proscribed abortion procedure as "gruesome," Justice Kennedy reasoned, suggested a further purpose to "express[ ] respect" for "all vulnerable and innocent human life" by barring a practice that resembles "the killing of a newborn infant."[209] Justice Ginsburg and the dissenting Justices were too quick to dismiss such "moral concerns" as *ipsi dixit* or a smokescreen to overturn the fundamental right to abortion estab-

202 *Id.*; *see also* Fox, *Retracing Liberalism*, *supra* note 138, at 172 (identifying Rawlsian luck, Darwinian evolution, and Transcendentalist environmentalism as among the secular foundations to which an "Ethic of Restraint" toward the natural world may appeal).

203 Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

204 *Id.* at 146.

205 *Id.* at 181 (Ginsburg, J., dissenting). Justice Ginsburg made the same point seven years earlier in *Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (Ginsburg, J., concurring).

206 *Carhart*, 550 U.S. at 181–82 (Ginsburg, J., dissenting) (quoting *id.* at 145 (majority opinion)).

207 *See id.*

208 *Id.* at 157–58.

209 *Id.* at 141, 157, 158 (quoting Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 note (2012) (Findings ¶ (14)(J))).

lished in *Roe* and reaffirmed in *Casey*.[210] Those "moral concerns" in fact comprise a legitimate social values rationale for the ban, discrete from the prenatal welfare one that the dissenters rightly rejected.

Even were they to have acknowledged the legitimacy of that interest in promoting respect for the unborn, it would not have been enough, on the dissent's account, to justify a law that they maintained should have been subjected to strict scrutiny as a restriction of the abortion right.[211] The majority concluded to the contrary, however, that the ban on *how* to terminate a pregnancy did not violate the right to choose *whether* to do so.[212] So *Carhart* did not determine the *strength* of the social values interest that the ban was, it held, designed to serve.[213] For if the ban violated no right, then it would have sufficed that that social values interest was not illegitimate.[214]

The strength of that social values interest had not been settled by the plurality's reliance in *Casey* on Pennsylvania's concern for promoting "respect for the life of the unborn" to uphold its informed consent and waiting period provisions, which did, they held, implicate the abortion right.[215] That is because the state's concern for that social value was not the only interest in potential life that the plurality offered as justification for the constitutionality of those provisions.[216] The joint opinion also relied heavily for these conclusions on the prenatal welfare interest in fetal preservation.[217] This interest, which *Roe* had held compelling at viability, was absent under the regulation in *Carhart*, where fetuses would be destroyed anyway, but present under those in *Casey* that would save them. So *Casey* never reached the

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210 *Id.* at 182 ; *see also id.* at 191 ("In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court . . . ."). For the most comprehensive and penetrating critique of my position here, see Suter, *supra* note 112, at 1580 (arguing, inter alia, that "[a]ssuming that the partial-birth abortion is more brutal than other late-term abortions, it is hard to see how the ban expresses respect for life simply because it regulates the means by which fetal life can be ended" (footnote omitted)).

211 *See Carhart*, 550 U.S. at 191 (Ginsburg, J., dissenting) ("Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health.").

212 *See id.* at 158 (majority opinion).

213 *See id.* ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others . . . .").

214 *See id.* at 191 (Ginsburg, J., dissenting) (arguing that, even under the majority's rational-basis standard, "the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational").

215 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 877 (1992).

216 *See id.*; *id.* at 882–83 (consent provision); *id.* at 886–87 (waiting period provision).

217 *See id.* at 882–83, 886–87.

question of whether the state's interest in promoting respect for the unborn could justify the infringement of a fundamental right under conditions like *Carhart*, in which the social values interest was not accompanied and so unreinforced by a separate interest that the Supreme Court had previously recognized as compelling.[218]

Nor did the Court enlighten the magnitude of that social values interest in the decades between *Casey* and *Carhart*. It came closest in *Lawrence v. Texas*.[219] Justice Kennedy, again writing for the majority, recognized that Texas asserted as its sole justification for barring gay sodomy its interest in expressing moral disapproval of homosexuality.[220] *Lawrence* said nothing, however, about the strength of this social values interest. The Court granted that such moral disapproval might well reflect "profound and deep convictions accepted as ethical and moral principles."[221] But when the state's interest in promoting that value is uncoupled from more tangible harms, it is not even rational, Justice Kennedy held for the majority, much less the kind of interest that is capable of saving an otherwise unconstitutional law.[222] "'[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral,'" the Court adopted by quotation from Justice Stevens' dissenting opinion in *Bowers*, "'is not a sufficient reason for upholding a law prohibiting the practice.'"[223]

Lawrence left unclear, however, whether its skepticism about such interests applies only narrowly to those social values that demean unpopular groups, as Justice O'Connor suggested in concurrence,[224] or whether that holding sweeps so broadly that, as Justice Scalia lamented in dissent, it "effectively decrees the end of all morals legislation."[225] The equivocal scope of that social-values holding has played

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218 The plurality emphasized, however, that it would "intrude upon a protected liberty" were "profound moral and spiritual" ideals about "the mystery of human life" not just reflected and reinforced through state action, but "formed under compulsion of the State." *Id.* at 850–51.

219 Lawrence v. Texas, 539 U.S. 558 (2003).

220 *Id.* at 571.

221 *Id.*

222 *See id.*

223 *Id.* at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

224 *See id.* at 580 (O'Connor, J., concurring); *see also* Romer v. Evans, 517 U.S. 620, 635 (1996) (invalidating under the Equal Protection Clause a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests").

225 *Lawrence*, 550 U.S. at 599 (Scalia, J., dissenting); *see also* William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1012 (2005) (arguing that "few constitutional scholars think the narrowest or the broadest reading of *Lawrence* [as to its holding about legislating morality] is correct"); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L.

out in the post-*Lawrence* circuit split over the constitutionality of laws that ban the sale or distribution of sex toys in order to serve "'morality based'" interests in discouraging "the pursuit of sexual gratification unrelated to procreation."[226] The Eleventh Circuit upheld an Alabama ban on the distribution of such devices on the ground that "public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence*."[227] The Fifth Circuit concluded, to the contrary, that to affirm a similar statute in Texas "would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive."[228]

The logic of Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton*,[229] decided three decades before *Lawrence*, sheds light on this interpretive dispute about the compass and authority of social values interests like respect for the unborn. The majority upheld Georgia's injunction against showing obscene films to consenting adults at Paris Adult Theatre.[230] The state's principal interest in preserving "the morality of the community," although it falls squarely within the government's police power, Justice Brennan argued in dissent, carries less force than its interests in promoting health, safety, or welfare.[231] The strength of that social values interest is limited, in Justice Brennan's view, by its characteristic reliance on "speculative" and controversial beliefs about "morality, sex, and religion."[232] "However laudable" the "moral tone" that the state seeks to maintain or establish, it cannot, in the absence of more concrete or less contested interests, promote social values that are "predicated on unprovable" or divisive foundations by means that restrict constitutional guarantees.[233]

REV. 1233, 1282 (2004) (arguing that "the [*Lawrence*] Court did not address th[e] possibility" that "natural law" or "some other source" besides "traditional majoritarian views. . . . could have informed the morality rationale").

226 Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 (5th Cir. 2008).

227 Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007).

228 *Reliable Consultants*, 517 U.S. at 745. For discussion, see Manuel Possolo, Note, *Morals Legislation After* Lawrence*: Can States Criminalize the Sale of Sexual Devices?*, 65 STAN. L. REV. 565, 580–89 (2013).

229 Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

230 *Id.* at 69.

231 *Id.* at 108–09 (Brennan, J., dissenting).

232 *Id.* at 109 (Brennan, J., dissenting).

233 *Id.* at 109–11 (Brennan, J., dissenting). *But see* Robert F. Nagel, *Unfocused Governmental Interests*, 55 ALB. L. REV. 573, 573, 580 (1992) (arguing that judicial suspicion of "diffuse or general moral objectives" reflects the conflict between equally intangible worldviews about what makes a society good).

Justice Brennan's case against the superseding strength of social values interests, because it came in a dissent, of course carries no precedential authority. But many share his intuition that the inexorably divisive content and potentially boundless scope of social values interests render them too vulnerable to pretext and misuse to save otherwise unconstitutional policies.[234] The limited strength of social values interests in the constitutional sphere echoes tort law's reluctance to recognize claims of "expressive" harm, absent more concrete kinds, based on both epistemic challenges in identifying in-the-air injuries and also on fears about opening a floodgate of litigation.[235]

Reading these insights into *Lawrence* suggests that what disqualifies the state from outlawing protected conduct to express disapproval of homosexuality is not just the animus that disapproval expresses. It is also the diffuseness and contestability that characterizes any social value. So the state's concern for expressing even the most "laudable" moral ideals or cultural attitudes is unlikely to qualify as a compelling state interest. Nor is there convincing doctrinal reason to think that multiple such non-compelling interests could be combined together, as some scholars have suggested in the abortion context, to produce a compelling interest capable of overriding constitutionally protected due process rights.[236] The social values interest in promoting respect for the unborn does less work than the compelling-at-viability prena-

234 *See, e.g.*, CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 105 (2004). For examples of such susceptibility to misappropriation in the potential life context, see *supra* notes 61–63, *infra* notes 316–25, and accompanying text.

235 *See, e.g.*, Hoffmann-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004).

236 *See, e.g.*, I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 238, 241 (2011) (ultimately rejecting what the authors describe as "an open question in American constitutional jurisprudence" that is "closer than defenders of the abortion right might like" about whether "the state's interest in preserving fetal life of a not-yet-viable fetus becomes compelling when we add the prevention of fetal pain on to it, thus two state interests not compelling standing alone may be compelling when added together"). No controlling precedent has categorically ruled out that several non-compelling, mutually reinforcing interests might converge into a compelling one that is capable of overriding rights. But neither have any cases endorsed this possibility, while a great many have tacitly declined the invitation to do so and others have expressly rejected such interest aggregation, if only in nonbinding dicta or concurring opinions. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 759–60 (2007) (Thomas, J., concurring) (arguing in the Fourteenth Amendment context that "the combination of" "'three essential elements'" said to comprise a compelling interest, "does not," if "[n]one of these elements is [itself] compelling," thereby "produce an interest any more compelling than that represented by each element independently"); Cal. Democratic Party v. Jones, 530 U.S. 567, 584–85 (2000) (holding that California's blanket primary violated a political party's First Amendment right to free association in part because, even though the primary served several legitimate state interests, none of those was by itself compelling).

tal welfare interest with which cases like *Casey* and *Carhart* confuse it under the aegis of potential life.[237]

D. Social Effects

The final cluster of government concern that courts conflate with the potential-life interest has to do with the material consequences that reproductive conduct and its regulation can generate in the aggregate.[238] These "social effects" interests are more tangible than social values and reach beyond the welfare of any individual human life, whether born or unborn. Consider, for example, the lower national crime rate for which John Donohue and Steven Levitt famously argued that the legalization of abortion was responsible.[239] Other social effects interests include concerns about resource depletion, unsustainable birthrates, and public health.[240] Some among these concrete kinds of state interests have been pronounced so strong that "[t]he liberty secured by the Fourteenth Amendment" "may at times" be restricted in "reasonable" ways in order to serve those interests "as the safety of the general public may demand."[241]

Justice Stevens mischaracterized this powerful kind of "broader interest" when he designated it in *Casey* among those sources of concern "that comprise the State's interest in potential human life."[242] The example that he gave in his separate opinion is the state's "pragmatic" interest in "expanding the population," whether to meet a public health crisis, to balance the ratio of working adults in the country to dependents, children, and retirees, or to respond to some other exigency that demands having more people in the country.[243] "There

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237 *See supra* notes 113, 216–17, and accompanying text.

238 *Cf.* Cohen, *Best Interests*, *supra* note 153, at 1217–18 (referring to the harms that preconception conduct imposes on third parties as "reproductive externalities").

239 *See* John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379, 381, 386–407 (2001) (providing empirical analysis for the hypothesis that a reduction in the number of children born to "[t]eenagers, unmarried women, and the economically disadvantaged" after abortion was legalized across the country in 1973 substantially contributed to the nationwide reduction in criminal activity in the 1990s, when the would-be cohort of statistically higher risk children would have reached the late adolescent stage at which criminal activity is most prevalent).

240 I have discussed these and other such social effects interests in Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J.L. & MED. 567, 581–83 (2007) [hereinafter Fox, *Silver Spoons*].

241 Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding the state's authority to mandate smallpox vaccinations).

242 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part and dissenting in part).

243 *Id.* Population studies suggest that the widespread adoption of legal contraception and

have been times in history when military and economic" necessity, for example, vests the government with what Justice Stevens called "potential life" interests "in increasing its population."[244] It is a mistake in this way to conflate with the state's interest in potential life, which does not become compelling until viability, the more commanding "demographic concerns about its rate of population growth" that a majority of Justices had previously described as "basic to the future of the State."[245]

Social effects interests like this one do not appear whenever potential-life interests do. The state has a prenatal welfare interest any time its action can save from destruction a living human organism between conception and birth.[246] But for a social effects interest to be present in such cases, certain other states of affair must hold beyond the existence of an embryo or fetus capable of being preserved.[247] The nature of those additional conditions—whether military, economic, demographic, or related to health and safety—will of course depend on the particular kind of social effect in which the state claims an interest.[248] For now, it stands to ask how a court should establish whether and to what extent a contested regulation does in fact serve any among this category of more powerful interests in promoting certain social effects.[249]

Determinations about the presence of social effects interests require a sound basis provable by evidentiary support or at least plausible reasons. Without such "footing in the realities of the subject addressed by the legislation,"[250] those asserted interests would be "im-

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abortion used to realize lifestyle preferences that deemphasize having children has in much of Europe reduced birthrates below those that would be required to replace existing populations. *See* Johan Surkyn & Ron Lesthaeghe, *Value Orientations and the Second Demographic Transition (SDT) in Northern, Western and Southern Europe: An Update*, DEMOGRAPHIC RES. 62–75 (Apr. 17, 2004), http://www.demographic-research.org/special/3/3/s3-3pdf.

244 Webster v. Reprod. Health Servs., 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part).

245 *See* Maher v. Roe, 432 U.S. 464, 478 n.11 (1977).

246 *See supra* text accompanying notes 122–26.

247 *See supra* text accompanying notes 148–50.

248 *Cf.* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 894–97 (2013) (distinguishing straightforward empirical claims whose truth or falsity can be readily verified through experience or experiment from more speculative legislative findings that involve predictions or observations about complex social realities).

249 *See id.* at 906–07 (arguing that courts are in general better equipped to review uncomplicated claims about empirics than those that are grounded either in part on ideology or entirely on values).

250 Heller v. Doe, 509 U.S. 312, 321 (1993).

possible to credit"[251] as "legitimate public purpose[s],"[252] rather than "unsubstantiated assumptions"[253] or constitutionally proscribed objectives, such as sheer "animus."[254] Putative social effects interests are specious or worse in the absence of background conditions that bear out a genuine risk of the claimed public harm. If the empirical foundation of a social effects interest credibly lacks factual basis, that interest can hardly be taken for granted.

