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Reconsidering Roe v. Wade: Equal Protection Analysis as an Alternative Approach

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RECONSIDERING *ROE V. WADE*: EQUAL PROTECTION ANALYSIS AS AN ALTERNATIVE APPROACH

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I. INTRODUCTION

On June 11, 1986, thirteen years after the United States Supreme Court held in *Roe v. Wade*[1] that the right of privacy encompasses a woman's right to seek an abortion, the Supreme Court narrowly reaffirmed the abortion right in *Thornburgh v. American College of Obstetricians and Gynecologists*,[2] in a 5-4 decision.[3] The fact that another abortion case was before the Court is not, by itself, particularly noteworthy. Indeed, the Court has considered at least ten such cases in the years since *Roe*[4]—confronting the abortion issue and interpreting the scope of its original decision. What is worthy of comment, however, is the fact that, while upholding its earlier decision, the ruling demonstrates sharp and deepening divisions among the nine justices over whether the 1973 ruling was correct. Indeed, all four dissenters raise strong concerns about *Roe* with several justices expressly urging that *Roe* be overturned.[5] Should the Court

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1. 410 U.S. 113 (1973).

2. 54 U.S.L.W. 4618, 4621 (1986) striking down as unconstitutional several provisions of Pennsylvania's 1982 Abortion Control Act.

3. Earlier this term, the Supreme Court considered another abortion case, Diamond v. Charles, 54 U.S.L.W. 4418 (1986), challenging requirements mandating the standard of care required of physicians performing abortions and requiring physicians to give their patients certain information when prescribing certain types of birth control. The *Diamond* opinion dismissed the appeal for want of jurisdiction. 54 U.S.L.W. at 4419.

4. In the years following the *Roe* ruling, the Supreme Court has confronted the abortion issue on at least ten different occasions: Doe v. Bolton, 410 U.S. 179 (1973) (the companion case to *Roe*); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979) (*Bellotti II*); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

5. Justices Burger and White expressly advocated that *Roe* be reexamined, 54 U.S.L.W. at 4628, 4631, while Justices O'Connor and Rehnquist declined to comment on the issue, stating that the question of whether to reconsider *Roe* was not properly before the Court. Nonetheless, O'Connor's dissent, in which Rehnquist joined, reaffirmed the position taken by O'Connor in *Akron*, 103 S.Ct. 2481, 2504, wherein she raised strong questions about *Roe*.

choose to reconsider *Roe*, it could put an end to the continuous series of legislative and judicial struggles that have marked the years since *Roe;* it could, on the other hand, merely shift the focus of the debate.

This Article examines the *Roe* decision, the doctrine of privacy on which that decision is based, and the problems inherent in a privacy approach to the abortion controversy. This Article then speculates on the options available to the Court, assuming *arguendo* it reconsiders *Roe* as urged by the *Thornburgh* dissenters. Specifically, this Article considers the equal protection doctrine as an alternative approach to abortion cases. Finally, this Article analyzes the advantages and disadvantages an equal protection approach provides over a privacy approach in the context of the abortion controversy.

II. *ROE V. WADE* AND THE DOCTRINE OF PRIVACY

A. *The Decision of* Roe v. Wade

In *Roe*[6] and its companion case, *Doe v. Bolton,*[7] the Supreme Court invalidated statutes prohibiting abortion in other than exceptional circumstances, holding that those statutes unjustifiably infringed upon a woman's right of privacy.[8] The *Roe* decision provides the analytical framework for subsequent abortion decisions—a framework expressly intended to balance the state's interests against the privacy right of the woman.[9]

Justice Blackmun, writing for the majority, cautioned that the right of privacy is a limited one to be considered against important, countervailing state interests.[10] The majority viewed the woman's decision as a fundamental right; the Court, therefore, applied the principle that only a compelling state interest, pursued through narrowly tailored legislation, can survive the strict scrutiny invoked to assess a statute's constitutionality.[11] The Court articulated two important state interests—the preservation of maternal health and the protection of fetal life—noting that each interest

6. 410 U.S. at 113. In *Roe*, a pregnant, single woman (Mary Roe) brought a class action suit challenging the constitutionality of the Texas criminal abortion statutes which prohibited obtaining or attempting to obtain an abortion unless it is for the purpose of saving the mother's life.

7. 410 U.S. 179 (1973). In *Doe*, the plaintiff attacked the validity of specific procedural standards prescribed by a Georgia statute, alleging that the statute resulted in an impermissible invasion of her right of privacy and was unconstitutionally vague. *Id.* at 185-86.

8. *Id.* at 164, 201. The *Roe* opinion announced the rationale for the holding in both cases on the abortion issue. *See Id.* at 189.

