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**ABORTION ACCESS IN AN ERA OF
CONSTITUTIONAL INFIDELITY**

Boston University School of Law Public Law Paper No. 13-57
93 B.U. L. Rev. 1297 (2013)

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ABORTION ACCESS IN AN ERA OF CONSTITUTIONAL INFIDELITY

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INTRODUCTION

Abner Greene’s *Against Obligation*¹ and Louis Michael Seidman’s *On Constitutional Disobedience*² offer provocative, subversive, and frequently convincing arguments against wholesale fidelity to the Constitution. Greene makes the case that individuals, at times, have no duty to obey the Constitution as it has been interpreted and articulates a methodology for how the government should accommodate these legitimate acts of disobedience. Seidman, however, makes the case that we should abandon the “pernicious myth” that we are obligated to obey the Constitution at all.³ He argues that if the fiction of constitutional obedience was jettisoned altogether, the national discourse about the issues that divide us – like the legality of gun ownership, affirmative action, and same-sex marriage – would concern the merits of various approaches to governmental regulation of the issues.⁴ The discourse would not hover around the question of whether a particular governmental regulation comports with the mandates of the Constitution. The latter, existing discourse is useless and frequently counterproductive, according to Seidman, as it stymies “the open-ended and unfettered dialogue that is the hallmark of a free society.”⁵

This Essay asks a simple, but important, question: What will happen to abortion access in an era of constitutional infidelity? Will women continue to be able to terminate unwanted pregnancies if there is no obligation to follow

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¹ ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

² LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

³ *Id.* at 9.

⁴ *See id.*

⁵ *Id.* at 10.

the dictates of the Constitution? How one answers the question may determine whether Greene's and Seidman's visions of constitutional defiance should be advocated, pursued, and implemented. That is, if one believes that governments should not be able to compromise a woman's ability to undergo an abortion procedure – even if a majority of citizens believe that no woman (or only some women, in certain circumstances) should be able to have an abortion – then one may find Greene's and Seidman's proposals unattractive. And quite terrifying.

At the outset, I should note that many argue that, with respect to abortion rights, we already live in an era of constitutional infidelity. That is, many critics of the right to abortion assert that there is nothing in the Constitution that so much as implies that it is illegitimate for governments to regulate, and even proscribe, abortion.⁶ The Court in *Roe v. Wade*⁷ was just making stuff up, they say.⁸ Accordingly, every time that a federal court strikes down an abortion regulation as an infringement on an individual's constitutional right to an abortion, it is not an act of obedience to the Constitution, but rather an act of *disobedience* to the Constitution insofar as the document allows states to reasonably regulate society, with the exception of a few choice areas that, through the Bill of Rights, have been exempted from this general maxim.⁹

⁶ For a well-known example of the argument that the abortion right has no textual base in the Constitution and is not otherwise implied by the Constitution, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973) (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure.” (citation omitted)).

⁷ 410 U.S. 113 (1973).

⁸ *Roe* famously, or perhaps infamously, located the abortion right in a general right of privacy, the existence of which was not explicitly established by constitutional text, but rather was suggested by precedents that protected individuals against governmental intervention in various “private” aspects of an individual's life. *See id.* at 152-53 (citing various cases for the proposition that there exists a “right of privacy” that protects activities “relating to marriage, procreation, contraception, family relationships, and child rearing and education” (citations omitted)). Critics argue not only that the Constitution does not provide for a “right of privacy,” Bruce Fein, *Griswold v. Connecticut: Wayward Decision-Making in the Supreme Court*, 16 OHIO N.U. L. REV. 551, 554-55 (1989) (describing the reasoning in *Griswold* as “utterly incomprehensible” and discussing other legal theories independent of creating a constitutional right to privacy that would have accomplished the same result), but that even if the Constitution does offer some protection against governmental regulation of individuals' private lives, access to abortion does not logically fall within the umbrella of that protection, *see, e.g., Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) (“I have difficulty in concluding, as the Court does, that the right of ‘privacy’ is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as *Roe*. A transaction resulting in an operation such as this is not ‘private’ in the ordinary usage of that word.”).