The demographic interest that Justice Stevens advanced against having too few inhabitants is a case in point.[255] The bare fact that the country's fertility rate is lower than that needed to replace the number of people currently inhabiting the country does not by itself demonstrate that the state has a social effects interest in promoting childbirth. For that apparent interest would fall away if whatever harms underpopulation portends are addressed through increased immigration, improved health care, or lower death rates.[256] For prenatal welfare interests, by contrast, the state enjoys a presumption of their presence anytime the continued existence of an embryo or fetus is on the line. It is accordingly far easier to establish that a policy prevents fetal destruction (a weaker interest) than that it responds to an empirically contingent threat of public harm (a stronger one). This invites those who would defend the policy, even if unawares, to obscure the ill-suited application of an otherwise powerful social effects interest within the auspices of potential life.

Carhart is again instructive.[257] The Supreme Court invoked "the State's interest in potential life" to pass off one final rationale for the federal ban on "abortions that involve partial delivery of a living fetus."[258] This last potential life justification is not a social value interest in promoting respect for the unborn, at least not as an end in itself.[259] It is instead a social effects interest in marking out clear, prophylactic limits in the context of "certain practices that extinguish life."[260] The

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251 Romer v. Evans, 517 U.S. 620, 635 (1996).

252 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

253 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535 (1973).

254 *Romer*, 517 U.S. at 632.

255 *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part).

256 *See, e.g.*, Jedediah Purdy, *The New Biopolitics: Autonomy, Demography, and Nationhood*, 2006 BYU L. REV. 889, 894 n.13.

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

258 *Id.* at 157–58.

259 *See supra* text accompanying notes 203–14.

260 *Carhart*, 550 U.S. at 158.

ban serves the government's interest in "potential life," Justice Kennedy maintained, by "drawing boundaries to prevent" a contested practice that, even if tolerable on its own, is so "laden with the power to devalue human life" that its permission risks sliding into other practices whose incidence cannot be tolerated.[261] Failing to ban that contested practice, the Court seemed to reason, risks desensitizing people to treatment of the unborn in ways that set society "down [a] path" toward accepting those "condemned" practices like "the killing of a newborn infant" or the harvesting of a fetus for spare body parts.[262]

This slippery-slope theory is an interest, not about prenatal welfare or social values, but about social effects. So demonstrating the presence of that interest calls for more, by way of evidence, than that the ban saves or respects the unborn. It also requires corroboration, or at least explanation, for why that law relieves the identified harmful consequence. Yet *Carhart*, by shrouding the social effects interest under the cover of potential life, offered no such support for how the regulation in question staves off the greater chance that certain intolerable practices will transpire. The majority thereby elided inquiry into the chain of inferences required to link the more likely occurrence of infanticide or fetus farming to the congressional ban on "partial birth" abortion. The point is not that this social effects interest is necessarily invalid, but that establishing its presence requires more than the mere observation that "potential life is involved."[263]

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This Part has mined the jurisprudence of potential life to reveal pervasively uncritical reliance on this monolithic interest. It has sought to expose the doctrinal confusion that courts inject by bunching these different kinds of interests together under the bromide of potential life. Judicial opinions like *Gonzales v. Carhart* appeal to that shibboleth to capture what are in fact four very different categories of government concern. Each of these, this Part has shown, arises under distinct conditions that respond to the particular kinds of public mischief it implicates. And each features varying levels of doctrinal strength and poses different risks to judicial reasoning and results. Social effects interests, while often the strongest of the four, apply only if

261 *Id.* at 157–58.

262 *Id.* at 158 (quoting Washington v. Glucksberg, 521 U.S. 702, 732 & n.23 (1997)); *id.* (quoting Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 note (2012) (Findings ¶ (14)(J))). For discussion of the slippery slope interest in *Glucksberg*, see I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1386 (2012).

263 Roe v. Wade, 410 U.S. 113, 150, 162–64 (1973) (emphasis omitted).

credible evidence bears out an empirical connection to the policy at issue. Postnatal welfare interests tend to be the next strongest, at least when offspring health is at stake; this kind of concern applies, however, just to those policies that improve the condition of born children. The prenatal welfare interests that *Roe* declared compelling at viability apply to any policy that is designed to preserve embryos or fetuses. The weakest of the four tend to be the social values concerns that are valid whenever the state seeks to promote any among a range of secular (and not illegitimate) moral or cultural norms.

To be clear, these generalizations about the four categories of government concern are simply that. The more particular interests that arise from within each will themselves vary in application and strength. So careful interest analysis requires more than simply identifying which of the four broad categories are at stake in a given case. But unpeeling this first layer of indeterminacy marks the largest and most important step in repairing the dangers of interest creep, especially against the rigidly tiered backdrop of constitutional scrutiny. It tells us, for example, that no social values interest is likely to rise to the compelling level that would enable it to restrict rights, and that social effects interests will apply little if at all where they rely on speculation alone. The next Part will elucidate how judges can adopt this conceptual framework of prenatal welfare, postnatal welfare, social values, and social effects interests to settle a range of reproductive conflicts in more precise and sound ways.

III. Resolving Interest Creep in Practice

The way in which courts characterize state interests often shapes how cases are decided.[264] This Part uses three live controversies to spell out how courts can and should use this spectrum of potential-life interests to repair the scourge of interest creep. It draws on conflicts about prenatal drug use, selective abortion, and embryonic stem cell research. Within each of these contexts, this Part illustrates how the creep of potential life confounds legal reasoning and conduces to incorrect outcomes.[265] It also demonstrates the ways in which an underspecified interest is vulnerable to cover for illegitimate purposes like enforcing traditional gender norms, discriminating against protected

264 *See supra* note 14 (providing examples from administrative, criminal, and private law).

265 Many of the interest creep cases examined in this Part are constitutional in nature because they are the most common. *See supra* text accompanying note 15. For nonconstitutional instances of interest creep in the context of potential life, see *supra* text accompanying notes 40–48.

classes, and encouraging people to have children of particular types.[266] Forbidden interests like these can be advanced not just by legislatures and agencies, but by courts too.[267]

This analysis is limited to the meaning and force of state interests, and does not address related questions considered elsewhere about reproductive rights, state action, rights-interest balancing, and standards of review.[268] It is of course critical to constitutional scrutiny whether a protected right has been restricted and what kind of means-end inquiry applies to the resolution of disputes involving embryos and fetuses. But these issues about rights, balancing, and standards of review do not want for attention in either the caselaw or the academic literature.[269] Thus, this Article focuses on the neglected creep of the state's interest in potential life. The aim of this third Part is to show in practical terms how courts can and should unpack the sources of concern at stake in several actual case studies that are commonly decided with undiscriminating reliance on the indeterminacy of potential life.

A. Drug Use During Pregnancy

Interest creep produces confused and confusing decisions when judges reason about concerns for postnatal welfare, social values, and social effects in the undifferentiated terms of potential life. This section explores the controversy over civil and criminal sanctions imposed and authorized against women in the name of potential life for their having used controlled substances while pregnant.[270] In some states, the government civilly commits women suspected of substance abuse during pregnancy.[271] Other states prosecute new mothers for in

266 *See supra* notes 61–63 and accompanying text.

267 *See, e.g.*, People v. Dominguez, 64 Cal. Rptr. 290, 293–94 (Ct. App. 1967) (chastising the trial court for imposing, as a condition of probate for a robbery conviction, that the defendant not become pregnant unless married, for the purpose, "implicit and explicit in th[e] record . . . to prevent" "poor, unmarried women" "from producing offspring").

268 *See, e.g.*, Fox, *Silver Spoons*, *supra* 240, at 575–84; Dov Fox, *The Illiberality of 'Liberal Eugenics,'* 20 RATIO 1, 2–6 (2007); Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1881–84 (2009) [hereinafter Fox, *Racial Classification*].

269 *See supra* notes 55–59 and accompanying text.

270 *See* Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J.L. & SOC. CHANGE 233, 237 (2011) ("In the last thirty years, American prosecutors in more than thirty states have indicted scores of . . . women for using alcohol and other drugs while pregnant, invoking a theory of 'fetal protection.'").

271 *See, e.g.*, MINN. STAT. § 253B.02(2) (2012); OKLA. STAT. tit. 63, § 1-546.4 (2004); S.D. CODIFIED LAWS § 34-20A-70(3) (2013); WIS. STAT. ANN. § 48.193(1)(c) (West 2013). A woman in Wisconsin recently filed the first-ever federal challenge to one such fetal protection law. *See* Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES, Oct. 24, 2013, at A1;

utero drug exposure on criminal charges ranging from "chemical endangerment" to "assault with a deadly weapon."[272]

For example, the South Carolina Supreme Court affirmed the eight-year prison term for a woman, Cornelia Whitner, indicted for having used crack cocaine while pregnant.[273] The Court construed the state's child abuse and endangerment law to apply to Ms. Whitner's use of controlled substances during the third trimester, by which time it was illegal for her to have an abortion.[274] The Court reasoned that, whatever rights she might have to be treated equally with men and nonpregnant women under the law, or "to carry her fetus to term" without the threat of punishment, any such rights would be trumped by the state's "profound interest in the potential life of the fetus."[275] That overriding interest that the "United States Supreme Court [reaffirmed] in *Casey*" "is not merely legitimate," the Court concluded summarily, "[i]t is compelling."[276]

A majority of states address the problem of drug-exposed infants by seeking to terminate the custodial rights of mothers under existing child welfare laws. Courts explain in cases like these that "[t]he only reasonable mechanism to implement state interests in the unborn is through existing abuse and neglect statutes."[277] A child welfare conviction for prenatal drug use in New York illustrates how potential-life creep obscures judicial reasongiving and distorts outcomes.[278] The state brought proceedings against a mother, identified only as Kathy, after her child, called Fathima, was born exhibiting symptoms of co-

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Dov Fox, *The Forgotten Holding of* Roe v. Wade, HUFFINGTON POST (Nov. 10, 2013, 8:47 PM), http://www.huffingtonpost.com/dov-fox/the-forgotten-holding-of_b_4252295html.

272 *See, e.g.*, Ada Calhoun, *Mommy Had to Go Away for a While*, N.Y. TIMES MAG., Apr. 29, 2012, at 30, 32 (reporting sixty such prosecutions in Alabama since 2006); *cf.* United States v. Vaughn, 117 Daily Wash. L. Rep. 441, 441 (D.C. Super. Ct. 1989) (sentencing a pregnant women who used cocaine to six months incarceration out of "concern for the unborn child" in order "to be sure she would not be released until her pregnancy was concluded").

273 Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997).

274 *See id.* at 779–81 (observing that homicide and wrongful death doctrine in South Carolina "has long recognized that viable fetuses are persons holding certain legal rights and privileges" and inferring "that the legislature intended to include viable fetuses within the scope of the [child abuse statute's] protection").

275 *Id.* at 785–86.

276 *Id.* at 786 (citing Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992)).

277 *E.g.*, *In re* Ruiz, 500 N.E.2d 935, 938 (Ohio Ct. Com. Pl. 1986) (internal quotation marks omitted); *see also In re* Valerie D., 595 A.2d 922, 925 (Conn. App. Ct. 1991) (adopting identical reasoning); *In re* Stefanel Tyesha C., 556 N.Y.S.2d 280, 285 (App. Div. 1990) (same).

278 *In re* Fathima Ashanti K.J., 558 N.Y.S.2d 447 (1990).

caine withdrawal.[279] A family court found that Fathima's "condition . . . at birth" called for "judicial intervention" to place her in the custody of social services.[280] The court's purported rationale for its holding that Kathy's parental rights "must yield to the compelling state interest in protecting . . . the unborn"[281] mistook a justification for the syllogism that "the state has 'an important and legitimate interest in potential life.'"[282]

As a reason for why Kathy is not allowed to care for her child, the bare invocation of the potential-life interest tells her close to nothing. The interest creep of potential life leaves her lawyer and the judges on appeal—along with future courts, litigants, advocates, and interested citizens or policymakers—only to guess at the reason that Kathy's drug use during pregnancy provides sufficient ground to prohibit her from raising her daughter. Does that interest in potential life capture a *pre*natal welfare concern, for example, that her conduct harmed the fetus that Fathima *was* before she was born?[283] Alternatively, is the interest a *post*natal welfare concern that the conduct harmed the born child that she now *is*?[284] Does it instead reflect a social effects concern for the tendency of prenatal drug use to impair the health of offspring at the cohort level, even if it did not leave Fathima herself any worse off?[285] Or is that reference to potential life actually a social values concern about eroding respect for the unborn, whether drug exposure harms embryos or fetuses at all?[286]

Judicial resort to the potential-life platitude is about more than the court's choice of words. The indeterminacy of interest creep also disfigures case outcomes and deprives litigants like Kathy of the reasons that she would have to refute on appeal. Consider, for instance, that if the court's reliance on potential life captured a concern for *pre*natal welfare, then whether the state can permissibly override her rights would depend on the strength of arguments about the impact of Kathy's drug use on the embryo or fetus in which form Fathima existed before she was born, whatever the impact of her mother's conduct on the child that she becomes.[287] If the state's potential-life

279 *Id.* at 447.

280 *Id.* at 448.

281 *Id.* at 449.

282 *Id.* (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

283 *See supra* Part II.A.

284 *See supra* Part II.B.

285 *See supra* Part II.D.

286 *See supra* Part II.C.

287 *See supra* notes 130–31 and accompanying text.

interest constituted a *post*natal welfare concern, by contrast, then the force with which it applies would have nothing to do with the consequences of Kathy's drug use on her fetus itself. A responsive challenge to that interest would instead call for evidence about Fathima's healthy delivery or normal development after birth.[288] In a similar vein, if the court's decisive reference to potential life expressed concern for social values or social effects, then that interest's ability to justify Kathy's punishment would hang on whether taking Fathima away from her tends to promote, not fetal or child wellbeing at the individual level, but cultural norms or offspring health more generally.[289] Each of these concerns—about prenatal and postnatal welfare, social values and effect—responds to distinct public goods and ills that do not simply hang together as subsets of some broader interest in potential life.[290]

Once the state's interest in potential life is properly understood as a concern about prenatal welfare, it becomes possible to see that punishing women for giving birth to a drug-exposed baby does not serve that interest. Prenatal welfare interests are absent under conditions in which state action, such as that brought against Kathy, is conditional upon live birth. It is immaterial for purposes of that *pre*natal welfare interest what happens to that embryo or fetus after it is destroyed or brought to term like Fathima was. The prenatal welfare interest that *Roe* designated compelling at fetal viability is an interest in protecting an embryo or fetus up until the point at which it is born or no longer alive.[291] So government sanctions like those imposed against Kathy do not, as the South Carolina Supreme Court claimed in *Whitner v. State*,[292] relieve "serious harm to the viable *un*born child."[293] To the contrary, punishing drug-addicted women who give birth to a child exposed in utero would in fact undermine the very potential-life interest in whose name they are imposed. Fear of detection and reprisal for drug use during pregnancy impairs prenatal welfare, courts have begun to recognize, by encouraging drug-dependent pregnant women to forego the clinical care essential to preventing miscarriage, or even to terminate pregnancies that they would otherwise keep.[294]

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288 *See supra* notes 152–54 and accompanying text.