9. The Court concluded that its analysis was "consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." *Id.* at 165.

10. *Id.* at 154. The Court stated: "[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation." *Id.*

11. *Id.*

becomes "compelling" at different points of the pregnancy.[12] In order to accommodate these state interests, as well as the woman's fundamental right, the Court utilized a framework dividing pregnancy into three trimesters. During the first trimester no state interest is considered compelling;[13] therefore, the state has no authority to regulate abortions.[14] At the outset of the second trimester the state's interest in maternal health is determined to be compelling, and thus the state can regulate the procedure as long as such regulation is reasonably related to maternal health.[15] At the beginning of the third trimester, the point at which the fetus is presumably viable, the state has a compelling justification for regulation—protecting "potential human life."[16] At this latter stage of pregnancy the state can regulate abortions to the extent of proscribing them, except where necessary to preserve maternal health.[17]

The *Roe* framework is based, therefore, first on whether the statute substantially infringes on a fundamental right. Once that infringement is established, a strict scrutiny standard is employed, and a statute will be struck down if the state does not have a compelling interest or if, even though there is a compelling state interest, there is a less restrictive alternative means to achieve the statute's purpose. If, on the other hand, no infringement of a fundamental right can be established, then a strict scrutiny test is not appropriate, and the statute must be merely rationally related to the end it is meant to achieve. Under this relaxed standard, a statute will likely be upheld as constitutional.

B. The Doctrine of Privacy as the Basis of the Roe Decision

In an effort to understand the *Roe* ruling, and the internal weaknesses in the decision, it is useful to examine the nature and historical devel-

12. *Id.* at 162-63.

13. The Court's basis for this determination was that "present medical knowledge" indicated that until the end of the first trimester, the mortality rate for abortion was lower than the mortality rate for normal childbirth. *Id.* at 163.

14. *Id.*

15. Examples of regulations the Court considered permissible during the second trimester included licensing requirements as to the qualifications of the person performing the abortion, the licensing of the facility in which the abortion would be performed, and the nature of the facility in which the procedure would take place. *Id.*

16. *Id.* at 159. While refusing to acknowledge the fetus as a human life, the Court adopted the term "potential human life" to describe the status of the fetus. The Court disposed of the argument that fetal life constituted human life by an exercise in inverse logic. The majority stated that:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Id. at 159.

17. *Id.* at 163-64.

opment of the legal principle underlying *Roe*. Fundamental to the *Roe* framework is the concept of privacy.

Acknowledging that the Constitution does not expressly mention a privacy right,[18] the *Roe* Court finds "that a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution."[19] The privacy right is deemed fundamental—one that is "implicit in the concept of ordered liberty."[20] Thus, the Court, in the *Roe* opinion, located privacy within the personal liberty protected by the due process clause of the Fourteenth Amendment.[21]

The early cases involving privacy matters found roots of the privacy right in the First Amendment;[22] in the Fourth and Fifth Amendments;[23] in the penumbras of the Bill of Rights;[24] in the Ninth Amendment;[25] or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.[26] Relative to abortion, the important privacy cases can be divided into two categories: (1) those involved in marriage and the family, including the raising of children; and (2) those connected with contraception and procreation.[27]

The first category is comprised of cases wherein the Court declared unconstitutional statutes which amounted to an arbitrary restriction of liberties guaranteed by substantive due process. *Meyer v. Nebraska*[28] and *Pierce v. Society of Sisters*[29] dealt with the education of children. *Meyer* arose from a Nebraska ordinance which prohibited the teaching of any modern language except English. In overturning the law on due process grounds, the Court said:

> Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[30]

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18. *Id.* at 152.
19. *Id.*
20. *Id.*, quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937).
21. 410 U.S. at 153.
22. Stanley v. Georgia, 394 U.S. 557, 564 (1969).
23. Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), *see* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
24. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).
25. *Id.* at 486 (Goldberg, J., concurring).
26. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
27. Patton, *Roe v. Wade: Its Impact on Rights of Choice in Human Reproduction*, 5 COLUM. HUMAN RIGHTS L. REV. 506-07 (1974).
28. 262 U.S. 390 (1923).
29. 268 U.S. 510 (1925).
30. *Meyer*, 263 U.S. at 399.