⁹ *See Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting) (arguing that rational basis review

Moreover, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰ which affirmed the “central holding” of *Roe*,¹¹ did little better than *Roe* in the way of convincing naysayers that the Constitution provides for an individual abortion right.¹² Instead of plumbing the depths of constitutional text or endeavoring to divine the Framers’ original meaning or intent in using the phrase “due process of law,” *Casey* fretted over *stare decisis*.¹³ It is not unfair to argue that the Court seemed more concerned with what would happen to the perception of the Court’s legitimacy if it overturned *Roe* than with whether *Roe* was correctly decided in the first place.¹⁴

Nevertheless, at present, we have an abortion right that, by hook or crook, enjoys some level of constitutional protection.¹⁵ As a result, women have

is the proper test for determining whether a law regulating abortion is constitutional and, as such, stating that courts need only ask the question they ask with respect to all “social and economic legislation” – that is, whether the law “has a rational relation to a valid state objective”).

¹⁰ 505 U.S. 833 (1992).

¹¹ *Id.* at 879.

¹² See, e.g., Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 106 (2005) (“Had the plurality treated seriously some of the other ‘prudential and pragmatic’ questions it enumerated, however, they would have had an ample basis for overruling *Roe* [when deciding *Casey*].”).

¹³ *Casey*, 505 U.S. at 854-61 (discussing whether *Roe* should be upheld under the principle of *stare decisis*).

¹⁴ *Id.* at 869 (“A decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*’s original decision, and we do so today.”). Interestingly, Seidman cites the doctrine of *stare decisis* as proof that we already live in an era of constitutional infidelity:

In the vast majority of these opinions [in which the Court analyzes whether a prior case should be upheld under the principle of *stare decisis*], the justices spend little or no effort examining constitutional text and history. Instead, the justices parse their own prior decisions. They do so because it is usually these decisions, rather than the Constitution itself, that will determine the outcome of the case.

SEIDMAN, *supra* note 2, at 85.

¹⁵ I describe the abortion right as having “some level” of constitutional protection because it is unclear where the undue burden standard falls within the tiers of strict scrutiny, intermediate review, and rational basis review. When the abortion right was first articulated in *Roe*, it was clear that the Court conceived of it as a fundamental right. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). Moreover, consistent with its approach to fundamental rights, the Court explained that courts should use strict scrutiny when reviewing abortion regulations and uphold such laws only if the state articulated a compelling interest supporting the regulation. See *id.* at 163 (finding that “[w]ith respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester” and that “[w]ith respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at

access to legal abortion, and those adult women¹⁶ with the ability to pay¹⁷ can terminate an unwanted pregnancy before viability. The question, then, is: What if we accepted Seidman's and Greene's arguments that we really do not have a duty to obey the Constitution? Would women still be able to terminate pregnancies that they no longer wish to carry?

I. SEIDMAN-STYLE CONSTITUTIONAL DISOBEDIENCE

In the current era of constitutional obedience, a state law prohibiting abortions would likely face immediate challenge, and a court would review the law in order to determine its constitutionality. In an era of Seidman-style

viability"). The trimester framework was the result of different state interests becoming compelling at different times during pregnancy.

Casey, however, replaced the trimester framework with the undue burden standard. *See Casey*, 505 U.S. at 876 (stating that the undue burden standard was the test that courts should use going forward when reviewing abortion regulations). One thing that is crystal clear about the test is that it is not strict scrutiny. *Id.* at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). The question, then, is whether the undue burden standard is closer to intermediate scrutiny or whether it is no more than a gussied-up rational basis review. *See* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 881, 917 (1994) (explaining that the *Casey* plurality's use of the undue burden standard amounted to rational basis review and highlighting similarities in the Court's language when applying the undue burden or rational basis standards in other types of cases); Laura J. Tepich, *Gonzales v. Carhart: The Partial Termination of the Right to Choose*, 63 U. MIAMI L. REV. 339, 382 (2008) (stating that the *Carhart* Court actually used rational basis review while claiming to use the undue burden standard). It is worth noting that if, as some argue, the undue burden test is just a species of rational basis review, then the abortion right is no more of a "right" than our "right" to enter into a contract with our employers. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (using rational basis review to uphold a law that interfered with the ability of parties to contract).