289 *See supra* notes 179, 249 and accompanying text.

290 *See supra* notes 74–77 and accompanying text.

291 *See supra* notes 118–23 and accompanying text.

292 Whitner v. State, 492 S.E.2d 777 (S.C. 1997).

293 *Id.* at 782 (emphasis added).

294 *See* State v. Gethers, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) (suggesting that

The absence of prenatal welfare interests in such cases prompts inquiry into other possible interests implicit in appeals to the state's interest in potential life. Consider the social values interest in promoting respect for the unborn by punishing its gratuitously harsh treatment through exposure to controlled substances in utero. The state's interest in promoting this social value of respect for the unborn is, as argued in Part II, a legitimate one that the Establishment Clause does not prohibit.[295] That valid interest is thus capable of sustaining a wide range of less intrusive measures, such as the conferral of truthful, nonmisleading information about the effects of drug use on offspring health outcomes. But it is not compelling, on my analysis of the *Carhart* line of cases, in the way that the prenatal welfare one can be.[296] The social values interest is constitutionally deficient to justify the more coercive or restrictive sanctions enforced against prenatal drug use, such as forcible detention or deprivation of parental rights.[297]

The state also has postnatal welfare and social effects interests in any harm incurred to an individual baby like Fathima or to the generational cohort to which she belongs. These can be very potent government interests—indeed more powerful even than prenatal welfare ones.[298] Establishing their relation to a particular policy like prenatal drug sanctions, however, requires plausible evidence or sound reason, beyond sheer conjecture, to think that punishing women who use controlled substances during pregnancy actually promotes offspring health at either the individual or cohort level.[299]

Courts that conflate postnatal welfare or social effects interests within the ambit of potential life assume that a child's having been exposed to drugs in utero invariably harms him after he is born. Monolithic appeals to that interest invite judicial reliance on that assump-

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punishing prenatal drug use encourages abortion); Commonwealth v. Pellegrini, No. 87970, slip op. at 9 (Mass. Sup. Ct. Oct. 15, 1990) ("The state's interest [in potential life] would be further undermined when women seek to terminate their pregnancies for fear of criminal sanctions."), *rev'd*, 608 N.E.2d 717 (Mass. 1993).

295 *See supra* text accompanying notes 177–79, 198–202, 208–10.

296 *See supra* text accompanying notes 215–37.

297 *See, e.g.*, Siegel, *Dignity*, *supra* note 58, at 1752 (analyzing *Casey*'s undue burden framework to show that it permits the state to "create meaning, promote values, or communicate with" a woman in ways that "persuade" but do not "manipulate, trick, or coerce her" to carry a pregnancy to term); *cf.* Cohen, *Regulating Reproduction*, *supra* note 63, at 430 (distinguishing "in terms of their level of intrusion" different "means by which the State seeks to influence the target" of reproductive decisions (emphasis removed)).

298 *See supra* text accompanying notes 174 (postnatal welfare), 239–40 (social effects).

299 *See supra* text accompanying notes 250–54.

tion, as in *Whitner*, based on bare assertions of "public knowledge."[300] Evaluating these postnatal welfare and social effects interests on their own terms, however, reveals that longstanding assumption is "at best grossly misleading, arising more from bias and prejudice than from the scientific literature."[301] For example, a recent examination of the thirty-six most methodologically sound peer-reviewed studies of in utero drug exposure found "no consistent negative association between prenatal cocaine exposure and physical growth, developmental test scores, or receptive or expressive language."[302] That meta-analysis also concluded that "[n]o independent cocaine effects have been shown on standardized parent and teacher reports of child behavior."[303] Even the "[l]ess optimal motor scores" that the study identified "up to age 7 months but not thereafter" were shown less to reflect exposure to cocaine than exposure to other factors like alcohol and secondhand smoke.[304]

To the extent that prenatal drug use does harm offspring health, punishing women has neither "created a strong deterrent effect" against such use nor "chang[ed] the social, behavioral and environmental factors" associated with it.[305] As even the Supreme Court has observed, hospital dragnets that monitor drug use during pregnancy "deter patients from receiving needed medical care" for the mother and resulting child.[306] Every major public health organization agrees that pregnant women who use controlled substances, when they are faced with the threat of criminal penalty, are less likely to stop using drugs than they are to try to keep their addiction hidden from the physicians whose care improves offspring outcomes.[307] The creep of the potential-life interest obscures the need for judicial inquiry into

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300 Whitner v. State, 492 S.E.2d 777, 782 (S.C. 1997).

301 Mishka Terplan & Tricia Wright, *The Effects of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth Versus Reality*, 30 J. ADDICTIVE DISEASES 1, 1 (2011).

302 Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1613 (2001).

303 *Id.*

304 *Id.*

305 Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 244, 265 (2011) (internal quotation marks omitted).

306 Ferguson v. City of Charleston, 532 U.S. 67, 78 n.14 (2001).

307 *See, e.g.*, Am. Pub. Health Ass'n, *Policy Statement 9020: Illicit Drug Use by Pregnant Women*, 81 AM. J. PUB. HEALTH 253, 253 (1991); Bd. of Trustees of the Am. Med. Ass'n, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990); Comm. on Substance Abuse, Am. Acad. of Pediatrics, *Drug-Exposed Infants*, 96 PEDIATRICS 364, 366–67 (1995) ("Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health . . . ."); *see also Ferguson*, 532 U.S. at 78 n.14.

whether sanctions for drug use during pregnancy serve the postnatal welfare and social effects interests that they purport to. Their conflation under the banner of potential life also makes it appear as if these commanding interests support those sanctions, when unbundling them as I have here reveals that they do not.[308]

Interest creep matters for more than state action that infringes rights.[309] Why? Because uncritical reliance on potential life frustrates the ability of courts to uncover not just reasons that are too weak to justify especially restrictive policies, but also those illicit reasons that cannot justify any policy at all, however lenient the standard of review that applies.[310] More careful interest analysis can uncover that what is in fact the "only apparent justification" for prenatal drug sanctions is not legitimate.[311]

Consider that postnatal welfare and social effects interests cannot credibly explain sanctions against prenatal drug use in states that punish neither drinking nor smoking during pregnancy, even though the adverse child health effects of drugs like cocaine "are less severe than those of alcohol and are comparable to those of tobacco."[312] Moreover, prosecutions that are pursued under the ostensible authority of potential life target prenatal conduct by women in ways that they do not target prenatal conduct by men like spousal abuse and secondhand smoke that incurs comparable risk of harm to newborns.[313] Fi-

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308 I have set aside questions that others have addressed about the conditions under which sanctions against prenatal drug use might restrict the rights of women. *See supra* notes 268–69 and accompanying text. For discussion of the conceivable due process and equal protection rights that I mentioned earlier, see April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 176–82 (2007); Roberts, *supra* note 62, at 1462–63 ("The woman's right at issue is not the right to abuse drugs or to cause the fetus to be born with defects. It is the right to choose to be a mother that is burdened by the criminalization of conduct during pregnancy." (footnote omitted)); *supra* text accompanying note 275. If punishment for prenatal drug use were to restrict women's rights, then its constitutional legitimacy would be in doubt. For I suspect that states could, at little if any greater expense, promote newborn health in more effective and less restrictive ways than the rights-restricting ones. The most obvious such alternative would be to expand access to prenatal care that reduces the incidence of premature delivery, which tends to account for a range of offspring health problems. There is even precedent for successful programs that are tailored to the needs of women who use drugs. *See* Laura Novak, *Forging Ahead with Life's Tests, One Day at a Time*, N.Y. TIMES, Nov. 12, 2007, at H12.

309 *See supra* notes 4–6 and accompanying text.

310 *See, e.g.*, *supra* notes 61–63 and accompanying text.

311 *Cf.* Zobel v. Williams, 457 U.S. 55, 65 (1982) (rejecting rationale for limiting dividend distribution plan to persons who established state residence before a certain date).

312 Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES, Jan. 27, 2009, at D1.

313 *See* Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1685 (2008).

nally, prenatal drug policies disproportionately afflict low-income women of color compared to affluent whites, whose offspring-imperiling alcohol dependency, prescription drug use, and technologically assisted reproduction are exempt from punitive intervention.[314]

What plausibly accounts for this disparate treatment of equivalently risky prenatal conduct across gender, race, and class are two impermissible judgments that get hidden under the cover of potential life. The first is a judgment about which kinds of citizens are worthy of being parents. The Supreme Court held in *Skinner v. Oklahoma*[315] that the government may not require the sterilization of certain, similarly situated criminals (thrice-convicted thieves) but not others (thrice-convicted embezzlers).[316] That holding might be thought to apply, among other possible reproductive regulations, to sterilization alone, owing to the particularly exacting physical and procreative burdens that it incurs.[317] But it is not implausible to think that this holding, on a more expansive reading, prohibits the government from restricting the reproductive lives of citizens that it regards as undesirable.[318] Under this broader interpretation of *Skinner*, the state may not impose, in ways that go beyond sterilization, certain kinds of invidious criteria for who is allowed to be a parent. By forcing poor, black, drug-dependent women who continue their pregnancies to forfeit their freedom or their children, government sanctions against prenatal drug use carry out "ethnocentric judgments," Dorothy Roberts has argued, "that certain members of society do not deserve to have children."[319]

The second impermissible judgment has to do with enforcing sex stereotypes. The state also punishes women alone, or more severely than men, for conduct that poses similar risk of harm to children at

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314 *See* Allen A. Mitchell et al., *Medication Use During Pregnancy, with Particular Focus on Prescription Drugs: 1976–2008*, 205 AM. J. OBSTETRICS & GYNECOLOGY 51.e1, 51.e1 (2011); Laura A. Schieve et al., *Use of Assisted Reproductive Technology—United States, 1996 and 1998*, 51 MORBIDITY & MORTALITY WKLY. REP. 97, 99 (2002); Troy Anderson, *Race Tilt in Foster Care Hit: Hospital Staff More Likely to Screen Minority Mothers*, L.A. DAILY NEWS, June 30, 2008, at A1. For discussion, see Dorothy E. Roberts, *Privatization and Punishment in the New Age of Reprogenetics*, 54 EMORY L.J. 1343 (2005).

315 Skinner v. Oklahoma, 316 U.S. 535 (1942).

316 *Id.* at 541.

317 *See* Cohen, *Rights Not to Procreate*, *supra* note 56, at 1195 n.244 (advancing this narrower interpretation of *Skinner*).

318 *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 36–38 (1994) (construing *Skinner*'s application in this broader way).

319 *See* Roberts, *supra* note 62, at 1476.

birth.[320] What credibly explains this unevenness is the state's illicit insistence "upon its own vision of the woman's role" to care for children.[321] A plurality of the Supreme Court made clear in *Casey* that the Fourteenth Amendment forbids the entrenchment of such gender roles.[322] Accordingly, the government cannot compel the view that the "sacrifices" of childbearing and childrearing, however "ennobl[ing]," should be "endured by wom[e]n" alone.[323]

To punish only women and not men for conduct that causes unhealthy delivery is to charge just the one sex with the costs of protecting unborn life. Such restrictions plausibly reflect the illicit "common-law principle" that consigns women to "'the center of home and family life,' with attendant 'special responsibilities' that preclude[s] [their] full and independent legal status under the Constitution."[324] Disentangling the state interests that lie behind indiscriminate appeals to potential life makes it possible for judges not only to analyze with greater precision the application and strength of legitimate concerns about postnatal welfare, social values, and social effects. Evaluating those concerns on their own terms also enables courts to "smoke out" the illicit purposes like "prejudice or stereotype" that interest creep can conceal.[325]

B. Selection for Sex, Race, Disability

The second potential-life conflict that this Part examines involves restrictions based on the reasons for which people make reproductive decisions.[326] Arizona recently asserted this interest in the protection of the unborn to make it a felony to perform any abortion "based on the sex or race of the child."[327] A North Dakota law calls upon that

320 *See supra* notes 312–13 and accompanying text.

321 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 852 (1992); *see also* Siegel, *Reasoning*, *supra* note 61, at 276–77 ("[P]hysiological reasoning to define the state's interest in potential life . . . unleashed a legal discourse of indeterminate content and scope . . . .").

322 *See Casey*, 505 U.S. at 852.

323 *Id.*

324 *See id.* at 897 (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

325 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (internal quotation marks omitted).

326 *Compare* Isaacson v. Horne, 716 F.3d 1213, 1218–19 (9th Cir. 2013) ("[P]atients seek pre-viability abortions 'for a variety of reasons, including that continuation of the pregnancy poses a threat to their health, that the fetus has been diagnosed with a medical condition or anomaly, or that they are losing the pregnancy ('miscarrying').'"), *with id.* at 1232–33 (Kleinfeld, J., concurring) (speculating that cases in which a woman has an abortion because her partner "pressures her to do so . . . . probably occur in substantial numbers, because ambivalence, moral strain, economic strain, and relationship strain may sometimes accompany pregnancy").

327 ARIZ. REV. STAT. ANN. § 13-3603.02 (2011) (criminalizing the knowing provision of an

same potential-life interest to prohibit abortions based on the sex of the unborn or its diagnosis with "a genetic abnormality or a potential for a genetic abnormality."[328] Four other states—Illinois, Kansas, Oklahoma, and Pennsylvania—also ban abortions on account of fetal sex, but not expected race or disability.[329] Bills that would criminalize sex- or race-selective abortion have been proposed in eight others states,[330] and three separate times in the U.S. House of Representatives.[331]

A complaint challenging the selective abortion law in Arizona, the first of its kind, was recently filed in federal district court.[332] But no court has yet assessed this potential-life interest that other states like Arizona and North Dakota have asserted as a justification to regulate decisions about what type of child (not) to have.[333] How should courts approach this novel question about the regulation of procreative control over offspring traits?[334] The Supreme Court has never before conditioned reproductive rights to abortion or otherwise on

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abortion sought on the basis of fetal sex or race and authorizing a woman's husband or parents to file civil suit against a doctor for reckless violation).

328 *See* H.B. 1305, 63rd Legis. Assemb., Reg. Sess. (N.D. 2013); Representative Bette Grand, N.D. House of Representatives, Statement During House Floor Session (Feb. 8, 2013), *available at* http://video.legis.ndgov/pb3/powerbrowser_Desktop.aspx?ContentEntityId=163&date=20130208&tnid=9&browser=0#agenda_ (timestamp 12:44:00) (citing the state's interest in potential life as justification for selective abortion ban).

329 *See* 720 ILL. COMP. STAT. 510/6(8) (West 2014); H.B. 2253, 2013 Leg., Reg. Sess. (Kan. 2013);OKLA. STAT. ANN. tit. 63, § 1-731.2B (West. 2014); 18 PA. CONS. STAT. ANN. § 3204(c) (2014).