The *Pierce* case involved an Oregon statute which made it compulsory that children between the ages of eight and sixteen attend only public schools. This statute was also nullified because the Court felt that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[31]

At issue in *Loving v. Virginia*[32] was an anti-miscegenation law. Although the Virginia statute was invalidated primarily on equal protection grounds, the Court took the opportunity to reiterate the special status of marriage rights under the due process clause:

> These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.[33]

The second category of decisions involving privacy include procreation and contraception. In *Skinner v. Oklahoma,*[34] the issue was a state law which allowed court-ordered sterilization of a felon who had been convicted three times. The Court struck down the law because it violated the equal protection clause. The Court went on, however, to add an important dictum to the effect that it considered the right to procreate to be a fundamental liberty: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[35]

Another important step in the development of privacy was taken in *Griswold v. Connecticut*.[36] The concern in *Griswold* was a Connecticut law banning the use or information about the use of contraceptives by married couples. In overturning the statute the Court declared that the marriage relationship, including the right to use contraceptives, is protected by a zone of privacy and that the Connecticut statute was an unconstitutional invasion of that privacy.[37] While seven justices agreed

31. *Pierce*, 268 U.S. at 534-35
32. 388 U.S. 1 (1967).
33. *Id.* at 12.
34. 316 U.S. 535 (1942).
35. *Id.* at 541.
36. 381 U.S. 479 (1965).
37. *Id.* at 484.

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Id. at 485-86 (emphasis in original).

about the existence of the right, they differed over its source.[38] As far as the evolution of privacy is concerned, however, the creation of this right relative to procreation was more important than its source. While *Skinner* classified procreation as a fundamental right, *Griswold* declared that *procreation prevention* within the marital relationship is also a fundamental right guaranteed by the Constitution. Once the woman's right to prevent conception had been secured, it was to be expected that the right to prevent childbirth after conception would soon become a constitutional issue.

Before the connection between privacy and the right to abortion became explicit in *Roe*, the *Eisenstadt v. Baird*[39] ruling provided an essential link. In *Eisenstadt*, the Court extended the right of privacy with respect to procreation to single individuals. The Massachusetts statute in issue permitted physicians and pharmacists to dispense contraceptives to married couples for the prevention of pregnancy but prohibited their distribution to single persons for the same purpose. The Court overturned the statute, holding that the law was an unconstitutional infringement on the right of privacy: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[40] Thus, the Court found the right of privacy extensive enough to permit the prevention of a pregnancy.

As is apparent from this overview of cases, the Supreme Court has uncovered a right of privacy which extends to activities relating to marriage, child rearing, contraception, procreation and education. As the concept has developed from *Meyer* through *Eisenstadt*, the trend of the Court has been to expand the boundaries of privacy to embrace an ever greater number of freedoms. The common theme running through all these decisions has been the right of individuals and families to control those decisions which integrally affect their lives. It was at this stage in the evolution of privacy that the Court applied a privacy analysis to the abortion issue in *Roe*. The Court once again extended the concept, stating:

38. Justice Douglas, writing for the Court, held that the first, third, fourth, fifth and ninth amendments create penumbras of rights, 381 U.S. at 484, and that these penumbras are made applicable to the states by virtue of the fourteenth amendment. *Id.* at 482. The guarantees contained in the penumbra of rights create zones of privacy. *Id.* at 485. The marriage relationship is protected by one of these zones of privacy. *Id.* Justice Goldberg, concurring, finds the:

> Concept of liberty protects those personal rights that are fundamental . . . that it embraces the right of marital privacy though that right is not mentioned explicitly in the constitution . . . [and finds support for this view] both by numerous decisions of this Court . . . and by the language and history of the Ninth Amendment.

Id. at 486-87.

39. 405 U.S. 438 (1972).

40. *Id.* at 453 (emphasis in original).

"This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[41]

C. *Problems Inherent in the* Roe *Approach*

As could be expected in a case involving an issue as controversial as a woman's right to have an abortion, the *Roe v. Wade* decision inspired a wide array of analyses, observations, and criticisms. Those who argued that a woman's right to have an abortion is the right of a woman alone to decide what to do with her body were dissatisfied with the Court's decision because it placed restrictions on that right.[42] Abortion critics cried out that the decision gave women the right to choose abortion on demand, "a practical license for elective abortion at any stage, right up to the last minute before normal delivery."[43] In addition, constitutional scholars were critical of the opinion, arguing there was no constitutional basis for finding that the privacy notion embodied in either the Bill of Rights or the remainder of the Constitution encompasses a woman's right to control her body.[44] In their view, the Court did not provide a satisfactory rationale for its conclusion that abortion is one of those rights included in the constitutional guarantee of personal privacy.[45]

Recently, Justices of the Supreme Court have joined the ranks of critics, seeking a reversal of *Roe* on the merits. In *City of Akron v. Akron Center for Reproductive Health, Inc.*,[46] Justice O'Connor, joined by Justices White and Rehnquist (who dissented in *Roe*), dissented from the Court's decision holding that direct state interference in the physician-patient relationship is outside the ambit of state authority,[47] which is limited to legislation that comports with "accepted medical practice."[48] Justice O'Connor began her dissent with sharp criticism of the trimester approach to abortion jurisprudence, labeling it unworkable and unable to accommodate mutually antagonistic rights and interests.[49] She rejected the Court's holding that advancements in medical technology had decreased the state's discretion in confining second trimester abortions to hospitals. O'Connor

41. *Roe*, 410 U.S. at 153.