¹⁶ *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515-17 (1990) (holding that requiring minors to prove they are mature and informed before being allowed to obtain an abortion does not violate their due process rights and that parental consent requirements for abortions are constitutional as long as there is a judicial bypass procedure); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 494 (1983) (upholding parental consent requirements for minors seeking an abortion); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (holding that states may implement parental consent requirements for minors seeking abortions so long as there is an alternate procedure through which the minor may also obtain consent if the parents disagree).

¹⁷ *See Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding the funding restrictions placed on abortions by the Hyde Amendment and holding that a state is not obligated to pay for abortions that are not funded due to these restrictions, even if the abortions are medically necessary); *Maher v. Roe*, 432 U.S. 464, 465-66 (1977) (holding that a state's participation in the Medicaid program does not obligate that state to fund non-medically necessary abortions).

constitutional disobedience, however, it is unclear what would happen if the same law was passed and its legality was challenged. This uncertainty results from the fact that, in an era of Seidman-style constitutional disobedience, *Marbury v. Madison*¹⁸ would not necessarily be binding precedent and, as a consequence, it would be an open question whether courts would retain the power of judicial review.¹⁹ Seidman does not conjecture an answer about the status of judicial review in an era of constitutional disobedience:

In the absence of constitutional obligation, the decision whether to have judicial review of this sort would, itself, be grounded in extra-constitutional considerations. I have no idea how the struggle over the Court's functions would ultimately be resolved, but at least the argument would be an honest one about what the Court actually does and what is actually at stake.²⁰

Accordingly, it is possible that these “extra-constitutional considerations” would lead to the eradication of judicial review. If so, the hypothetical state law prohibiting abortion would not be subject to challenge in the courts. Perhaps a new mechanism would be erected by which Congress, the President, or an administrative agency would have the power to review a state law and strike it down if appropriate. Perhaps no mechanism of review would be erected, and it would be impossible for an external body to review a state law once it has been enacted; only a majority of voters could remove a problematic law – by voting to have it repealed.

It is also imaginable that “extra-constitutional considerations” would lead to the maintenance of judicial review. The people could decide that it was in their best interest that “an elite, deliberative, and reason-giving body should have a check on the political branches.”²¹ Importantly, the people would make the decision to give courts the power to check the political branches with the knowledge that these courts were not interpreting the Constitution, but rather were decreeing the legality or illegality of laws based on other “extra-constitutional considerations.”

And what would these “extra-constitutional considerations” be? Frighteningly, they could be anything. Seidman explains:

Courts exercising this review would presumably resort to some sort of more general principles to decide the cases before them. Perhaps the judges would begin with a presumption favoring individual liberty or, alternatively, with a presumption favoring democratic decision making. Perhaps they would resort to Kantian or utilitarian theories. Perhaps they would even refer to biblical teachings.²²

¹⁸ 5 U.S. (1 Cranch) 137 (1803).

¹⁹ *See id.* at 173-80.

²⁰ SEIDMAN, *supra* note 2, at 129.

²¹ *Id.*

²² *Id.* at 130.

