The correct answer is indicated in red. In addition, sometimes I have added comments (also in red) to the incorrect answers.

1. Most of the individual rights protected by the Constitution of the United States are protected only against governmental and not against private interference.

   a. True. See the discussion in the original handout materials.
   b. False

2. Herbert Wechsler argued that Brown v. Board of Education was wrongly decided because it was not based on a neutral principle.

   a. True
   b. False. Wechsler objected to the Court’s subsequent use of Brown as extending beyond the school context without a principled explanation.

3. Amsterdam and Wechsler take diametrically opposed positions; Wechsler argues that constitutional decisions should be based on “neutral principles,” while Amsterdam argues that neutral principles are impossible and not worth striving for.

   a. True
   b. False. Amsterdam does believe that institutional factors make it frequently difficult and sometimes impossible for the Court to settle on an appropriately principled argument, but he does not dispute that such an opinion is the proper objective.

4. Wechsler’s argument for neutral principles is more consistent with the view that the meaning of the Constitution must be derived by the courts over time than it is with the view that the constitution’s meaning was fixed when each provision was adopted.
a. True. If the meaning was fixed when the constitution was adopted, the question would not be one of “neutral principles” but rather the historical question what was intended.

b. False

5. The Chase-Iredell debate was settled (in Iredell’s favor, and against natural law principles) by *Marbury v. Madison*’s emphasis on a written constitution as the basis of the power of judicial review.

a. True

b. False. *Marbury*’s emphasis on the written nature of the constitution as a reason for judicial review may well be more consistent with Iredell’s view, but two centuries of history have made plain that the debate was not “settled” in 1803.

6. The Court in *McCulloch v. Maryland* held that

a. Congress could charter the Bank of the United States because the Commerce Clause gave it power to manage the national economy. No; the Court didn’t find any “power to manage the national economy” in the Commerce Clause.

b. Congress could charter the Bank of the United States because the Constitution by implication gives the government the means to obtain constitutionally legitimate ends. This is, I think, the best reading of *McCulloch* (which merely notes that the Necessary and Proper Clause did not diminish the powers of Congress).

c. Congress could charter the Bank of the United States, but only because the Necessary and Proper Clause enlarges the powers of Congress. This is a common, modern reading but for the reason given above is not, I think, the actual basis of the opinion. Note that this answer was mistakenly labeled “b” (a second “b”) on the exam as distributed.

d. Congress lacked power to charter the Bank of the United States. If you thought this, you got the case backwards. The Court held Congress did have the power to charter the bank.

7. *McCulloch v. Maryland* takes the position that the meaning of the Constitution is to be determined over time.

a. True. Look at the language around “it is a constitution that we are expounding.” The Court’s argument that the details could not have been comprehended by any human mind must mean that some of those details are to be worked out over time.
8. In *Gibbons v. Ogden*, Gibbons was found to have been engaged in commerce among the several states because his boat was steaming between New York and New Jersey. However, if the boat’s route was Albany (New York) to New York (New York) to New Jersey, the Court likely would have held that only that portion of the journey between New York (New York) and New Jersey was commerce among the several states.
   
   a. True
   
   b. False. Note the Court’s emphasis on the breadth of the commerce clause.

9. As the law was understood during the first decades of the 20th Century, Congress under the Commerce Clause
   
   a. Could not regulate manufacturing because manufacturing only “indirectly” affected commerce among the several states.
   
   b. Could not regulate manufacturing because manufacturing did not substantially affect “Commerce … among the several States”.
   
   c. Could regulate manufacturing if the business was “affected with a public interest.” No. It’s true that the Court had suggested that the due process clause meant that government (state or federal) could not regulate business that were not “affected with a public interest,” a position not abandoned until *Nebbia*, but even a business affected with a public interest could not be regulated by Congress under the Commerce Clause unless it either was CATSS or directly affected CATSS.
   
   d. Could regulate most manufacturing because, in the aggregate, most manufacturing substantially affected “Commerce … among the several States”.