330 H.B. 845, 2013 Leg., Reg. Sess. (Fla. 2013); H.B. 1327, 2012 Leg., Reg. Sess. (Fla. 2012); S.B. 529, 150th Gen. Assemb., Reg. Sess. (Ga. 2010); H.B. 693, 60th Leg., 2d Reg. Sess. (Idaho 2010); S.B. 799, 2009 Leg., Reg. Sess. (Mich. 2009); S.B. 1073, 86th Leg., Reg. Sess. (Minn. 2009); S.B. 2166, 2010 Leg., Reg. Sess. (Miss. 2010); Gen. Assemb. 162, 214th Leg., Reg Sess. (N.J. 2010); S.B. 62, 77th Leg., Reg. Sess. (W. Va. 2010). The selective abortion bills in Florida, Georgia, Idaho, Mississippi, and New Jersey include race provisions.

331 Prenatal Nondiscrimination Act of 2012, S. 3290, 112th Cong. (2012) (proposing criminal penalties and injunctive rights for abortion to "eliminat[e] an unborn child" based on its expected sex or race); Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009) (same); Susan B. Anthony Prenatal Nondiscrimination Act of 2008, H.R. 7016, 110th Cong. (2008) (same). For discussion, see Jennifer Steinhauer, *House Rejects Bill to Ban Sex-Selective Abortions*, N.Y. TIMES, June 1, 2012, at A20.

332 *See* Complaint, NAACP v. Horne, No. 2:13cv1079 (D. Ariz. May 29, 2013) (seeking injunctive relief on the ground that the ban violates the equal protection rights of women from the targeted groups).

333 The American Civil Liberties Union ("ACLU") lawyer who argued *Casey* in the Supreme Court reported that this sex-selection provision went unchallenged because the ACLU could not find a woman who would claim injury from it. *See* Charlotte Allen, *Boys Only*, NEW REPUBLIC, March 9, 1992, at 16.

334 In *Silver Spoons*, *supra* note 240, at 577–80, I distinguish analogic arguments for a possible right to genetic selection, grounded in the "history or tradition" standard in *Glucksberg*,

people's having any particular reasons for exercising those rights.[335] In *Roe v. Wade*, however, it rejected the proposition that, in the abortion context at least, a woman "is entitled to terminate her pregnancy . . . for *whatever* reason she alone chooses."[336] Judicial analysis of reason-based restrictions on reproductive conduct must attend, not just to progenitors' rights, and to whatever standard of review applies, but also to the countervailing government interests at stake.[337] The legitimacy and strength of the state's interest in restricting people's particular reasons (not) to become a parent have significance, beyond the abortion context "for sexual and reproductive behavior, prenatal genetic diagnosis, embryo selection in assisted reproduction, and choice over prebirth selection of children's traits generally."[338]

For the selective abortion laws considered here, the undue burden framework established in *Casey* elevates judicial analysis of the potential-life interest to a prominent place.[339] For this is the interest that the plurality of the Court held that any legitimate regulation of abortion must, in the first place, advance.[340] Only if it duly "further[s] the State's interest in fetal life" need a court even analyze whether such regulation is designed not to "hinder," but to "inform the woman's free choice" about whether to carry a pregnancy to term, and whether it "plac[es] a substantial obstacle in the path of . . . [her] choice."[341] The undue burden standard requires courts to determine, as a baseline inquiry before reaching these other concerns, the extent to which any challenged regulation of abortion serves that potential-life interest that the joint opinion held too weak "before fetal viability" to legitimately restrict, in its purpose or substantial effect, a woman's decision about whether to continue a pregnancy.[342] So the key

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from liberty-based arguments for such a right, based on the "personal dignity and autonomy" standard in *Casey*.

335 John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 374 (2011) [hereinafter Robertson, *Abortion and Technology*].

336 Roe v. Wade, 410 U.S. 113, 153 (1973) (emphasis added).

337 *See* Fox, *Silver Spoons*, *supra* note 240, at 581–83.

338 Robertson, *Abortion and Technology*, *supra* note 335, at 374.

339 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 874–79 (1992). Although that part of the lead opinion in *Casey* which enunciates the undue burden test "was endorsed by only three justices, as the narrowest ground for the Court's holding" in that case, it is no less binding than had it received a majority of the votes. Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 921 n.11 (9th Cir. 2004) (citing Marks v. United States, 430 U.S. 188, 193 (1977) and Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 473 (7th Cir.1998)).

340 *See Casey*, 505 U.S. at 872.

341 *Id.* at 877; *see also id.* at 872.

342 *Id.* at 877–78.

state interest question for selective abortion analysis under *Casey* is whether, and if so by how much, the interest in potential life is more strongly implicated when a woman seeks to terminate her pregnancy for proscribed reasons, rather than for any other reason, all of which are permitted.[343]

This section seeks to show that selective abortion prohibitions conflate under the mantle of potential life three different kinds of interests in prenatal welfare, social values, and social effects. Evaluating these distinct interests on their own terms reveals that otherwise powerful prenatal welfare and social effects interests apply only weakly, if at all. The remaining social values grounds for regulating selective reproduction, legitimate though they are, cannot sustain restrictions of fundamental rights like the woman's to terminate her pregnancy. Laws that prohibit selective abortion are accordingly unconstitutional.[344]

First among the reasons that lawmakers give for selective abortion bans is a social effects concern about population demographics. Lawmakers in North Dakota declined to argue that the state has an interest in increasing the number of children born with even debilitating or fatal genetic conditions.[345] So I will not consider that argument here.[346] A federal selective abortion bill that was narrowly rejected in the House blames sex- and race-selective abortion, however, for "unnatural sex-ratio imbalances" and underrepresentation "of minorities in the . . . American electorate."[347] These claims, though cast in poten-

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343 *See, e.g.*, Araiza, *supra* note 248, at 948 (arguing that "[t]he importance of motivation" to undue burden analysis, "given *Casey's* recognition of both the importance of the right and the legitimacy of certain government motivations in curbing that right [ ] opens the door for Congress to use findings to disguise an abortion law's real motivation").

344 *See* Dov Fox, *The Flawed Logic of Prenatal Discrimination*, HUFFINGTON POST (Apr. 1, 2013, 9:32 AM), http://www.huffingtonpost.com/dov-fox/prenatal-discrimination_b_2983994html [hereinafter Fox, *Flawed Logic*].

345 *See id.*

346 For discussion of this demographic argument, see Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, 29 HASTINGS CENTER REP., Sept.–Oct. 1999, at S1, S1–S2. I have elsewhere considered a distinct social effects interest that "disability-selective abortion might encourage an unwillingness to accommodate, care for, or find ways to improve the lives of those whose abilities fail to meet the demands of modern society." Dov Fox, *Prenatal Screening Policy in International Perspective: Lessons from Israel, Cyprus, Taiwan, China, and Singapore*, 9 YALE J. HEALTH POL'Y L. & ETHICS 471, 480, 481–82 (2009) [hereinafter Fox, *Prenatal Screening*] (reviewing RUTH SCHWARTZ COWAN, HEREDITY AND HOPE: THE CASE FOR GENETIC SCREENING (2008)).

347 H.R. 3541, 112th Cong. §§ 2(a)(1)(F), 2(a)(2)(E), 3 (2011) (proposing to authorize criminal prosecution for up to five years incarceration of physicians who perform selective abortion and for up to one year for health professionals who do not report suspected violations without exception for preferences to avoid a sex-linked disease).

tial-life terms, represent social effects interests against the troubling consequences thought to follow from having a disproportionate number of women or minorities in society.[348] Determining the presence of this social effects interest, as opposed to the prenatal welfare one approved in *Roe*, requires more by way of justification than the sheer threat of fetal destruction. To establish whether selective abortion threatens objectionable demographic disparities, a court would need to consider, namely, both empirical evidence linking birthrate statistics to selective abortion and normative reasons about why it would be bad to allow any resulting decline that was projected in the number or proportion of minorities or women born in the next generation.[349]

For example, the primary sponsor of Arizona's law against race-selective abortion made much of the fact that black women terminate pregnancies almost five times as often as white women.[350] There exists no credible evidence that this higher incidence of abortion among black women owes, however, as state and federal lawmakers have claimed it does, to the discriminatory preferences of "a mother [who] does not want a . . . minority baby,"[351] or to "the targeting of the black community by abortion providers."[352] Far from it, the most reliable studies suggest that higher abortion rates among black women result instead from their higher rates of unintended pregnancy, which are in turn rooted in racial disparities of wealth, health care, and sex education.[353] Restrictions on selective abortion in no way improve these underlying conditions that lead black women to terminate pregnancies

348 *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 652–53 (1966) (upholding the Voting Rights Act provision that exempts from English literacy tests persons educated through sixth grade in Puerto Rican schools on the ground that the franchise would confer on residentially segregated immigrants greater political power to obtain "nondiscriminatory treatment in public services").

349 Demographic state interests like these resemble what Bill Araiza has called an "evaluative fact[that] entail[s] a mixture of empirical observation and value judgment." Araiza, *supra* note 248, at 895.

350 *See, e.g.*, *Hearing Before the H. Comm. on Health and Human Servs.*, 50th Leg., 1st Reg. Sess. 63–66, 74–75 (Ariz. 2011) (statement of Rep. Steve Montenegro); Complaint, *supra* note 332, ¶ 31 (quoting a letter from U.S. Congressman Trent Franks).

351 Caitlin Coakley Beckner, *House OKs Outlawing of Race- and Gender-Selection Abortions*, ARIZ. CAPITOL TIMES (Feb. 21, 2011, 4:55 PM), http://azcapitoltimes.com/news/2011/02/21/bill-to-ban-selection-abortion-gets-initial-oks/ (reporting statements made by Rep. Steve Montenegro and critiques of his views).

352 155 CONG. REC. H1111, H1113 (daily ed. Feb. 10, 2009) (statement of Rep. Franks) (asserting that this alleged "targeting" amounts to the perpetration of an "unspeakable tragedy" against black America).

353 *See* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER POL'Y REV., Summer 2008, at 2, 2–4; *New Health Disparities Report: More Context for Higher Unintended Pregnancy and Abortion Rates Among Women of Color*, GUTTMACHER INST. (June 11, 2009), http://www.guttmacher.org/media/inthenews/2009/06/11/indexhtml.

in greater proportions than others.[354] Even the sponsor of one such law was forced to concede that race selective abortion, while "something I feel we should protect against," as he put in in proposing the ban on the floor of the Idaho state House of Representatives, is "not something that I know of that is a problem."[355]

As for sex selection, it is true that gender disparities in some parts of China, India, and South Korea, for example, have produced increasing numbers of men whose inability to find partners appears to contribute to their underemployment, transience, and marginalization.[356] In certain provinces of these and other countries, inheritance rights, dowry obligations, and other patriarchal norms lead many families to prize boys over girls.[357] In this country, a study of Indian, Chinese, and Korean Americans—who together comprise less than two percent of the American population—found that a fraction of those whose first child was a daughter tend to have sons as second and third children at rates high enough to suggest some kind of prenatal intervention, whether it takes place after conception, as through abortion or embryo selection, or before conception, using sperm-sorting technologies.[358] No sex-skewing trends have begun to emerge at anything like the population level, however. To the contrary, the overall sex ratio at birth in the United States continues to fall squarely within the biological norm,[359] and U.S. gender preferences have remained about the same over the past seventy years.[360] The regulation of sex-selective abortion therefore serves no social effects interest sufficient to

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354 *See* S. Cohen, *supra* note 353, at 12.

355 *Lawmakers in Idaho, Kansas Address Abortion, Provider 'Conscience' Bills*, NAT'L PARTNERSHIP FOR WOMEN & FAM. (March 22, 2010), http://go.nationalpartnership.org/site/News2?abbr=daily2_&page=NewsArticle&id=23772 (reporting statements by Rep. Kren).

356 *See* MARA HVISTENDAHL, UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS, AND THE CONSEQUENCES OF A WORLD FULL OF MEN 10–15 (2011) (citing sex disparities in Armenia, Azerbaijan, Georgia, Pakistan, Singapore, Taiwan, and Vietnam as well, and predicting "threats to women, including sex trafficking, bride buying, and forced marriages").

357 *See* VALERIE M. HUDSON & ANDREA M. DEN BOER, BARE BRANCHES: SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION 64, 71 (2004).

358 Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 PROC. NAT'L ACAD. SCI. 5681, 5681–82 (2008). For a discussion of preconception sex selection technology, see Fox, *Safety, Efficacy, and Authenticity*, *supra* note 137, at 1142–43.

359 *See* T.J. Mathews & Brady E. Hamilton, *Trend Analysis of the Sex Ratio at Birth in the United States*, 53 NAT'L VITAL STAT. REP., June 14, 2005, at 1, 4; *The World Factbook—Field Listing: Sex Ratio*, CENT. INTELLIGENCE AGENCY, https://www.ciagov/library/publications/the-world-factbook/fields/2018html (last visited Mar. 2, 2014).

360 Frank Newport, *Americans Prefer Boys to Girls, Just as They Did in 1941*, GALLUP (June 23, 2011), http://www.gallup.com/poll/148187/Americans-Prefer-Boys-Girls-1941.aspx (reporting that the "tilt toward a preference for [having] a boy rather than a girl" as a first child is "remarkably similar to what Gallup measured in 1941").

restrict reproductive rights in the absence of "population-based data [that] demonstrate[s] trends of discrimination via selective abortion that could harm society as a whole if left unchecked."[361]

There is another category of state interests that lawmakers have appealed to in potential-life terms to justify selective abortion bans. This second kind of rationale seeks to enlarge the scope of the prenatal welfare interest in preserving the existence of an embryo or fetus. Fetuses that get singled out for destruction on the basis of protected traits such as race, sex, and disability "deserve protection," as one Arizona state senator put it, from the discriminatory treatment of which they are "at risk for no fault of their own, for being a minority of a certain type, for being of a certain culture, for being male or female."[362] This prenatal-welfare variant is a purported concern, not for *whether* a fetus is destroyed, but for *why* it is. It is not fetal *destruction* that selective abortion prohibitions target, at least not principally or on their face, but rather fetal *discrimination*. After all, these laws permit abortion for any reason other than the few proscribed ones.

The state's prenatal welfare interest in preserving the unborn is alone insufficient under *Casey* for the state to ban abortion prior to viability.[363] So the question that interest analysis poses is how if at all does this new context strengthen that conventional interest in potential life?[364] On review, *discriminatory* destruction does not in fact impair fetal welfare in any way that its *nondiscriminatory* destruction does not. To see why this is so, consider that the kinds of harms against which antidiscrimination law ordinarily protects individuals presuppose their possession of the capacity to experience such harm, whether denial of education, employment, or membership, or injured sense of identity, worth, or dignity.[365] Or, in the alternative, for those like infants or people in a persistent vegetative state who might be

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361 Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 61 (2012); *see also id.* at 60 (observing that while "[s]ocietal-level harms are often difficult to quantify," empirical data about such harms can be obtained in states like California, where prenatal and newborn screening are already carefully monitored).