Those who are fond of abortion rights may find unappetizing a system in which a woman's ability to determine whether or not she will become a mother – and thus, her ability to determine the trajectory of her life – turns on a court that may be guided by biblical teachings. Also unappetizing, but probably less so, is a system in which a woman's access to abortion depends on a court that favors democratic decisionmaking; those who are fond of abortion rights characterize access to abortion as a right precisely because doing so removes the question of abortion access from democratic decisionmaking.²³ Furthermore, it is not obvious that abortion rights would fare much better when contingent on a court that favors Kant, Bentham, or some undefined and open-ended notion of individual liberty. And, of course, this problem of “extra-constitutional considerations” that would determine the legality or illegality of abortion laws is not unique to courts and judicial review; it is also present if the power to review laws resides in Congress, in the executive branch, or with the voters in a jurisdiction.

Seidman argues that this system – one in which the propriety of all laws, including abortion regulations, is determined by extra-constitutional considerations of all varieties – is preferable to the current system, in which the propriety of laws is determined by resort to constitutional argumentation. He bases this preference in something he calls “contestability theory,” or the tendency of a system moored in extra-constitutional considerations to keep political dialogue going.²⁴ Simply stated, when a person argues that the hypothetical abortion prohibition is good law because it is consistent with biblical teachings, another will argue that it is bad law because it is inconsistent with a theory of individual liberty. When this naysayer makes his point, another will then pipe up and contend that, according to an alternate theory of individual liberty, the abortion prohibition is actually *good* law. At which point, another will join the dialogue and make the case that the abortion prohibition is *bad* law because it is inconsistent with Kantian ethics. In Seidman's view, the conversation would continue until the propriety of abortion access is settled:

Precisely because we all have a stake in maintaining a political community, our disputes are likely to be resolved one way or the other. Ultimately, our willingness to reach resolution depends upon our capacity

²³ Notably, Seidman doubts that abortion rights in the current era of constitutional fidelity actually remove the question of abortion access from democratic decisionmaking. He argues that the contours of the abortion right as fashioned by the Court closely follow the majority's opinions about when and for whom abortion should be available. *See id.* at 33 (“In some of the circumstances where majorities do not favor the [abortion] right – for example, in cases of poor women who seek state-funded abortions, young women who want abortions without the consent of their parents, or women who need late-term abortion procedures – the Court has restricted the right.”).

²⁴ *Id.* at 136-37.

for compromise, for transcending self-interest for the benefit of the common good, and for empathic connection to our political opponents.²⁵

Those who favor abortion rights might find this scenario unappealing. For those who believe that abortion access is a tool that a woman must wield in order for her to determine her life course and the quality thereof, a system in which the availability of this tool hinges on a national conversation is unpalatable. Essentially, proponents of abortion rights do not trust political dialogue to lead to the “right” answer to the question of whether a woman should carry the pregnancy to term; instead, they trust *women* to arrive at their own, personal right answer to the question of whether they should carry a pregnancy to term.²⁶

II. GREENE-STYLE CONSTITUTIONAL NONOBLIGATION

Unlike Seidman, Greene does not advocate throwing established precedent, and the Constitution generally, out the window. Rather, he offers a theory of the Constitution that requires the accommodation of those who would prefer to live their lives in a way that is inconsistent with the way the majority would have them live.

It becomes obvious fairly quickly, however, that Greene’s proposal, if followed, would have the practical effect of throwing out established precedent as it relates to abortion rights. Greene argues that no one, including state and local officials, is obliged to follow the Court’s interpretation of the Constitution.²⁷ Thus, although the Court in *Roe* interpreted the Constitution to provide a woman with the right to terminate an unwanted pregnancy, and although the Court affirmed that decision in *Casey*, all manner of governmental actors can disagree with that interpretation. Accordingly, within Greene’s proposal, it is legitimate for an official or lawmaking body to pass a law prohibiting abortions in a jurisdiction as long as it argues that its own independent review of the Constitution, contrary to the Court’s review of the document, revealed it as containing no prohibition on the law at issue.²⁸ The

²⁵ *Id.* at 138.