10. *Hammer v. Dagenhart*
   
   a. Is not in good odor these days, but has never been overruled.
   
   b. Was overruled in *United States v. Darby*.
   
   c. Is still good law in cases where an Act of Congress regulating the interstate movement of goods was passed with the intention of inhibiting the local production or use of these goods.
11. If Congress today passed a statute forbidding racial discrimination in video rental stores,

   a. The statute would probably be held constitutional under either the Thirteenth Amendment or the Commerce Clause. As to the Thirteenth Amendment, see Jones v. Alfred H. Mayer. As to the Commerce Clause, see Katzenbach v. McClung.

   b. The statute would probably be held constitutional, but only under the Fourteenth Amendment. No; no state action.

   c. The statute would probably be held constitutional, but only under the Privileges or Immunities Clause of the Fourteenth Amendment.

   d. The statute would probably be held beyond the power of Congress.


   a. Still cannot discriminate among its customers on the basis of race, because it is engaged in an economic activity. This is probably the best current understanding of the line drawn by Lopez and Morrison.

   b. Still cannot discriminate among its customers on the basis of race, because even if Congress lacks power to enact the statute under the Commerce Clause, it can enact it under the Thirteenth Amendment. This is also true, see Jones v. Alfred H. Mayer.

   c. Both of the above. So this is the best answer.

   d. Neither of the above.

13. In Hamilton’s view, the power of Congress to spend money was not limited to the purposes specified in the Constitution, and the Supreme Court has adopted this view.

   a. True. See the discussion in Butler. (By the way, this was also George Washington’s view, opposed by Jefferson and Madison.)

   b. False

14. Most but not all States make forcible rape of one’s spouse a crime. Among the States that do make it a crime, the precise definitions and possible sentences vary considerably. Congress would like to make the definition and punishment of forcible spousal rape uniform throughout the United States. Which of the following Acts of Congress would most likely be held constitutional?
a. An act setting forth a “model spousal rape statute,” and providing that States which adopted this statute would receive a $2 million annual appropriation for rape counseling programs. This is almost certainly okay; see the Social Security cases (*Helvering v. Davis*).

b. An act setting forth a “model spousal rape statute,” and providing that States which did not adopt the statute within one year would have their federal highway funds reduced by 10%. This might be okay under *South Carolina v. Dole*, but it’s starting to push the case fairly far. Note that in *Dole* the requirement was related to highway safety; this isn’t.

c. An act defining and punishing spousal rape as a federal crime, and providing that state laws to the contrary were invalid. Almost surely no good under *Morrison*.

d. None of the proposed statutes has a significant possibility of being held constitutional.

15. The Privileges and Immunities Clause of Article IV

a. provides a major source of congressional power to protect individual rights against infringement by private parties. *Nope; it could have been read that way, but it hasn’t.*

b. is the major source of constitutional protection for the rights of aliens against infringement by state governments. *Nope; only protects citizens.*

c. was substantially read out of the Constitution by the Court in the *Slaughterhouse Cases*. *Nope, that’s the 14th Amendment clause.*

d. has been interpreted, in substance, as a kind of “little equal protection clause” protecting citizens of one State who are temporarily in another.

16. The Court’s present position on the application of the Bill of Rights (Amendments 1-8) against the States is

a. Anything forbidden to the federal government by the Bill of Rights is also forbidden to the States.

b. The Bill of Rights may or may not restrict the States; decision whether or not it does is made on an Amendment-by-Amendment basis.

c. The Bill of Rights may or may not restrict the States; decision whether or not it does is made on a clause-by-clause basis.
d. The Bill of Rights does not restrict the States.

17. A state law forbidding the use of cell phones by a person operating a motor vehicle, justified as improving highway safety, would be constitutional under the Due Process Clause of the Fourteenth Amendment

   a. If and only if the State could persuade the reviewing court that the law was necessary to reduce highway accidents; *Nope. If, but not “only if”*. See *Carolene Products*.

   b. If and only if the State could persuade the reviewing court that the law would probably reduce highway accidents more than other restrictions, such as reducing the speed limits or forbidding drivers to eat while driving. *Nope; no general requirement that a statute be the most efficient way to the end sought*, see e.g. *Williams v. Lee Optical*.

   c. If the State could persuade the reviewing court that a reasonable person could think that the law would reduce highway accidents. *Yup. Carolene Products*.

   d. virtually no matter what, since driving is a privilege not a right.