362 Tessa Muggeridge, *Brewer Signs Bill to Ban Race- and Sex-Selection Abortions*, TUCSON SENTINEL (Mar. 31, 2011 5:34 AM), http://www.tucsonsentinel.com/local/report/033111_abortion_bill/brewer-signs-bill-ban-race-and-sex-selection-abortions/ (quoting Arizona State Senator Nancy Barto).

363 *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846, 860, 877 (1992).

364 *See supra* notes 339–43 and accompanying text.

365 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [children] . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

thought to lack such capacities, their protection under the antidiscrimination law presupposes that they have antecedently protected liberty interests of their own that include rights against discriminatory treatment.[366]

Not a single Supreme Court Justice has ever suggested that fetuses, by contrast, qualify as persons with rights to equal protection under the law.[367] And the brain development of even a late-term fetus is too immature for the fetus *itself* to care how it is treated.[368] So singling a fetus out for adverse treatment does not "frustrate any self-identity" that it is capable of knowing itself, or any "sense of dignity that it might enjoy."[369] Accordingly, selective abortion bans cannot be said to serve this antidiscrimination adaptation of the prenatal welfare interest.[370]

Proscribing abortion based on fetal race, sex, or disability might of course matter for reasons unrelated to the way that a fetus experiences its selective destruction. Lawmakers also march under the banner of the potential-life interest a separate social values interest in promoting nondiscrimination norms. "[C]hoosing not to prohibit" selective abortion, they contend, "[i]mplicitly approv[es]" and even "reinforce[s]" discrimination on the basis of those protected categories.[371] Even if parents have innocent reasons for wanting a child of a particular type, this argument goes, and even if their selection would have no bad social effects, selective abortion can express the disparaging judgment that girls, minorities, or people with disabilities make less desirable children or citizens.[372] Failure to ban the destruction of fetuses "based on the fact that they're the wrong colour, or that they're a girl or boy," explains the author of the federal selective abortion bill, "is the equivalent of endorsing the practice."[373]

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366 *See, e.g.*, Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 55 (2000) (arguing that state segregation of day care centers "would violate Equal Protection notwithstanding the fact that the babies suffer no psychological harm"); Fox, *Racial Classification*, *supra* note 268, 1862–64.

367 *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring) ("No Member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment.").

368 *See generally* Joan Stiles & Terry L. Jernigan, *The Basics of Brain Development*, 20 NEUROPSYCHOL. REV. 327, 341–42 (2010).

369 Fox, *Flawed Logic*, *supra* note 344.

370 *See id.*

371 H.R. 3541, 112th Cong. § 2(a)(3)(B) (2011).

372 For discussion of this expressivist critique of selective abortion, see Fox, *Prenatal Screening*, *supra* note 346, at 478–80.

373 Lauren Vogel, *Sex Selective Abortions: No Simple Solution*, CAN. MED. ASS'N J., Feb. 21, 2012, at 286–88 (quoting Rep. Franks).

The state's interest in promoting such nondiscrimination norms resembles the government concern that animates those hate crime laws that operate to a send message "of tolerance and against prejudice," even on the understanding that the enhanced sentences that they would impose do not, as a matter of social effects, deter crimes that target victims based on race.[374] This social values interest in promoting antidiscrimination norms is convincing in the context of criminal punishment.[375] But it looks insincere in the context of family formation. Consider that among all the states that have sought to ban selective abortion, not one has made any efforts to regulate the selection of eggs, sperm, frozen embryos, or adoptive children when pregnancy is not involved, even though these practices might be thought in a similar way to devalue people whose traits parents choose against.[376]

Another social values concern that these bans assert in potential-life terms is the interest in promoting respect for fetuses, or, as the federal selective abortion bill puts it, "the value of the unborn" that "[s]ex-selection and race-selection abortions trivialize."[377] These restrictions express respect for potential life, on this rationale, by barring certain kinds of less worthy reasons for destroying it, whether discriminatory reasons or frivolous ones having to do with "whim[ ] or caprice."[378] I read the *Carhart* line of cases to suggest that this interest in promoting respect for the unborn is legitimate but not compelling.[379] So, too, with a third social values interest that permitting selective abortion imparts the notion "that a child's particular genetic make-up is quite properly a province of parental reproductive choice, or the idea that entrance into the world depends on meeting certain

374 153 Cong. Rec. H4445 (daily ed. May 3, 2007) (statement of Rep. Holt) (proposing hate crime legislation to promote values "of tolerance and against prejudice" even if such sentence enhancement would provide no deterrent effect). For discussion of the legislative emphasis on the expressive dimension of hate crime laws, see Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. Rev. (forthcoming 2014) (manuscript at 11–13), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322438.

375 *See* Douglas Husak, Overcriminalization: The Limits of the Criminal Law 141 (2008); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. Rev. 1227, 1254 (2000); Kahan, *supra* note 106, at 463–67.

376 Support for this statement comes from a Lexis Advance and WestlawNext search performed on September 30, 2013, using the search terms "artificial insemination," "assisted reproduction," "in vitro," and "discrimination." *See* Fox, *Racial Classification*, *supra* note 268, at 1891 (arguing that a race-salient design of sperm donor catalogs risks expressing a divisive social meaning "that same-race families should be preferred to mixed-race ones").

377 H.R. 3541, 112th Cong. § 2(a)(3)(B) (2011).

378 Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting).

379 *See supra* text accompanying notes 229–37.

genetic criteria"?[380] The sponsor of one selective abortion ban explained, for example, that it is designed to prevent the "creat[ion] [of] genetically designed babies, including self-selection of the child's sex."[381]

I have argued that all such social values interests—whether in promoting norms of nondiscrimination, unborn respect, or parental love—are, by virtue of their diffuseness and contestability, insufficient to override constitutionally protected conduct like a woman's decision about whether to terminate a pregnancy.[382] I have also explained why I believe that the prevailing doctrine cuts against the argument that any number of such mutually reinforcing social values interests can be taken together to form a compelling interest that none comprises by itself.[383] As with the prenatal welfare and social effects interests at stake in the selective abortion context, these social values interests cannot justify the rights-restricting laws on the books in four states and proposed in many others.[384]

The absence of sufficiently strong justifications for these laws raises the suspicion that their true purpose is to enact the "invidious and unfounded racial stereotype" that minority women "who choose[ ] abortion do[ ] so out of racial animus towards [their] own community" and "that Black women who make the personal and private decision to end a pregnancy do not do so knowingly or thoughtfully."[385] Judicial review of the selective abortion ban must therefore identify the distinct kinds of government concern that might underlie blanket appeals to protecting the unborn. Interest analysis reveals that some of these concerns are legitimate, but inadequate to override rights, and that others might be categorically forbidden. The reviewing court that relies uncritically on "the State's interest in potential life, as recognized in *Roe*,"[386] and neglects to assess the merits of the more particular concerns its creep conceals, risks not only misleading

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380 PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 95 (2004). For discussion of this social value of promoting particular norms of parental love, see Dov Fox, *Parental Attention Deficit Disorder*, 25 J. APPLIED PHIL. 246, 248–55 (2008) [hereinafter Fox, *Parental Attention*].

381 Drew Zahn, *New Law Bans Picking Baby's Sex by Abortion*, WND (May 23, 2009, 12:00 AM), http://www.wnd.com/?pageId=98886#ixzz1clzUVMu5 (quoting Oklahoma State Representative Dan Sullivan).

382 For incisive argument for the strength of "morals" interests, see generally Nagel, *supra* note 233, at 575–76.

383 *See supra* note 236.

384 *See supra* notes 327–31 and accompanying text.

385 Complaint, *supra* note 332, at ¶ 2.

386 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 873 (1992).

litigants, lower courts, and others, but also reaching the misguided conclusion that this mantra trumps.

C. *Embryonic Stem Cell Research*

This section conducts interest analysis in a third context in which the uncritical adoption of potential life papers over the actual government concerns at stake. That context is agency rulemaking about medical research that destroys embryos in the quest to cure disease and disability. At the direction of President Obama, the National Institutes of Health ("NIH") issued guidelines in 2009 to fund stem cell research on certain embryos from among the almost half-million frozen in storage in the United States.[387] The guidelines make eligible for funding research that requires the destruction of embryos that were made with the intention of producing children, but for which the people who created them have since given their informed consent to use those embryos for research.[388]

Legal challenges to these NIH guidelines have proceeded under different theories. One such lawsuit was pursued on behalf of the embryos themselves.[389] Judge Wilkinson, writing for the Fourth Circuit majority that ultimately dismissed the suit for lack of standing, remarked that a "complaint that provided more concrete information about the identity of the named plaintiff embryo," and about whether that particular embryo was slated for stem cell research under the guidelines, would raise "what the Supreme Court has identified as serious constitutional concerns."[390] A second challenge to the funding expansion was brought by scientists vying for federal funding to conduct research on non-embryonic human stem cells.[391] A District of Columbia district court temporarily blocked the guidelines.[392] Although that preliminary injunction was vacated on appeal, the district court granted it in part on the potential-life ground that it furthered "the public interest" against the "federal funding of" conduct that "involves the destruction of embryos."[393]

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387 Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009); National Institutes of Health Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170, 32,171 (July 7, 2009); Rick Weiss, *400,000 Human Embryos Frozen in U.S.*, WASH. POST, May 8, 2003, at A10.

388 *See* 74 Fed. Reg. at 32,172.

389 *See* Doe v. Obama, 631 F.3d 157, 159 (4th Cir. 2011).

390 *Id.* at 163.

391 *See* Sherley v. Sebelius, 610 F.3d 69, 70 (D.C. Cir. 2010).

392 *See* Sherley v. Sebelius, 704 F. Supp. 2d 63, 69–70 (D.D.C. 2010), *vacated*, 644 F.3d 388, 390 (D.C. Cir. 2011) (finding plaintiffs unlikely to prevail on the merits).

393 *Sherley*, 704 F. Supp. 2d at 69–70, 73 (finding that the plaintiffs were likely to succeed on

Ten states have invoked this same potential-life interest to prohibit research or experimentation that involves the destruction of human embryos.[394] These bans assert an "interest in potential life from the moment of conception," scholars have observed, "whether conception takes place inside a woman's body or in a laboratory."[395] One court has, in a different context involving the early human embryo, noted that the "State's interest in its life" arises independently of "whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish."[396] The creep of potential life obscures, however, just what kinds of concerns that interest comprises, and with what levels of force they operate. Teasing them out can help courts to determine whether, for example, federal agency rules survive injunction review, or whether state bans on practices that destroy embryos override constitutionally protected interests. Conceivably, these interests might include free speech rights to conduct scientific research,[397] due process guarantees to access needed therapies,[398] or, in related cases, "a person's right to engage in IVF [in vitro fertilization] or avoid reproduction by discarding unwanted embryos."[399]

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the statutory merits and suffer irreparable injury were the injunction denied and that granting the injunction would not substantially injure other parties).

394 *See* ARIZ. REV. STAT. ANN. § 36-2302 (2014); 2011 Fla. Laws 3406; LA. REV. STAT. ANN. § 9:129 (2011); ME. REV. STAT ANN. tit. 22, § 1593 (2012); MICH. COMP. LAWS § 333.2685 (2013); MINN. STAT. § 145.422 (2012); N.M. STAT. ANN. § 24-9A-3 (West 2013); OKLA. STAT. ANN. tit. 63, § 1-270.2 (West 2012); 18 PA. CONS. STAT. ANN. § 3216 (West 2012); S.D. CODIFIED LAWS § 34-14-17 (2012).

395 *E.g.*, Mailee R. Harris, *Stem Cells and the States: Promulgating Constitutional Bans on Embryonic Experimentation*, 37 VAL. U. L. REV. 243, 270 (2002).

396 Kass v. Kass, 1995 WL 110368, at *2–3 (N.Y. Sup. Ct. 1995), *overruled by* 696 N.E.2d 174 (N.Y. 1998) (embryo disposition dispute between formerly married persons).

397 *Compare, e.g.*, John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1217–18 (1977) (arguing that "[i]f the First Amendment serves to protect free trade in the dissemination of ideas and information, it must also protect the necessary preconditions of speech, such as the production of ideas and information through research" (footnote omitted)), *with* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1155 (2005) ("There is no First Amendment problem with legislators using . . . moral and ideological perspectives as justifications for restricting what scientists do . . . . But the government shouldn't be trusted to use these perspectives as justifications for restricting what scientists say about science, any more than for restricting what people say about politics.").

398 An en banc court of the D.C. Circuit has held that terminally ill patients lack due process rights to treatment with unapproved, investigational drugs. *See* Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 703–04 (D.C. Cir. 2007) (en banc).

399 John A. Robertson, *Embryo Stem Cell Research: Ten Years of Controversy*, 38 J.L. MED. & ETHICS 191, 193 (2010) (arguing that "[a]ny restriction on creating, preserving, or dis-

The Supreme Court has held that the state's interest in "potential life" is present "at all stages in the pregnancy."[400] That this interest "grows in substantiality as the woman approaches term" suggests that it is less strong as it applies earlier in the course of unborn development.[401] For embryos less than a week old, prenatal welfare and social values concerns are still legitimate but weak reasons to regulate their destruction.[402] Only one court has considered such early-stage prenatal welfare interests when pregnancy is not involved.[403] That Tennessee state court discounted the strength of that interest in protecting embryos frozen outside the woman's body. "[I]f the state's interests do not become sufficiently compelling in the abortion context until the end of the first trimester, after very significant developmental stages have passed," it explained, "then . . . . the state's interest in the potential life embodied by these four- to eight-cell preembryos . . . is at best slight."[404] In the context of stem cell research, too, it seems doctrinally sound to accord the government a valid but "slight" interest in preventing this nascent human life from being "reduced to embryonic stem cells," as Judge Wilkinson reasoned in the Fourth Circuit decision.[405]

The sparse case law on this prenatal welfare interest in protecting ex vivo embryos tells us only, however, that to whatever extent that interest applies before implantation, it is weaker than it would become later in prenatal development. The cases that discuss this interest, if only obliquely, say neither how much weaker it is at this early stage nor what explains that comparative weakness.[406] I explained in Part I that what accounts for the growing strength of the state's interest in potential life cannot be the fact of the unborn's potentiality, whether that property is understood as its biological potential to become a person (which is no more or less at any point between conception and birth), or as its proximity to or probability of birth (because the Court has never talked about potentiality in these ways).[407] What more plausibly explains that interest's growing strength, I argued, is some

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carding embryos that substantially interferes with a decision to have or not have offspring would have to meet a higher standard than that of rational basis").

400 Gonzales v. Carhart, 550 U.S. 124, 163 (2007).

401 Roe v. Wade, 410 U.S. 113, 162–63 (1973).

402 *See* Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1266–68 (Ariz. Ct. App. 2005) (discussing developmental biology of human embryo from fertilization to eight weeks gestation).

403 *See generally* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

404 *Id.* at 602.

405 Doe v. Obama, 631 F.3d 157, 160 (4th Cir. 2011).

406 *See supra* notes 400–05 and accompanying text.