²⁶ It is possible that even in the current era of constitutional obedience, judges are relying on these “extra-constitutional considerations” when they determine the constitutionality of abortion regulations. That is, when the majority in *Roe* looked to precedent, found a right to privacy, and determined that this right was broad enough to encompass the abortion decision, it may have been motivated by extra-constitutional considerations such as utilitarianism or some notion of individual liberty. Similarly, when Justice Rehnquist argued in his dissent that the Constitution did not contain a fundamental right to privacy, he may have been motivated by extra-constitutional considerations like biblical teachings or Kantian ethics. Thus, the “pernicious myth” of constitutional obligation forces the obfuscation of the actual motivations behind decisions.

²⁷ GREENE, *supra* note 1, at 239-47.

²⁸ Greene writes that officials should take into consideration a number of factors when deciding whether to follow the Court’s interpretation of the Constitution. *See id.* at 223-28

Court retains the power to strike down the prohibition, of course, understanding the law as an “interpretive challenge.”²⁹ Greene writes that such laws would “awaken the Court to its fallibility and, according to the strength of the challenge, lead the Court to be more (or less) willing to reexamine its doctrine.”³⁰

There should be no doubt that, if Greene’s proposal were accepted, the Court would face “interpretive challenges” to *Roe* and *Casey* often – perhaps every term.³¹ Even if the Court reaffirmed the decisions subsequent to every challenge, however, it would be hard to describe the state of affairs as one in which women’s abortion rights were protected. Once the abortion prohibition

(arguing that officials should consider coordination and stability among officials, the level of consensus within the Court, factors distinguishing cases, the persuasiveness of the Court’s reasoning, generational participation in debating the issues, and officials’ positional duties). Interestingly, many of the considerations that he itemizes do not support a fidelity to the Court’s abortion precedent. He asserts that officials ought to obey precedent if disobeying it means upsetting an established regulatory structure, *id.* at 223; disobeying *Roe* and *Casey*, however, does not threaten governmental stability. He further conjectures:

Perhaps an official should adhere to constitutional principle announced by a 9-0 Court vote more readily than she should a 5-4 one, and perhaps she should be more apt to follow an opinion quickly adhered to across the country than one to which popular (and official) resistance has been present from issuance.

Id. at 223-24. The fact that *Casey* managed to garner only a plurality of Justices, coupled with the fact that *Roe* was hardly “quickly adhered to across the country,” suggests that an official need not find themselves tethered to the opinions.

Greene also asserts that an official might not disobey an opinion that he finds persuasive. *Id.* at 224 (“In deciding whether to challenge Court precedent, government officials should consider the soundness of the Court’s reasoning in the relevant case(s), as judged by standard interpretive norms.”). Suffice it to say that an official who believes that abortion is a religious or moral wrong would probably not find his or her hands stayed by the soundness of the Court’s reasoning in either *Roe* or *Casey*.

²⁹ *Id.* at 248.

³⁰ *Id.*

³¹ There are political groups whose entire purpose is to see the Court overturn *Roe*. See, e.g., *Why End Roe*, ENDROE.ORG, <http://www.endroe.org/home.aspx> (last visited May 16, 2013). Legal scholars who support the anti-choice movement take issue with the *Roe* Court’s constitutional interpretation. See, e.g., Clarke D. Forsythe, *A Legal Strategy to Overturn Roe v. Wade After Webster: Some Lessons from Lincoln*, 1991 BYU L. REV. 519, 531-34 (arguing that *Roe* overlooks an unborn child’s constitutional right to life); Raymond B. Marcin, *God’s Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of Roe*, 25 J. CONTEMP. HEALTH L. & POL’Y 38, 38-39 (2008) (arguing that the Court should overturn *Roe* using anti-choice reasoning because that approach is stronger than a federalism-based strategy). There are even those who support a woman’s right to choose whether to end her pregnancy, but who disagree with the reasoning in *Roe*. See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198-1200 (1992) (asserting that, had the Court simply based its striking down of abortion restrictions in *Roe* on theories of equal protection, the decision would not have been subjected to extreme controversy and criticism to the extent that it has been).

passed, women in a jurisdiction would be without abortion access until the law was challenged and the Court granted certiorari, heard the case, and issued its decision.³² Abortion rights advocates would hardly find this alternate state of affairs preferable to the current one.