18. A state law provides that any person (other than a physician in the course of good medical practice) who provides cocaine to any other person shall be imprisoned for five years, but shall be imprisoned for ten years if the person to whom the cocaine was provided was pregnant. Sarah has been convicted and sentenced to ten years in jail for providing cocaine to her pregnant daughter Carol. She wants to challenge the statute as violating the due process and equal protection clauses. *Because I mistakenly left in my notes, and because the presence of the notes arguably made any answer correct, I gave credit for any answer to this question. The best answer, however, was “d”.*

   a. Sarah’s due process claim will fail because she has no fundamental liberty interest in giving people cocaine, and she will not have standing to raise her daughter’s right to receive cocaine. *No, she will have standing under Griswold*.

   b. Sarah’s due process claim will probably succeed because the statute violated her fundamental right to raise her child as she sees fit. *No, the cases don’t go this far*.

   c. Sarah’s equal protection claim may well win because the statute involves sex discrimination and so the distinction in the statute will need to have an exceedingly strong justification. *Not under Geduldig*.
d. Sarah’s equal protection claim will probably lose because the statutory distinction between providing cocaine to pregnant women and providing cocaine to others will be judged under the rational basis standard.

19. State law punishes the possession of marijuana by anyone but allows the possession of alcoholic beverages (by adults). The strongest argument that this statutory scheme is unconstitutional is

   a. Equal protection: there is no rational basis for prohibiting marijuana but not alcoholic beverages. All of the arguments are weak, but I think this is the strongest.
   
   b. Equal protection: there is no rational basis for allowing adults but not children to possess alcoholic beverages.
   
   c. Due process: there is no rational basis for prohibiting the possession of marijuana.
   
   d. All of the arguments have a substantial chance of prevailing and there is no strong basis for saying that one is more likely to succeed than another.

20. Which of the following classifications have been held “suspect” or “quasi-suspect” so that a state statute using the classification is subject to more than rational basis review under the Equal Protection Clause:

   a. The mentally retarded. No, see *Heller v. Doe*.
   
   b. Small businesses.
   
   c. Poor people.
   
   d. None of the above.

21. The Allegheny School of Social Graces, whose founder and sole faculty member is a woman named Marcella Reinhart, offers courses in sex education. For $1000, Marcella will spend four hours in private with a student and engage in (almost any) sexual acts the student desires. Marcella has been convicted under a Montana law forbidding prostitution for engaging in ordinary, heterosexual sex (for $1000) with a police undercover agent.

   a. Marcia’s conviction will be reversed because under *Lawrence v. Texas* one has a constitutional right to engage in sex in private. It’s quite possible (though not certain) that *Lawrence* will be understood to bar statutes making fornication in general a crime, but *Lawrence* does not
Examination continued on next page
b. If you could make that showing, the town would still have at least a theoretical chance of avoiding strict scrutiny. Yes; they could show that they would have enacted the ordinance even if they hadn’t been thinking of race.

c. If you could make that showing, the ordinance would be subject to strict scrutiny (which it probably couldn’t survive).

d. If you could make that showing, nothing more would be needed to render the ordinance unconstitutional since *Yick Wo* forbids racial motives.

24. Which of the following *Lochner*-era cases is probably good law today?

a. *Adair v. United States*

b. *Muller v. Oregon*

c. *Hammer v. Dagenhart*

d. All of these cases are probably good law today.

e. None of these cases is probably good law today. *Muller* is the closest, but its holding that the State could provide greater protections for women in manufacturing jobs would almost surely fall under sex discrimination principles. *Hammer* was overruled in *United States v. Darby*, and *Adair* likewise can’t survive *Darby*.

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**Part Two**

In recent years, a significant number of women have served as “host mothers,” women who authorize the implantation in themselves of the fertilized egg of another woman, with the intention of giving birth to a child who will be raised by someone else. A few states have sought to regulate the practice by specific laws; others have no statutes directed at the practice, and legal issues that have arisen (ranging from the validity of contracts through child custody) have been dealt with by courts with no specific legislative guidance. As a general rule, the cost of harvesting eggs, performing in vitro fertilization, and implanting them in the host mother ranges from about $15,000 to $35,000. These costs are generally not covered by insurance.

Marcia Auerbach is a Member of Congress from Minnesota who thinks that the federal government should regulate the practice of host mothering. She has, in the main, four concerns. First, she wants to
prevent what she views as the potential exploitation of poor women. Second, she wants to assure that the child born to the host mother is as healthy as can be and will be well provided for after its birth. Third, she wants to allocate decisionmaking responsibility for the abortion decision and the method of birth between the host mother and the people for whom she is bearing the child. In pursuit of these goals, she has drafted a proposed statute to provide for federal regulation along the lines she wants. You are one of her aides; she wants your judgment on the constitutionality of some of the parts of the statute.