407 *See supra* notes 144–47 and accompanying text.

physical or mental capacity or cluster of capacities that the unborn comes to acquire as it develops.[408] One such capacity, whose acquisition the Court has held marks the emergence of the potential-life interest as compelling, is the "point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid."[409]

That the prenatal welfare interest grows gradually after conception in a manner that corresponds to the unborn's acquisition of mental and physical traits suggests that this interest applies weakly to the preservation of the eight-cell embryos from which stem cells are extracted for research.[410] The prenatal welfare interest, because it is legitimate at any point "postconception," would still justify less intrusive interventions, such as the government's refusal to fund practices that destroy embryos, for example, or its promotion of educational campaigns to discourage those practices.[411] But that interest, as it applies to days-old embryos, would not justify laws that restrict a protected right, if any such right were recognized, for example, to conduct scientific experiments, to access medical treatment, or to make decisions about whether to have genetic children.[412] This prenatal welfare interest in preserving the early human embryo carries no greater force when it is invoked outside the constitutional context as a public policy consideration in administrative or private law adjudication.[413]

There is a similarly weak but still legitimate social values interest in regulating embryonic stem cell research. Recall that while prenatal welfare and social values interests very often tend to reinforce one another, state action that aims to preserve unborn life from destruction need not promote respect for the unborn, and vice versa.[414] The "respect" that is owed to "potential life," *Casey* held, is "profound," suggesting a way of valuing such entities that is more than nominal, as with human hair, but less than consummate, as with born persons.[415] The same Tennessee court that found the prenatal welfare interest "at best slight" in preserving "preembryos" explained that "their poten-

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408 *See supra* notes 148–50 and accompanying text.

409 Roe v. Wade, 410 U.S. 113, 160 (1973); *see also* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846, 860 (1992).

410 *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring) (suggesting limited "interest in the protection of an embryo").

411 *Casey*, 505 U.S. at 871–73.

412 *See supra* notes 397–99 and accompanying text.

413 *See supra* notes 41–42, 44–45, 391–93, 403–04 and accompanying text.

414 *See supra* text accompanying notes 187–210.

415 *Casey*, 505 U.S. at 877.

tial [to become actual] human life" nevertheless makes them worthy of "respect greater than that accorded to human tissues" such as blood or hair.[416]

The state could promote this value of respect for the unborn were it to restrict conduct that destroys embryos for trivial purposes like producing cosmetics, for example, or perhaps even for nontrivial but insufficiently worthy purposes like teaching high school biology.[417] This social values interest, while a perfectly valid reason for much government action, is not by itself weighty enough, for the reasons discussed above,[418] to justify the restriction of rights such as, we might imagine, the censorship of otherwise protected artistic expression that involves the destruction of embryos.[419] To be clear, my present point is not that such regulations are valid law or good policy, but only that they would advance the state's social value interest in promoting respect for the unborn. The harder question is whether those regulations also promote the respect that thereby triggers that legitimate social values interest when the restricted conduct would destroy embryos for noble purposes like trying to cure or treat serious diseases and disabilities.[420]

Some scholars argue that the destruction of unused embryos for research is saved from charges of disrespect because they would otherwise likely be destroyed anyway.[421] It is true that languishing in storage facilities across the country are hundreds of thousands of cryopreserved embryos that are no longer needed for their originally intended procreative purposes by the people who created them using their sperm and eggs.[422] That many of these so-called spare embryos are, as a matter of practice, left to perish does not tell us, however, whether that convention erodes moral ideals or cultural attitudes of respect for early human life.[423] The argument that "nothing is lost" because those "spare" embryos are unlikely to be implanted anyway accordingly fails to persuade. For if these embryos were not used for

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416 Davis v. Davis, 842 S.W.2d 588, 596–97, 602 (Tenn. 1992).

417 *See supra* text accompanying notes 190–206.

418 *See supra* text accompanying notes 233–35.

419 *Cf., e.g.*, Martine Powers, *For Senior, Abortion a Medium for Art, Political Discourse*, YALE DAILY NEWS (Apr. 17, 2008), http://yaledailynews.com/blog/2008/04/17/for-senior-abortion-a-medium-for-art-political-discourse/.

420 *See supra* text accompanying note 188.

421 *See, e.g.*, Gene Outka, *The Ethics of Embryonic Stem Cell Research and the Principle of "Nothing is Lost,"* 9 YALE J. HEALTH POL'Y L. & ETHICS 585, 590 (2009).

422 *See* Weiss, *supra* note 387.

423 *See* Dan W. Brock, *Creating Embryos for Use in Stem Cell Research*, 38 J.L. MED. & ETHICS 229, 232 (2010).

research, they could remain "frozen indefinitely" with the chance, however small, of being donated for reproduction.[424] So their destruction, if not at the hands of a stem cell researcher, is not preordained, as this argument presumes, at least not inescapably or imminently so.[425] Nor does the foreseeable likelihood of those embryos' eventual destruction necessarily justify destroying them deliberately now.[426]

The presence and force of this social values interest more plausibly turns on two other factors instead. Whether and how far restrictions on embryonic stem cell research promote respect for early human embryos is a function of the extent to which, first, the therapeutic purpose and, second, the scientific promise of research that would destroy those embryos outweighs the purpose and promise of research that would not.[427] The first question, on this account, is whether the therapeutic purpose of embryo research is: (a) at its most noble, to cure pervasive, debilitating diseases; (b) somewhat less laudably, to treat less acute or common conditions; or (c) simply to enhance the already normal workings of the mind or body.[428] If the therapeutic purpose of that research is suitably worthy, then there is a second prong of this inquiry into whether a stem cell restriction promotes respect for the unborn. This second, scientific promise prong asks the extent to which that research can be achieved, and at what cost, in ways that do not require the destruction of (any, as many, or as developed) embryos. A court charged with reviewing the social values interest that embryonic stem cell research implicates must then, after analyzing its therapeutic purpose and scientific promise, ask whether that interest is strong enough to justify the particular restriction in question.

A final source of concern that opponents of stem cell research sometimes slip in under the guise of potential life is a social effects interest in preventing slippery slopes. I discussed this strain of social effects interest briefly in the context of claims about "partial birth" abortion in *Carhart*.[429] The slippery slope claim in the stem cell con-

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424 *Id.*

425 *See id.*

426 *Cf.* Fox, *Retracing Liberalism*, *supra* note 138, at 174 ("A high rate of infant mortality . . . does not justify infanticide.").

427 *See* Sherley v. Sebelius, 644 F.3d 388, 390 (D.C. Cir. 2011) (recognizing "debate as to which type of stem cell holds more promise of yielding therapeutic applications").

428 For analysis of the distinction between therapy and enhancement, see Fox, *Parental Attention*, *supra* note 380, at 252–55. For a primer on the ethics of enhancement, see Fox, *Safety, Efficacy, and Authenticity*, *supra* note 137, at 1146–53.

429 *See supra* text accompanying notes 257–62.

text posits that permitting practices that destroy early embryos for the worthy purpose of research will lead to their use for reproductive cloning or genetic engineering, or to the exploitation of even more developed unborn life as a raw material.[430] "Violate the blastocyst today," when the early embryo is but a "tiny clump of cells on the head of a pin," warned one member of the President's Council on Bioethics, and that "practice will inure you to violating the fetus or even the infant tomorrow."[431] What we now regard as accept*ed*, we will come to think of as accept*able*, this argument goes, inclining us at a later time to tolerate what we presently regard as intolerable.[432]

Scholars like John Robertson find the "genetic horribles" that stem cell opponents parade under the banner of potential life "highly fanciful."[433] No empirical precedent supports those conjectures, Professor Robertson argues, noting the ease with which we draw lines "in myriad [other] areas of law and policy," for example, and the foreseeably low demand to clone people, given its "high cost, low efficacy, and considerable doubts about safety."[434] Evaluating this social effects interest with the care it requires calls for analysis sensitive to the psychosocial facts relevant to the particular stem cell question in context. A cursory review of that interest here, however, suggests that—like the prenatal welfare and social values interests at stake—it is likely legitimate, though relatively feeble.[435] So these interests could justify less intrusive regulations, but not those that restrict rights.

* * *

Part III has used the context of potential life to illuminate the dangers of interest creep and ways in which to address them. This Part sought to demonstrate, through controversies involving prenatal drug use, selective abortion, and embryonic stem cell research, how courts that underspecify the creeping interest in potential life tend to obfuscate the rationales for their decisions and reach erroneous re-

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430 *See, e.g.*, Leon R. Kass & Daniel Callahan, *Cloning's Big Test: Ban Stand*, NEW REPUBLIC, Aug. 6, 2001, at 10, 12.

431 Charles Krauthammer, *Crossing Lines: A Secular Argument Against Research Cloning*, NEW REPUBLIC, Apr. 29, 2002, at 20, 21–22.

432 *See* John A. Robertson, *Precommitment Issues in Bioethics*, 81 TEX. L. REV. 1849, 1849 (2003) (observing that slippery slope appeals tend to operate as a precommitment device to prevent future decisionmakers from evaluating a controversy's merits differently than we do).

433 John A. Robertson, *Embryo Culture and the "Culture of Life": Constitutional Issues in the Embryonic Stem Cell Debate*, 2006 U. CHI. LEGAL F. 1, 27, 30.

434 *Id.* at 28, 30.

435 *See supra* text accompanying notes 410–20.

sults. Courts can and should resolve disputes like these in sounder ways by displacing hollow references to potential life with more careful attention to the government concerns at stake. This examination of the concerns implicit in those controversies has modeled the kind of state interest analysis that judges should undertake in other potential-life contexts. The three case studies focused on here represent but a fraction of the cases in which the creep of that interest distorts legal reasoning and outcomes. The same conceptual vocabulary of prenatal welfare, postnatal welfare, social values, and social effects can help to settle disagreements that range from, already, prenatal testing torts and conflicts over the disposition of frozen embryos,[436] to, perhaps one day, farther reaching reproductive possibilities involving genetic design or human experimentation.[437] And the broader interpretive methodology that this Article has adopted to disentangle the potential-life interest can be transposed beyond the reproductive context altogether to address the creep of interests in other areas, such as those mentioned only briefly here, like national security, child protection, political anticorruption, and educational diversity.

IV. OBJECTIONS AND REFINEMENTS

This Part presents and refutes the two strongest reasons to resist my proposal to unravel indiscriminate state interests like potential life. The first of these objections is that courts lack the institutional resources to disentangle such ambiguous interests. The flexibility of interests like potential life serve a valuable placeholder function, on this account, by equipping courts to adapt the doctrine over time to the evolving facts and values that tend to emerge from especially dynamic spheres of human life. The second objection is that unpacking the more particular interests at stake would invite cultural friction. When courts weigh in on disputes about which society is deeply divided, the abstraction of national security, child protection, or potential life can mediate social conflict on this account by saving judges from having to pick sides among people's strongly held and sharply opposing moral commitments. I argue in this final Part that neither of these reasons for judges to hedge on the meaning of underspecified

436 For brief discussion of these examples and others, see *supra* notes 40–45 and accompanying text.

437 *See, e.g.*, Henry T. Greely, *The Revolution in Human Genetics: Implications for Human Societies*, 52 S.C. L. REV. 377, 387–88 (2001) (predicting that "[d]esigner babies" and "[f]ree market eugenics" will be a "reality for at least the next generation" and that the engineering of "things that are half human and non-human" will not be far behind).

sources of government concern is sufficient to justify the persistence of interest creep.

A. Institutional Competence

Even those who share my misgivings about interest creep might fear that the alternative would be worse: that having judges try to discern the underlying concerns at stake would degenerate into "ad hoc and plenary judicial second-guessing of legislative policy judgments."[438] Scholars such as William Araiza, for instance, recognize that when courts review "even a non-controversial law," they must "engage in a purpose inquiry," at least to confirm that it is not in fact illegitimate.[439] But even those like Araiza insist that courts narrowly focus such review on empirical questions and, if they struggle to find such facts on their own, simply defer to congressional findings.[440] Courts cannot call for investigative hearings in the way that legislatures can, after all, and they lack the sophisticated fact-finding resources that agencies have at their disposal.[441] Nor do unelected judges have straightforward professional incentives to keep abreast of social mores or be responsive to popular opinion.[442]

This objection that courts lack the institutional competence to disentangle interest creep appreciates that interest creep tends to operate against the background of shifting facts and values that can unsettle the bounds of approved justifications. Underspecified interests might under dynamic or complex circumstances be defended as a kind of placeholder. Judicial deference to those flexible interests permits courts to signify the *presence* of government reasons whose more precise *content* courts thereby reserve space, this argument goes, to "further illumin[ate]" as developments unfold.[443]

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438 Bhagwat, *supra* note 15, at 324.

439 Araiza, *supra* note 248, at 948.

440 *Id.* at 906–09, 926–30. On appellate review of trial court (as opposed to legislative) factfinding in the potential-life context, see *supra* note 267 and accompanying text, and generally, see Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013).

441 *See, e.g.*, Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–87 (2001).

442 *See, e.g.*, Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, 559–60 (2011).

443 Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (denying certiorari so that a novel issue could further percolate in the lower courts before the Supreme Court decides it); *see also* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 177 (1996) (noting that judges tend to confront piecemeal slices of larger controversies and to lack representative backgrounds or philosophical training).

Take the open-ended state interests with which this inquiry began.[444] The adoption of ostensibly expandable interests like national security, for example, could help to adapt legal protections to modern methods of waging war,[445] as could the state's interest in child protection to the new kinds of harms to which minors' access to technology exposes them.[446] In the potential life context too, interest creep might be thought to buy time for judges to work out the government's more particular reasons, as transformations in cultural values and practices, or "technological developments in embryology, genomics, neuroscience, and neonatology . . . [come to] illuminate the normative and legal issues at stake."[447]

The "deferential standard" under which courts review legislative factfinding, even for federal laws enacted by a coordinate branch of government, does not, the Supreme Court wrote in *Gonzales v. Carhart*, require "uncritical deference to Congress' factual findings."[448] The legislature's political legitimacy and institutional wherewithal to find facts does not discharge courts of their "independent constitutional duty," the majority affirmed, "to review factual findings where constitutional rights are at stake."[449] Nor are courts absolved from reviewing the interests that such findings of fact sustain, be these facts empirical or normative.[450]

My examination of the potential-life interests that states assert suggests that the judiciary is equipped to ascertain and assess the government reasons at stake, even when they are disputed or disguised.[451]

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444 *See supra* notes 7–9 and accompanying text.

445 *See, e.g.*, United States v. Ressam, 679 F.3d 1069, 1100 (9th Cir. 2012) (en banc) (Reinhardt, J., concurring) (expressing skepticism "that our government or our citizens have yet determined how to deal with . . . differences" between "our current war with terrorism" and "ordinary wars").

446 *See, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 947 n.3 (3d Cir. 2011) (en banc) (Fisher, J., dissenting) (discussing "cyberbullying" among young students).

447 Robertson, *Abortion and Technology*, *supra* note 335, at 335.

448 Gonzales v. Carhart, 550 U.S. 124, 165–66 (2007) (discussing the possibility of a maternal health exception in the Partial-Birth Abortion Ban Act).