But, perhaps Greene's proposal would be more attractive to abortion rights proponents if we imagine an alternate world in which *Roe* and *Casey* have been overturned³³ and a jurisdiction has passed a law prohibiting abortions altogether or limiting access to them to a small number of circumstances. In this world, Greene would allow individual women to seek exemptions from the regulation through the judiciary.³⁴ In order to be exempted from the law, a woman would have to claim that the law's application to her would burden the exercise of her religion or force her to violate a deeply held "comprehensive view"³⁵ founded in some other normative authority, whether it be "philosophical, cultural, family-based, etc."³⁶ Should the woman make a prima facie showing for an exemption to the abortion ban, the government could resist granting the exemption by showing that it has a compelling state interest in enforcing the ban despite the woman's normative convictions.³⁷

Greene's proposal is attractive insofar as it allows for the possibility of women accessing abortion should *Roe* and *Casey* be overturned. The likelihood of women *actually* accessing abortion, however, would be frighteningly low; moreover, the burdens that they would have to face in order

³² Of course, challengers could seek a temporary injunction of the law while the case wended its way to the Court. Lower courts, however – which, like state and local officials in Greene's proposal, do not have an obligation to follow Court precedent – would determine whether or not to enjoin the law. Just as it is not unrealistic to believe that states would challenge *Roe* and *Casey* if released from the yoke of obedience to Court precedent, it is not unrealistic to believe that many lower courts would choose not to enjoin abortion prohibitions.

³³ It is worth noting that Greene does not advocate fidelity to *Roe* and *Casey* as a matter of course, simply because they are precedent and women have relied on the decisions. See GREENE, *supra* note 1, at 192 ("[I]f *Roe* and *Casey* were wrongly decided, that the government could now protect fetal life and women might no longer have access to legal abortions would be a correct state of affairs, and the resulting systemic costs would be acceptable ones. If *Roe* and *Casey* are to be maintained, it should be on the merits, not because they are extant precedent."). *But see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

³⁴ See GREENE, *supra* note 1, at 116.

³⁵ *Id.* at 129.

³⁶ *Id.* at 117.

³⁷ See *id.* at 118.

to gain that access would be exceedingly high. To begin, individual women would have to plead for exemptions to judges on a case-by-case basis.³⁸ Judges, then, would determine whether they believe the woman when she says that being compelled to abide by the abortion prohibition – that is, being compelled to bear a child – would violate some religious or other normative conviction.³⁹ It may suffice to say that it is hard to imagine that many women would be successful in convincing anyone that a religious or normative conviction would be burdened by carrying a pregnancy to term. Moreover, even if judges believed that such a conviction existed, they would have the latitude to decide that, although the conviction might be violated by the abortion ban, the conviction is not central to the woman or the violation is not substantial.⁴⁰ The scenario is eerily reminiscent of the pre-*Roe* era, when women had to plead for abortions from panels of doctors who were empowered to determine whether her abortion was actually “medically necessary.”⁴¹ Simply put, forcing a woman to try to convince someone that an abortion is in her best interests demeans her and denies her decisionmaking capacity.⁴²

Even if a woman convinced a judge of her sincerity and made a *prima facie* case for an exemption, a state could argue that it has a compelling interest in nevertheless applying the law to the woman. Greene does not offer a theory of how courts should determine whether or not the state’s asserted interest is compelling. Thus, if his proposal were to be accepted, judges would experience the same problems they do now with respect to deciding whether an interest is weighty enough to justify infringing an individual liberty.⁴³ Demonstrating the enduring nature of this problem, Greene uses an example of religious observers who would like to engage in the ritual slaughter of animals

³⁸ *Id.* at 130-32 (describing the requirement of “case-by-case judicial balancing”).