The law defines a “host mother” as a woman who agrees to bear a child, produced from the egg of a person other than the host mother, with the intention that the child will be raised by a person other than the host mother; or by a couple not including the host mother; or by more than two people not including the host mother. Thus the law does not cover a woman who bears a baby intending to raise it herself or with others, no matter how the child was conceived. It also does not cover a woman who, has become pregnant from one of her own eggs, and who agrees before birth that the child will be adopted by someone else.

The law defines the “birth parents” as the people on whose behalf the child is born. As more fully explained below, the birth parents must be precisely two people; a single person cannot serve as a birth parent, nor can more than two people serve as birth parents.

The law prohibits the practice of host mothering except as provided in the law. All host mothering must be carried out pursuant to a form contract that is contained in the statute.

**Payment.** The host mother must be paid $30,000 by the birth parents for her services, and all of her medical expenses incident to the pregnancy, if not covered by insurance, must be paid by the birth parents. The fee and payment of medical expenses cannot be waived, and the fee may neither be increased nor decreased except that, if the host mother lives in a state different from the birth parents, the birth parents may pay for the host mother to come live with them and pay her living expenses during the pregnancy and until she has physically recovered from the birth.

**Limitations on host mothers.** No person may serve as a host mother if that person is (a) under the age of eighteen or over the age of fifty at the time the embryo is implanted. No person may serve as a host mother who has not, within six months of implantation, passed a physical examination designed to assure that the person does not suffer from any disease which is likely to endanger the implanted embryo, or make the pregnancy dangerous to the host mother. No person may serve as a host mother who has not, within six months of implantation, passed a physical examination designed to assure that the person does not suffer from any disease which is likely to endanger the implanted embryo, or make the pregnancy dangerous to the host mother.
mother who is in jail or prison, on probation, or on parole, at the time of entering into the contract or implantation of the embryo.

**Activities during pregnancy.** The form contract provides that commencing one day before implantation, the host mother may not consume any amount of alcohol, any illegal drugs, and any drug from a list (assume the list is a sensible one) of drugs that may endanger the embryo. If necessary the birth parents may obtain a court order, including in the discretion of the district court an order of confinement in an institution, to assure that the host mother complies with these restrictions. Should it become necessary, in order to preserve the life or health of the host mother, she may under medical advice take one of the drugs on the list, but she must inform the birth parents.

**Abortion and birth.** The host mother is entitled to obtain an abortion at any time if it is medically necessary to protect her life or health. She is required to agree, in the contract, that she will not have an abortion for any other reason, except that she also agrees that she will have an abortion any time before the 24th week of pregnancy if both of the birth parents desire that she have the abortion and it can be performed without substantial risk to the host mother’s life or health. The host mother makes the final determination whether the birth will be by ordinary or extraordinary (e.g. caesarian section) methods, but the birth parents may insist that delivery take place in a hospital. Once the child (or children, if more than one) is born, notwithstanding any contrary provision of state law it shall be legally the child of the birth parents, regardless of their sex, and the host mother shall have no legally protected relationship with the child.

**Limitations on birth parents.** The birth parents must be two and only two people. If male and female, they must be married at the time of entering into the contract and certify, under penalty of perjury, that they intend to remain married until the child dies or attains the age of 18. If both male or both female, they may not be related to each other within the degree of relationship that would constitute incest, and neither may be married to another person. Both must certify, under penalty of perjury, that they intend to remain as a couple, and not marry anyone else, until the child dies or attains the age of 18. In all cases both birth parents must accept full legal and financial responsibility for the child. The birth parents may not be less than 18 years of age at the time of entering into the contract, and may not be more than 60 years of age at the time of entering into the contract.

Representative Auerbach has three questions for you. She wants you to assume that, under the Commerce Clause, Congress has affirmative constitutional power to enact her proposed statute. She is, however,
quite concerned with possible individual rights problems with the statute. She wants you to write her a memorandum answering four questions – assuming the statute is enacted and found to be within the power of Congress under the Commerce Clause, assuming that constitutional challenges are made to its various parts, and assuming the Supreme Court agrees to review those challenges:

1. Would the Supreme Court hold that the payment provisions violate the Constitution of the United States?

2. Would Supreme Court hold that the provisions regarding abortion and birth violate the Constitution of the United States?