449 *Id.* at 165. *But see id.* at 161–63 (upholding the federal law based in part on Congress's findings, convincingly rejected by the lower court, that the regulated abortion procedure was never medically necessary).

450 *See supra* note 349 and text accompanying notes 200–10.

451 *See, e.g.*, Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 238 (Stephen E. Gottlieb ed., 1993); Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 454–55 (1998); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25–26 (2d ed. 1986) ("Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.").

My analysis showed across several potential-life case studies that judges can readily discern those more particular concerns by applying ordinary interpretive methodologies to statutory text, legislative history, and political context. These methods include analysis of what a regulation does;[452] what the lawmakers who enacted the regulation said about it;[453] the plausibility of alternative ways to account for that regulation;[454] whether its service of the asserted interest looks sincere by reference to measures that appear elsewhere in the broader statutory scheme;[455] and how well that regulation serves the asserted state interest by comparison to less restrictive measures that would also be effective.[456]

Consider the putatively compelling interest in preventing fetal pain that eight states have cast in potential-life terms as justification to prohibit abortion before the stage of fetal viability.[457] My point in the discussion of the example that follows is not that potential-life claims about fetal pain are necessarily invalid or misleading.[458] To focus in this section on the objection about institutional competence, I will refrain from disentangling the more particular concerns at stake in this fetal pain interest, as I did with the cases studies in the previous Part. What I mean instead to demonstrate here is the satisfactory range of interpretive resources available to courts to assess the presence and

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452 *See, e.g.*, *supra* text accompanying notes 394–95 (prenatal welfare interest in the regulation of embryonic stem cell research).

453 *See, e.g.*, *supra* text accompanying notes 347–48 (social effects interest in the regulation of selective abortion).

454 *See, e.g.*, *supra* text accompanying notes 320–25 (illicit status-enforcing purposes in the regulation of drug use during pregnancy).

455 *See, e.g.*, *supra* text accompanying notes 374–76 (social values interest in the regulation of selective abortion).

456 *See, e.g.*, *supra* note 308 (public health measures in the regulation of drug use during pregnancy).

457 *See* ALA. CODE § 26-23B-2 (2013), H.B. 2218; 2012 Ga. Laws Act 631, §§ 1-2; IND. CODE ANN. § 16-34-1-9 (West 2011); KAN. STAT. ANN. § 65-6722 (West 2013); NEB. REV. STAT. ANN. § 28-3,104 (West 2013); OKLA. STAT. ANN. tit. 63, § 1-738.10 (West 2013). The fetal pain laws in Arizona and Idaho were recently struck down for placing an undue burden on the abortion right. *See* Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013) (overturning Arizona statute); McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1149 (D. Idaho 2013) (overturning Idaho statute) ("At the heart of *Casey* is a determination that the State may not rely on its interest in the potential life of the fetus to place a substantial obstacle to abortion before viability in women's paths.").

458 *See* Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15, 44–46 (2008); Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 842 (2012).

strength of interests for which scientific conclusions are not undisputed and technological possibilities are still developing.

Nebraska was the first state to proscribe abortions performed after twenty weeks in ostensible service of "a compelling state interest in protecting the lives of unborn children from the stage at which" lawmakers maintained that "substantial medical evidence indicates that they are capable of feeling pain."[459] The U.S. House of Representatives recently voted to pass a similar Pain-Capable Unborn Child Protection Act that would likewise ban access to abortion after twenty weeks.[460] This potential-life argument about fetal pain had assumed national prominence in the executive and judicial branches long before the recent spate of pre-viability abortion legislation on that basis.[461]

This purported concern for fetal pain has been regarded as the quintessential kind for which judges should bow to the state's declaration of its own interests. Scholars have defended judicial deference to that asserted interest on the ground that "facts regarding fetal pain are best discovered using the processes normally seen as legislative strengths—long investigations, evolving medical evidence, and a building of institutional expertise in a complex area."[462] Most fetal neurology and neonatology "experts agree that the fetus becomes

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459 NEB. REV. STAT. § 28-3, 104(5) (West 2013). For critical evaluation of the Nebraska statute, see generally Cohen & Sayeed, *supra* note 236.

460 H.R. 1797, 113th Cong. (2013).

461 Justice Stevens, writing only for himself, had as early as 1986 tied the state's interest in potential life in part to "the organism's capacity to feel pain." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring). Three years later, Justice Stevens clarified his view of fetal pain's relevance to the state's potential-life interest. Webster v. Reprod. Health Servs., 492 U.S. 490, 560 (1989) (Stevens, J., concurring in part and dissenting in part). Again writing separately, he contended that the state has a valid interest in protecting "from physical pain" "the potential life of" the "developed fetus" but not the "newly fertilized egg," for which "the capacity for such suffering does not yet exist." *Id.* at 569. Justice Stevens was emphatic that whatever interest the state has related to potential life, including any concern for preventing fetal pain, is not compelling before viability. *See id.* at 568 & n.13 (noting that not even the dissenters in *Roe* questioned that "viability" is "the time when the fetus has become a 'person' with legal rights protected by the Constitution"); *cf., e.g.*, Francis X. Clines, *Reagan Appeal on Abortion Is Made to Fundamentalists*, N.Y. TIMES, Jan. 31, 1984, at A16 (quoting President Reagan's claim that "when the lives of the unborn are snuffed out, they often feel pain—pain that is long and agonizing"); Jason DeParle, *Beyond the Legal Right*, WASH. MONTHLY, Apr. 1989, at 28 (discussing Reagan's White House screening of *The Silent Scream*, a film created by splicing together a series of still ultrasound images in a way that purports to show a twelve-week-old fetus recoiling from the instruments used to perform an abortion).

462 *E.g.*, Antony B. Kolenc, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 TEX. REV. L. & POL. 171, 216, 218–19 (2005).

pain-capable" only sometime after it reaches viability, but the claim underlying pre-viability abortion bans that a fetus can feel pain as early as twenty weeks is contested in the medical literature.[463] Even as scientific understandings about fetal pain perception continue to unfold, however, courts have had little trouble intelligibly evaluating this asserted potential-life interest in preventing the infliction of pain to the unborn.[464]

The first court to consider that interest at any length ably analyzed claims about fetal pain capability as neural pathways develop over the course of gestation.[465] This fetal pain inquiry, the district court appreciated, required it to consider not just the biological question of what kind of brain development the unborn needs for it to sense pain,[466] but also the epistemic question of how we know it feels pain,[467] and finally the conceptual question of what pain perception means.[468] For example, "evidence that a fetus of age twenty to

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463 Robertson, *Abortion and Technology*, *supra* note 335, at 368, 389 n.197. *Compare, e.g.*, Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 952 (2005) (concluding that "the capacity for conscious perception of pain can arise only after thalamocortical pathways begin to function . . . [at] around 29 to 30 weeks' gestational age, based on the limited data available"), *with* Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 881, 882, 885 (1999) (relying on evidence of withdrawal reflexes to conclude that fetuses feel pain as early as twenty weeks' gestation).

464 *See, e.g.*, Isaacson v. Horne, 716 F.3d 1213, 1231–32 (9th Cir. 2013) (Kleinfeld, J., concurring); Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980); McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1149–50 (D. Idaho 2013); Women's Med. Prof'l Corp. v. Voinovich, 911 F. Supp. 1051, 1071–72 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997). Glenn Cohen and Sad Sayeed have suggested an alternative way to construe fetal pain statutes as seeking not to prevent fetal pain, but to establish the capacity for such pain sensation as "itself a criterion of constitutional personhood, such that pain-capable fetuses are constitutional persons." Cohen & Sayeed, *supra* note 236, at 240. The Supreme Court has squarely rejected, however, the proposition that the unborn can qualify as constitutional persons. *See supra* notes 116–21, 367 and accompanying text; *see also* Roe v. Wade, 410 U.S. 113, 156, 161–62 (1973) (holding that "the unborn have never been recognized in the law as persons" or "accord[ed] legal rights").

465 *See Women's Med. Prof'l Corp.*, 911 F. Supp. at 1071–72 (observing that the validity of an asserted "state interest in preventing unnecessary cruelty to the human fetus . . . . appears to be an issue of first impression before this, or any, Court" (emphasis removed) (internal quotation marks removed)).

466 *See id.* at 1072 & n.28 (noting that a neurology expert who had "testified that, at the age of twenty to twenty-four weeks, many of the neural pathways which transmit pain to the brain are established, although the cortical projections from the lower level of the brain, the thalamus, are not yet established").

467 *See id.* at 1073 (quoting an expert who testified that conscious feeling "involves perception, designation, locality, and things that are far too speculative for me to assure you that a fetus feels pain").

468 *See id.* (noting physiological, psychological, and behavioral conceptions of pain awareness).

twenty-four weeks will react . . . to noxious stimuli" does not itself prove that it can feel pain, the court determined.[469] Indeed, living organisms are capable of a reflexive response—like the way that a mimosa plant shrinks from touch—even if they lack the nerve receptors required to perceive the subjective experience of pain. The court ultimately held that the state's asserted interest in fetal pain prevention, while presumed "legitimate," was insufficient to override the constitutional right to abortion "[u]ntil medical science advances to a point at which the determination of when a fetus becomes 'conscious' can be made within a reasonable degree of certainty."[470]

Even if medical science were in the future to determine with confidence that fetuses could feel pain prior to viability, that fact would neither settle the constitutional question nor disqualify courts from competently reviewing the asserted interest in preventing fetal pain. At least three grounds enable courts to determine that the state's pain prevention interest would not justify restrictions on abortion. First, the plurality in *Casey* reaffirmed *Roe*'s holding that it is "the attainment of viability" (at however many weeks neonatal technology enables a fetus to survive outside the womb), and not its ability to feel pain, that "continue[s] to serve as the critical fact" in determining when the state's interest in potential life becomes compelling.[471] Second, courts have never held that the state's interest in preventing pain is a compelling one in either the context of cruelty to animals, which like the unborn lack individual rights, or the context of capital punishment, as to persons with constitutional rights of their own.[472] Finally, even if the state's interest in preventing fetal pain were compelling, that interest could be supported in less restrictive ways than banning abortion: for example, "by requiring anesthetization of the fetuses about to be killed," as Judge Kleinfeld noted in a recent Ninth Circuit

469 *Id.* at 1071–73 & n.28.

470 *Id.* at 1072, 1074.

471 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 860 (1992); *see supra* note 113 and accompanying text (describing viability standard). *But see* Cohen & Sayeed, *supra* note 236, at 237 ("Although the Supreme Court has said that the preservation of fetal life becomes compelling only at the viability point, it has not said this can be the state's *only* compelling interest and it has said nothing about fetal pain at all.").

472 *See, e.g.*, United States v. Stevens, 559 U.S. 460, 471–72 (2010) (declining to hold that the government's interest in preventing animal cruelty is sufficient to justify a ban on depictions of animal cruelty); Baze v. Rees, 553 U.S. 35, 47, 50 (2008) (holding that the Eighth Amendment prohibition on cruel and unusual punishment does not forbid state execution practices that inflict the "'unnecessary risk' of pain," but only those that incur a high likelihood of "caus[ing] serious illness and needless suffering").

case, "much as it requires anesthetization of prisoners prior to killing them when the death penalty is carried out."[473]

Again, this discussion of the asserted interest about fetal pain is not meant to prove that it is necessarily illegitimate or too weak to have force. My point, rather, is that even in contexts like fetal pain, in which the facts underlying an asserted interest are contested or emerging, courts are usually competent to evaluate the merits of that interest as it applies in a particular case.

It is of course possible, however, that in certain contexts judges will not be in that usual position to identify or assess the concerns that animate legislative or administrative appeals to an indiscriminate interest.[474] In some cases of interest creep, the record might present either little evidence of a policy's enactment or a factual or moral landscape very different from that in which the asserted interest developed.[475] If a court lacks the evidentiary resources to discern the actual reasons for a disputed policy, it should neither speculate nor blindly accept those that lawmakers assert, but ask them for clarification.[476] For a policy that would not pass constitutional muster if not for the interest whose content the record fails to enlighten, judges should strike the policy down on narrow grounds that would not rule out the possibility that the state could pass it as law again, this time with a stronger explanation of the interests that it advances.[477] Courts may in such cases even include explicit instructions for lawmakers to

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473 Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2013) (Kleinfeld, J., concurring). Judge Kleinfeld here echoes arguments made in Cohen & Sayeed, *supra* note 236, at 239–40.

474 *See generally* Araiza, *supra* note 248, 882–83 (arguing that judicial deference to congressional fact-finding depends on (1) the expertise and authority that congressional acts enjoy as to particular questions of fact, (2) the empirical or normative character of the fact that Congress has found, and (3) the "underlying judicial doctrine that Congress" seeks to implement by finding that fact).

475 *Cf.* Costello v. INS, 376 U.S. 120, 126 (1964) (finding that "such a generalized purpose [of deportation] does little to promote resolution of the specific problem before us, of which there was absolutely no mention in the Committee Reports or other legislative materials").

476 *See* Guido Calabresi, Foreword, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991) ("[W]hen the legislature has acted with haste or hiding in a way that arguably infringes even upon the penumbra of fundamental rights, courts should invalidate the possibly offending law and force the legislature to take a 'second look' with the eyes of the people on it.").

477 *See* Quill v. Vacco, 80 F.3d 716, 738 (2d Cir. 1996) (Calabresi, J., concurring) ("[C]ourts ought not to decide the ultimate validity of [an outdated] law without current and clearly expressed statements, by the people or their elected officials, of the state interests involved."), *rev'd on other grounds*, 521 U.S. 793 (1997).

reenact a policy with more comprehensive fact-finding or clearer articulation of the interests that it is designed to serve.[478]

Judge Calabresi's second-look approach should be reserved for cases in which interpretive evidence is deficient, not because it risks the appearance of undemocratic lawmaking, but because the legislative reconsideration that it invites is easily distorted by enduring coalitions or fragmented compromises. This return mechanism diminishes the acoustic separation between courts and legislatures. To be clear, it does not work like federal abstention doctrine, wherein a federal court puts its consideration of a case on hold while it refers an issue to state courts to clarify state law.[479] Here, courts would invalidate a law altogether, requiring reenactment de novo, to "give [lawmakers] a chance for a better-informed second thought"[480] as to an articulable public interest that "might justify impairment of the freedom."[481] That courts can, when their institutional competence is thin, enlist lawmakers as a backstop to work out the evolving sources of public concern at stake, enervates the placeholder justification for simply abiding the creep of state interests like potential life.

B. Social Conflict Mediation

Interest creep might be deemed a valuable way for courts to accommodate not just evolving facts and circumstances, but also the competing religious and philosophical commitments that tend to accompany matters of public controversy. The underspecified sources of concern that phenomenon empowers—potential life, child protection, national security—can abstract away, this argument goes, from the contentious beliefs that lie at the heart of bitterly contested issues such as abortion, obscenity, campaign finance, and affirmative action. What makes questions like these so fraught is that they tend to implicate strongly held convictions about which a pluralistic society is

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478 *See id.* at 742 (urging interbranch dialogue that "tells the legislatures and executives . . . that if they wish to regulate conduct that, if not protected by our Constitution, is very close to being protected, they must do so clearly and openly").