³⁹ *Id.* at 129-30 (observing that courts may justifiably inquire into the sincerity of the belief of a person asking for an exemption to a law).

⁴⁰ *Id.* at 130-31 (stating that “there’s no reason . . . that centrality should not be part of the inquiry into the nature and significance of the burden” and that courts should “inquire into whether there’s a substantial burden” on the individual’s norms).

⁴¹ *Roe v. Wade*, 410 U.S. 113, 138-40 (1973).

⁴² *See id.* at 153 (explaining physical and psychological harms that may befall a woman if she is not allowed to choose whether or not to end her pregnancy).

⁴³ *See* Jed Rubenfeld, *On the Legal Status of the Proposition That “Life Begins at Conception,”* 43 STAN. L. REV. 599, 603-04 (1991) (“On the whole, however, the compelling state interest doctrine remains an unstructured balancing test in which our constitutional guarantees may always give way to *raisons d’état*.”); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987) (arguing that Justice Blackmun’s defense in *Roe* of viability as the point at which the state’s interest in protecting fetal life becomes compelling “is a definition of viability, not an explanation of value”); Ely, *supra* note 6, at 924 (“Exactly why [viability] is the magic moment is not made clear [T]he Court’s defense seems to mistake a definition for a syllogism.”).

and who seek an exemption from a law requiring that all animals be stunned prior to their killing.⁴⁴ Should the state's interest in protecting animals from cruelty – and from dying unnecessarily painful deaths – trump the religious observers' interest in practicing their religion in the manner they believe it ought to be practiced? He writes: "The case involving animal slaughter is harder because we have to determine how to assess the interest in animal welfare [T]here is a legitimate debate about the extent to which we must consider animal welfare on a par with human welfare."⁴⁵ He ultimately suggests that the state's interest in animal welfare is not compelling and that the exemption should be granted:

Exempting ritual slaughter from the stunning rules is a plausible way of finding a middle ground between two claims of right – the claim on behalf of the animals and the claim from religious truth. For those of us who aren't sure about either claim (in part because we're neither non-human animals nor devout Jews or Muslims), the rule-plus-exemption approach makes sense.⁴⁶

But, what about fetuses? Just as "we have to determine how to assess the interest in animal welfare" in Greene's example, a judge would have to determine how to assess the interest in fetal welfare. And just as "there is a legitimate debate about the extent to which we must consider animal welfare on a par with human welfare," there is a legitimate debate about the extent to which we must consider fetal welfare on a par with the welfare of human beings capable of living independently of and externally to another human being. Perhaps the difference between the example of animal slaughter and the issue of abortion is that, while advocates of animal rights might admit that there is some ambiguity to their claim as compared to the claim of religious observers, advocates of fetal rights tend to express absolute conviction that fetal interests should in most, if not all, cases trump the interests of women bearing unwanted pregnancies. Moreover, the reverse is true of advocates of women's reproductive rights. Thus, the likelihood that opponents and supporters of abortion would agree to a "middle ground" – in which there is a rule prohibiting abortion, but exemptions are allowed for individual women who make convincing arguments about their need to have their normative convictions honored – is low.

CONCLUSION

Seidman concludes his analysis with the observation that perhaps the illusion of obligation to the Constitution is necessary to keep the country from spiraling into anarchy; perhaps it is necessary to keep the country united.⁴⁷ He

⁴⁴ GREENE, *supra* note 1, at 127.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ SEIDMAN, *supra* note 2, at 143.

hopes not, however, writing: “We cannot know for sure until we give constitutional disobedience a try. And that is reason enough to make the effort.”⁴⁸ But, as the above analysis reveals, an era of constitutional infidelity would likely substantially reduce the level of abortion access that adult women with the ability to pay enjoy in our present era of constitutional fidelity. For those who believe that abortion access is paramount in ensuring that women are able to participate in society as equals, the fact that constitutional infidelity may render this access impossible may be reason enough to resist giving it a try.

⁴⁸ *Id.*