3. Would Supreme Court hold that the limitations on birth parents violate the Constitution of the United States?

[Note that someone else is working on questions regarding activities during pregnancy and limitations on who can be a host mother; you are not to deal with those issues.]

END OF THE EXAMINATION

Comments. Raw scores on these three questions ranged from 60 to 96, with scores in the 80s most common.

In general, I tried to give more weight to what you did say than what you didn’t, so although missing (or at least failing to talk about) an issue, though it didn’t help you, wasn’t disastrous if you were good about what you did write on. This I hope made the exam a little less a test of issue-spotting than sometimes. Likewise, although this is an Act of Congress and the relevant questions are therefore under the Due Process Clause of the Fifth Amendment, I didn’t subtract points if you talked exclusively about the Due Process and Equal Protection Clauses of the Fourteenth Amendment. That was a blunder, but not one with relevant consequences so I let it go (though it certainly didn’t help you). I didn’t give formal credit for the occasional witty remark, but I did enjoy them (and they helped my mood). Clear writing and good organization were pluses.

I was a little surprised at the number of people who misread one or another aspect of the statute (or the question) – perhaps most often, the number of people who thought that the statute required birth parents to stay together, instead of just requiring them to swear that this was their present intention. This may be related to the fact that many people
suffered from new hammer syndrome (“To the man with a new hammer, the whole world looks like a nail”) and so tended to assume the statute must be unconstitutional and read it however you had to read it to reach that result. Many of you, probably most, were better at coming up with arguments to support your conclusions than at anticipating the arguments that would be made on the other side. This is something you want to work on throughout your time at law school. Be sure you don’t talk only with people who agree with you. Finally, a lot of you seemed to think something very much like, “If I think this is a bad law, then there’s no rational basis for it.”

Three things are (I think) key to a first-rate analysis of the provisions. First, although obviously they have something to do with reproduction, and many of the provisions impose an obstacle or even make it impossible for some people to hire a host mother, whether or not the consequence would be more than rational basis scrutiny is something that has to be examined not assumed. Second, nobody’s forced to be a host mother and the host mother has entered into a contract, so there’s at least a question whether her relevant constitutional rights have been validly waived. Finally, the statute appears to take the position that for many purposes the “parents” in question are the birth parents, and the woman actually bearing the child isn’t. Whether government can constitutionally do this (and whether it makes a difference) are obviously major questions.

Overall, I think the payment provisions would almost certainly be upheld by the Supreme Court, and the limitations on who can be a birth parent very probably would be. The birth provisions would likely also pass constitutional muster (perhaps not in some extreme circumstances), but the provisions on abortion are highly questionable. They might, however, survive.

I include some notes below. I wouldn’t expect that anyone would say all this in the course of an exam, but the A answers touched on the major issues for each question.

**Question 1.** The payment provisions set a minimum and maximum fee for the services of a host mother – $30,000. You weren’t told what the norm is (you were told that the cost of obtaining and fertilizing eggs and implanting them in the host mother ranges from $15,000 to $35,000). It turns out, although I didn’t know it at the time and of course you have no reason to have known it, that presently the going rate for the host mother’s services is about $20,000.

The Court would almost certainly uphold these provisions against a general due process attack. Minimum wage legislation has been common
for more than half a century, and since *West Coast Hotel v. Parrish* in 1937, routinely upheld by the courts. In fact the Court has not struck down economic regulatory legislation on due process grounds since 1937. The law also prohibits charging *more* than $30,000 for the service, and admittedly we don’t have any cases in which the Court has upheld maximum prices for services but maximum price regulations in general have been upheld since *Munn v. Illinois* (1876; maximum prices for grain storage), at least so long as they were “reasonable,” and $30,000 for the service in question can’t seriously be attacked as unreasonably low. Of course one can fairly debate whether a woman who’d rather not be a host mother is “exploited” if she gives in to the temptation of a higher offer, but if the matter is debatable its resolution is for the legislature. *Ferguson v. Skrupa.*

What about a couple, otherwise unable to produce a child, offering to show that they could afford, say, $10,000 (and they have a woman willing to serve for that), but no more – or, perhaps less attractively, the couple alleging that nobody will bear their child for $30,000 but someone will for $100,000? The argument, of course, would be that the fee limitation denies them their “right to procreate” and is therefore either unconstitutional or constitutional only if justified under strict scrutiny, which this statute likely wouldn’t survive.