479 *See, e.g.*, Harrison v. NAACP, 360 U.S. 167, 176 (1959) ("[T]he federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.").

480 *Cf.* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 31 (1957).

481 Abele v. Markle, 342 F. Supp. 800, 811 n.18 (D. Conn. 1972) (Newman, J. concurring), *vacated*, 410 U.S. 951 (1973). Judicial advice-giving aims to facilitate dialogue between judges and policymakers by "refracting issues with judicial insight rather than merely reflecting them back." Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1193 (2000).

deeply divided.[482] Courts that weigh in on such matters risk exerting the imprimatur of the state to disclaim those moral and cultural ideals that individuals regard as inseparable from what makes them the particular people they are.[483] Official repudiation of people's defining identities risks undermining their free moral agency or exciting civic fracture or "backlash."[484]

Interest creep might under such conditions provide courts a way to respect individual autonomy and sustain democratic stability amidst acute differences of opinion.[485] The multiplicity of plausible meanings that those interests assume might save judges from having to take sides on the deeper questions that those disputes presuppose. By distracting attention from such disagreements, vague grounds for disposing of those divisive questions make it easier, on this account, for people of diverse moral persuasions to accept those decisions as valid.[486] It might also be thought that interest creep could enhance a legal decision's credibility to the extent that underspecification helps to build coalitions among judges on a deciding court who disagree about the underlying sources of government concern at stake.[487] Interest creep might for this reason be endorsed, as a matter of principled compromise or pragmatic strategy, for its promise to help encourage "would-be dissenter[s] . . . to go along with a disfavored result if a disfavored rationale is avoided."[488]

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482 *See* Fox, *Retracing Liberalism*, *supra* note 138, at 170–71 (discussing democratic pluralism and liberal neutrality).

483 *See, e.g.*, STEPHEN HOLMES, *Gag Rules or the Politics of Omission*, *in* PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 202, 217 (1995) (arguing that citizens can be expected to submit to majority rule only if "assured that 'ultimate values'—the things they care about most—will not be dragged through the mud of contestation").

484 Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 477 (2005) (arguing that certain cases "produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over 'outside interference' or 'judicial activism,' and they alter the order in which social change would otherwise have occurred").

485 *Cf.* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 776–77 (1997) (arguing that pluralistic societies can minimize the political threat of instability and illiberality by governing according to principles that form an "overlapping consensus" of "reasonable comprehensive doctrines").

486 *See* Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 19 (1989) (arguing that the principle of "conversational restraint" does not "require people to say things they believe are false" but only "to repress their desire to say many things which they believe are true").

487 Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388 (1995) ("The first potential source of institutional legitimacy—or, if absent, a potential source of diminished legitimacy—is unanimity or near unanimity in judicial opinions.").

488 Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1379 (1995).

Consider how this conflict mediation defense of interest creep might apply in the context of potential life. Disputes about how to treat human embryos and fetuses are frequently a site of contestation about the proper relationship between men and women, parents and children, individuals and government, humans and nature.[489] Would judges be forced to wade into such conflicts if they were to forego bland potential-life appeals to resolve reproductive controversies by reference to the more particular sources of concern at stake? Declining to recognize any prenatal welfare interest in favor of an exclusively postnatal welfare one, for example, by affirming the total absence of government concern for human life before birth, sends a clear message to people who believe that life starts at conception that "[*y*]*our* metaphysics are not part of *our* constitution."[490] On the other hand, embracing the kind of fetal personhood interests that *Roe* rejected would, in matters involving pregnancy, "collapse[ ]" the competing conviction and equal protection mandate that a woman should be free to determine whether to avoid motherhood.[491]

Courts can muffle such conflicts, this argument goes, by embracing an anodyne potential-life rationale that takes no obvious sides on questions about fetal status or family roles. Packaging decisions about reproductive controversies in the murky rhetoric of potential life allows people who hold opposing views about the intractable questions that those controversies presuppose to find common ground, on this account, in the principle that the unborn is worthy of government concern, even as it lacks legally protectable interests of its own.[492] For those in the pro-life camp, that interest furnishes a constitutional foothold for protection of "*at least* potential life."[493] To those of a pro-choice persuasion, recognition of "*only* the potentiality of life"[494] means declining to afford embryos or fetuses individual interests that frustrate a woman's right "to determine her life's course, and thus to

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489 *See* Stenberg v. Carhart, 530 U.S. 914, 920–21 (2000) (recognizing that citizens hold "virtually irreconcilable" beliefs about questions such as when "life begins").

490 GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 95–96 (1985) (internal quotation marks omitted).

491 *Cf.* Roe v. Wade, 410 U.S. 113, 156–57 (1973) (saying nothing about whether abortion regulations impermissibly stereotype women's biological or social role to bear and rear children in asserting that were "the fetus [ ] a 'person[ ]' within the language and meaning of the Fourteenth Amendment," then the case for a woman's right to abortion "collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment").

492 *See supra* Part II.A.

493 *Roe*, 410 U.S. at 150 (emphasis added and removed).

494 *Id.* at 162 (emphasis added).

enjoy equal citizenship stature."[495] The versatility of the potential-life interest thus appears to facilitate judicial decisionmaking that implicates the question of "when life begins" without having to "speculate,"[496] at least in explicit terms, about the relative merits of conflicting beliefs that citizens "cannot abandon."[497]

Where this argument goes wrong is in thinking it possible to resolve disputes about those controversial practices without having to choose among rival worldviews. Such choices are in fact unavoidable in prenatal-welfare cases involving the destruction of human embryos or fetuses that regulation would save. To affirm a policy that restricts embryonic stem cell research, for example, whatever the rationale for that restriction, risks imposing deeply personal convictions about unborn personhood on those who do not accept them.[498] Yet striking down such a ban, I have explained elsewhere,

> requires denying, at least implicitly, that embryos have the same moral value as human persons. For if an embryo were, morally speaking, no different from a child—and stem cell research were therefore tantamount to removing vital organs from infants—then . . . [not even] the [worthy] interest of scientists in conducting research, nor that of patients in being restored to health [ ] could outweigh the competing interest of persons, *qua* embryos, in not being killed.[499]

Employing an underspecified interest like potential life to gloss over such reasons will do little to appease those whose deeply held views a judicial decision fails to vindicate. What reason is there to think that people who believe that stem cell research or abortion "is akin to causing the death of an innocent child" will be consoled by judicial appeal to a rudderless interest in potential life that, whatever else can be said for it, does not stop the destruction of embryos and fetuses?[500] Why should those who believe that bans on those practices jeopardize cures for suffering patients or "condemn . . . women to lives that lack dignity" find any greater solace in the underspecification of a potential-life rationale?[501]

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495 Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

496 *Roe*, 410 U.S. at 159.

497 *Cf.* Guido Calabresi, Bakke *as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 429 (1979) (arguing that where a clear-cut decision in either direction would conflict with a deeply held social value, it can be better to "fudge" than to reject one of those deeply held values).

498 Fox, *Retracing Liberalism*, *supra* note 138, at 173.

499 *Id.*

500 Stenberg v. Carhart, 530 U.S. 914, 920 (2000).

501 *Id.*

It is of course prudent for courts to reason in ways that mitigate social fracture when doing so does not pose overriding costs. Judges must take seriously the threat of exciting resistance among those whose convictions their judgment subordinates. And they should care that those subject to their rulings are made to feel respected as members of the community rather than ridiculed as outsiders. Justice Stevens was for this reason right to make plain, in his separate opinion in *Casey*, that "[m]any of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is intolerable."[502] Indeed, judicial authority depends on the confidence of citizens to accept legal decisions as legitimate. It is not implausible that drawing rival values into public view may by raising the stakes of those disagreements tend to deter compromise or openness to persuasion.

But it is mistake to overstate the promise of interest creep to achieve social peace among judges on a court or citizens in a society. "[T]here is little, if any, evidence to suggest that" the kind of "judicial sincerity" that attends the careful articulation of state interests "would undermine the strength of precedent and create confusion about the meaning of majority or plurality opinions."[503] Nor is there reason to think that exploiting interest creep to paper over cultural dissensus will promote civic cooperation or stave off violence in the streets. The risk that disentangling the more particular state interests at stake will incite conflict is too negligible to warrant the obfuscation of those interests.[504] So long as citizens "remain committed to a common constitutional enterprise," as Robert Post and Reva Siegel underscore, even pitched battles are routinely channeled through litigation, legislation, political campaigns, and nomination hearings.[505] "Refus[ing]" to address these underlying sources of concern or to "enforce a constitutional right" for the sake of showing deference to "those who might be offended" by its safeguard amounts to a "covert judgment" that adjudicative norms of clear reasongiving, no more than the "relevant con-

502 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 914–15 (1992) (Stevens, J., concurring in part and dissenting in part).

503 Schwartzman *supra* note 83, at 1022.

504 *Cf.* Fox, *Retracing Liberalism*, *supra* note 138, at 180 (arguing that "moral inquiry should be brought back into politics as a live issue open for public reflection and deliberation" in areas such as biotechnology and also including "flag burning, same-sex marriage, [and] physician-assisted suicide").

505 Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 427 (2007).

stitutional value[s]," are "insufficiently important to merit judicial protection."[506]

Having judges fight out in dueling opinions the disagreements that they cannot reasonably avoid about matters of sex, race, nature, faith, and family of course offers no guarantee that society will come any closer to accord or acquire greater appreciation for those views with which they disagree.[507] Nor is there value in using the power of law gratuitously to disaffect those whose beliefs are sufficiently far afield of the cultural mainstream that they have no plausible sway.[508] But judicial discourse nevertheless has the power, as I have explained in a different context, to "set the terms on which we understand ourselves and relate to others."[509] Casual reliance on underspecified interests like potential life, national security, or child protection frustrates a constructive struggle about how best to make sense of the various plausible but distinct concerns that those shibboleths are invoked to capture over time and across contexts.[510] Interest creep erodes adjudicative norms by impeding the capacity of litigants, judges, advocates, lawmakers, and citizens "to debate and to criticize the true reasons for [judicial] decisions."[511] And the judgments that trade on those equivocations risk impairing sound adjudication.[512]

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506 *Id.* at 426.

507 *See* Fox, *Retracing Liberalism*, *supra* note 138, at 173.

508 *See* Kahan, *supra* note 106, at 492.

509 *Cf.* Fox, *Racial Classification*, *supra* note 268, at 1867.

510 *Cf.* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993) (describing ideological drift as the phenomenon in which the political valence of an abstract idea changes as groups compete to interpret the idea or the values underlying it).

511 Shapiro, *supra* note 84, at 738; *see supra* Part I.B.1.

512 *See supra* Part I.B.2. There remains a practical question that legal scholarship tends to neglect about how the ideas that academics develop in "law review commentary" acquire authority "[i]n the absence of judicial precedent." Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 307 (2000). Institutional and other forces press lawmakers, administrators, and judges, at least in lower courts, to abide interest creep, for example, and thus to perpetuate its distortionary effects. *See, e.g.*, *supra* text accompanying notes 16, 151, 443–47, and 483–88. So how might this new way of thinking in the law reasonably be expected to disrupt the settled doctrine that this phenomenon disfigures?

There are a number of mechanisms by which dislodging the creep of underspecified interests might make its way out of law journals and into judicial opinions. An article might make its way into the hands of a deciding judge who finds himself convinced of its utility in approaching a case at bar. *See* Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 Nw. U. L. REV. 995, 1021 n.73 (2012). I am dubious that judges are very often influenced in this direct way by academic commentary that they learn of through their own research, for example, or from talking with law clerks or attending conferences.

A more credible point of entry for legal scholarship into the adversarial process is through the parties, their counsel, and other advocates. Lawyers or amici may adopt a conceptual frame-

CONCLUSION

Interest creep has surface appeal. It invites courts to recycle flexible government reasons that seem capable of accommodating competing values and adapting to evolving circumstances. But this promise belies its deficiencies. Uncritical reliance on underspecified state interests deprives litigants of the clear explanation to which they are entitled; deprives lower courts of the needed guidance to resolve disputes in consistent ways; and deprives advocates and citizens of grounds for judgment with which to engage.

In the forty years since *Roe* canonized the state's interest in potential life, that interest has crept steadily outward to consume four distinct kinds of government reasons to intervene in matters involving reproduction and research. In cases ranging from fetal pain, prenatal drug use, and IVF torts to selective abortion, personhood laws, and embryonic stem cell research, the state's ostensible uniform interest in potential life eclipses variously applicable and weighty concerns about prenatal welfare, postnatal welfare, social values, and social effects. These distinct sources of concern require evaluation on their own terms, not least in order to determine whether they are capable of doing the work for which they are enlisted under the watchword of potential life.

I developed this conceptual framework in Part II and applied it in Part III to tease apart and analyze the interests at stake in the context of potential life. This analysis provides a paradigm for how advocates, scholars, or others might seek to disentangle similarly underspecified interests in, for example, national security, child protection, political

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work that they find helpful in arguing before a court or writing a brief that the judges and their law clerks do read. The judge who, through these intermediaries, is convinced to cite or implement this new perspective or vocabulary in a written opinion may influence other judges too, perhaps one day enough to change the doctrine. Perhaps most plausible is that law professors influence through their writings and teaching among their students who go on to become judges. *See, e.g.*, Adam J. White, *The Burkean Justice: Samuel Alito's Understanding of Community and Tradition Distinguishes Him from His Supreme Court Colleagues*, WKLY. STANDARD, July 18, 2011 (discussing Alexander Bickel's influence on the judicial opinions of Justice Alito).

Prominent examples of the impact that scholarship can have on doctrine include the privacy tort introduced in a late-nineteenth century article by Louis Brandeis and Samuel Warren, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219 (1890), and the sexual harassment cause of action that Catherine MacKinnon's work more recently advanced and legitimized. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 174–80 (1979). I am not in a position here to evaluate the conditions under or dynamics through which scholarly arguments such as these have come to be manifested in the law. But the possibility of that influence is not so remote to debilitate academic efforts to dislocate the troubling tendencies that the doctrine entrenches.

anticorruption, and educational diversity.[513] The reasons advanced in Part I for why courts should displace interest creep, like the objections considered in Part IV, might of course apply differently in these other areas than they do in the potential-life context of human reproduction and research. Future studies into these other candidates for interest creep would make worthy contributions to our understanding of the phenomenon.[514] The unraveling of interest creep may in these areas as with potential life expose contradictions in the usage and application of government reasons at the same time that it illuminates the rich complexity of reasons that find expression in the law.

513 *See, e.g.*, *supra* text accompanying notes 8–9, 18–29, and 87–102.

514 Accentuating the ripeness of these further inquiries for exploration are the recent Supreme Court cases that have uncritically gestured toward those other interests in contexts as diverse as antiterrorism measures, *see, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2735 (2010), television censorship, *see, e.g.*, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2312 (2012), and independent expenditures, *see, e.g.*, Am. Traditional P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012).