The argument is perhaps appealing but unlikely to succeed. Although the Court has talked about a “right to procreate,” it has protected it only where (as in *Skinner*) the threat was one of forced sterilization or a complete ban on marriage. On the other hand, in *Eisenstadt* the Court noted without apparent objection that Massachusetts forbade fornication, and in *Zablocki* both emphasized that in Wisconsin marriage was the *only* way legally to have children, and noted that only “significant” restraints on marriage would be subject to strict scrutiny. Compare *Michael M. v. Superior Court* (state has a “compelling” interest in preventing teenage pregnancy). Here the restriction is only on one particular (and quite novel; it was unknown two generations ago) method of reproduction; it’s not a complete ban; and it’s not likely to affect the truly poor, who can’t afford the other expenses of the procedure and often couldn’t afford to raise a child in any event.

Moreover, the Court has recently shown considerable deference to legislatures regarding new medical technologies. See *Cruzan*; compare *Washington v. Glucksberg*. Perhaps the Court would build on prior law and find this one beyond the constitutional pale (if it did, it’s hard for me to see how it could avoid also striking down laws forbidding human cloning), and some excellent answers argued it would. But I think it unlikely.
Abortion and birth provisions. In essence, what this part of the law tries to do is separate decisions about abortion and birth into two parts – one part dealing with the host mother’s life or health, and the other part dealing with the fetus – and leave the first set of decisions with the host mother while giving the second set to the birth parents. The abortion provisions are the most troubling.

It’s plain as a pikestaff that, unless there’s something special about this situation, the rule that the host mother can have a non-health abortion only with the birth parents’ consent violates Casey (it’s an a fortiori case of spousal notification, struck down there) as an “undue burden.” The only question is whether there’s a difference because (a) in this case the fetus is not genetically the host mother’s (and may well be, genetically, the birth parents’) and (b) the host mother consented to the limitation, and therefore arguably waived her right to a not-life-or-health abortion.

Neither of these issues was involved in any of the prior cases, although arguably the rejection of a spousal consent or even notification (Casey) rejects any idea that the right to abortion is “waived” by marriage. But marriage vows don’t contain an explicit waiver and in any event the issue wasn’t pushed in the prior cases. Should the waiver argument make a difference? There are no cases clearly in point, and plausible analogies are hard to come by.

In addition, the fetus in question was provided by the birth parents and is to be raised by them; in many, probably most cases it is partly or entirely their genetic material. Insofar as Roe rested (and its language certainly emphasizes) on the desire not to rear the child as a reason to find a right to abortion, that element is absent from the present statute — the child, under the statute, is the birth parents’. On the other hand, this emphasis was absent from Casey, which seems to center more on the woman’s desire not to be pregnant.

The case could come out either way. On the one hand, it is the host mother’s body, and she is the one to bear the strains and pains of pregnancy. On the other hand, nobody forced her to sign the contract and start the process, and the birth parents (who could probably have gone elsewhere) may never have another chance, for instance if the fetus is from the last of their fertilized eggs. It’s hard to explain to them why “their baby,” as they may well understandably think of it, should be aborted because the host has changed her mind. (But that’s also true for husbands, who in the ordinary case have no enforceable right.)

What about the compelled abortion? Presumably the reason is to allow birth parents to abort a defective fetus, although as worded the statute
would allow them to act for any reason (for instance, if they changed their mind). So far as I know no state has ever sought to compel a woman to have an abortion, and though the Court’s cases on compelled medical treatment are weak (Cruzan accepts arguendo the notion that there is something like a fundamental right to refuse treatment, but adds that there are lots of cases where it can be overridden; and other cases have upheld forced treatment in some cases, such as forced vaccination) it’s extremely rare that we force treatment on someone when the public health isn’t implicated. Simply to say that the host mother can refuse the abortion but must then take responsibility for the child is a neat but not satisfying solution, much as adoption is unsatisfactory for women who don’t mind pregnancy but don’t want to give birth to a defective and possibly suffering child even if they don’t have to pay for it. I think the Court would be less likely to uphold this provision than the waiver of abortion, but it’s unknowable until the question is actually decided.

The rest is easier. Almost surely under current law the pregnant woman has the right to choose the manner of delivery, and the statute wouldn’t change that; it’s hard to see whose right would be infringed by this (the fetus is not a constitutional “person” until born). Allowing the birth parents to insist on delivery in a hospital is a relatively trivial restriction on the host mother’s rights, and one that government could probably require in general (note in Roe the Court said that second-trimester abortions could be regulated as to place for safety purposes). If the case is otherwise close, the waiver argument should make it an easy one. Finally, even a traditional parent with fully protected parental rights can give a child up for adoption. That the agreement is made before the child is born may make it unusual but it’s hard to see why a legislature can’t constitutionally validate such a process. (So far as I know, some state legislatures have but only for the fathers.)

**Restrictions on birth parents.** Current law in general is that only two people can formally have parental rights (*Michael H.; Troxel*) and it’s hard to see how a constitutional argument can be made that this is improper. (Note that nothing prevents the legal parents from bringing other people into their “family;” the others just don’t have formal legal control and obligations.) What about singles? The law clearly tries to assure that every child has two responsible parents. As a matter of legal responsibility, the illegitimacy cases seem to suggest that every child is entitled to two.

But what about the single person who argues that he, or she, has a constitutional right to have and raise a child alone? It’s certainly true that a lot of people do; in fact most, perhaps all, states allow single
parents to adopt\(^1\) but must government allow this? Note that this is *not* a matter of forcing people to live together after the child is born, simply a matter of requiring couples to say that’s their present intent. And it applies only to this novel, unique method of reproduction.

On its face, this looks very much like a requirement of marriage (and the classic wedding vow, Britney Spears notwithstanding, is to remain together “until death do us part”). See the discussion above of the Court’s apparent acceptance of marriage as the only lawful forum for childbearing in *Zablocki*, and the acceptance of laws barring unmarried sex in *Eisenstadt*. As above, *if* there is a fundamental right to reproduce outside of marriage, and *if* that right includes not only the ordinary methods but also this one, and *if* the right is significantly impeded by the couples requirement, then the statute would be strictly scrutinized and probably not pass muster.

Straight couples are required to marry to take advantage of the procedure. Assuming that the right to marry includes the right not to, which it surely does,\(^2\) is that pressure unconstitutional? It’s doubtful; the whole reason for the Court’s finding a “fundamental right” to marry is because married couples are given a host of benefits not available to singles. If distinctions between married couples and singles are generally unconstitutional because they might pressure people who want the benefits into marriage, then it’s hard to see the point of *Loving* and *Zablocki*. Gay couples can’t marry in most states, so not requiring them to do what they can’t do hardly violates equal protection. (Conceivably a straight couple in a State where gays can marry would have a claim of a denial of equal protection, though I doubt it would prevail; this is a far claim from the anti-gay statute of *Romer v. Evans*).

**Age.** The younger age restrictions are almost surely constitutional (compare *Michael M.*, where the court accepted a “compelling interest” in preventing teenage pregnancy). The older limit might not satisfy strict scrutiny, but the fact that some older people might make great parents doesn’t mean that there’s no rational basis for the rule. See *Williamson v. Lee Optical* (needless, wasteful requirement okay); *Ferguson v. Skrupa* (can ban all nonlawyers from debt adjusting though doubtless some

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\(^1\) They didn’t always, and I’m told that in many cases single parents are limited, in fact if not necessarily in law, to “special needs” children or others difficult to place, with easy to place children going to couples. Single men have a particularly hard time finding children to adopt.

\(^2\) At least one pre-Revolutionary colony provided that the consequences of fornication were marriage, but outside of that the American tradition of shotgun weddings has been a private not a governmental matter.
nonlawyers are fine); *Railway Express* (ban on all non-owner ads on vehicles).

**Incest.** The bases for anti-incest rules in general are rarely examined by courts, but the Supreme Court has never come close to suggesting that they are unconstitutional. For same-sex couples there is no basis for a genetic argument, but absent a political movement still in the future I find it hard to imagine that the Court would hold that government can’t impose such a limitation on same-sex couples in this limited situation. (Note that nothing prevents, for example, two brothers from otherwise obtaining a child and raising it.)