42. *See, e.g.*, Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985); Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 SYRACUSE L. REV. 565 (1982).

43. Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059, 1062 (1973).

44. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). *See generally* Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in The Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

45. The *Roe* Court simply stated: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

46. 462 U.S 416 (1983).

47. *Id.* at 421.

48. *Id.*

49. *Id.* at 440.

asserted that despite the majority's claimed adherence to the *Roe* framework, it had "blurred" the bright lines drawn by that decision.[50] The dissent noted that advancements in medical technology will inexorably delay the point at which the state's interest in maternal health becomes compelling. Conversely, science increasingly will advance the point of viability and, consequently, the point at which the state may proscribe nontherapeutic abortions to preserve fetal life. Thus perceived, the dissent concluded that the *Roe* framework is "on a collision course with itself."[51]

In addition to Justice O'Connor highlighting the weaknesses inherent in the *Roe* framework, the rationale adopted by the *Akron* Court in its defense of *Roe* also suggests *Roe*'s weakness. *Akron* did not offer new reasons supporting *Roe;* it merely invoked *stare decisis*.[52] Invoking this doctrine in support of a weak rationale magnifies the latter's weakness as it demonstrates that no better rationale is available. Furthermore, invoking *stare decisis* to support a *constitutional* decision magnifies its weakness even more, as *stare decisis* constrains the Court less in constitutional interpretation than in other areas of law.[53] Indeed, the Court admits that the doctrine of *stare decisis* is "never entirely persuasive on a constitutional question,"[54] and at the same time finds the doctrine controlling in *Akron*. Thus, by finding that *stare decisis* requires reaffirming *Roe* the Court highlights the weakness of *Roe*.

The Court's defense of *Roe* in *Akron* may actually enhance *Roe*'s ripeness for judicial reconsideration. Recognizing that it must retain control over questions of constitutional interpretation,[55] the Court after *Akron* likely will be more receptive than before to an argument that *Roe* should be abandoned. Most recently, the 6-3 majority in *Akron* was reduced to 5-4 in *Thornburgh,* with Chief Justice Burger switching sides, voting to reexamine *Roe*.[56] Thus, taken together with the changes in composition of the Court, the time appears near when the Supreme Court may be willing to reconsider the *Roe* approach.

D. Alternative Approaches Should the Court Reconsider Roe

Should the Court succumb to the urgings of the dissenting justices,

50. *Id.* at 441.

51. *Id.* at 442. Justice O'Connor determined that, under the majority's opinion, "the State must continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to 'depart from accepted medical practice' insofar as particular procedures and particular periods within the trimester are concerned." *Id.* at 441.

52. *Id.* at 422; *see also id.* at 422 n.1.

53. Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 408 (1932) (Brandeis, J., dissenting)).

54. *Akron,* 462 U.S. at 422.

55. *See, e.g.,* Marbury v. Madison, 5. U.S. (1 Cranch) 137, 173-74 (1803).

56. 54 U.S.L.W. at 4628.

among others, there are at least three approaches the Court may choose to consider. First, the Court could refuse to continue this line of substantive due process adjudication, and, just as with economic due process adjudication,[57] dismiss the substantive due process premise as not in concert with the constitutional proposition that courts do not substitute their value judgment for that of the legislative bodies.[58] Because such an approach would nullify any constitutional basis for a woman's right to an abortion, and would result in differing rights depending upon the jurisdiction in which the woman resides, this approach is not an appropriate solution to the *Roe* dilemma.

Second, the Court could adopt the approach advocated by Justice O'Connor in her dissent from *Akron*.[59] Because the lines of the trimester approach have been "blurred," resulting from improvements in medical technology moving forward the state's compelling interest in the mother's health, and moving backward the state's compelling interest in the potentiality of human life,[60] O'Connor suggested the Court depart from *stare decisis* and set a new course.[61]

In establishing an alternative legal framework, O'Connor developed a two-part test. In the first step, it must be determined whether the law unduly burdens the woman's right to obtain an abortion.[62] "Undue burden," in this sense, means "situations involving absolute obstacles or severe limitations on the abortion decision."[63] If an undue burden cannot be found, the inquiry is then limited to whether the law is rationally related to a legitimate state purpose.[64] If the law is found to be unduly burdensome, the Court will employ the second part of the test, namely, the "compelling state interest" standard.[65] For purposes of this test, the state's interest becomes compelling *throughout the pregnancy,* both in the moth-

57. *See, e.g.*, Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

58. *See* Ferguson v. Skrupa, 372 U.S. 726, 730. A full discussion of this controversy is outside the scope of this Paper. For a more thorough discussion of the issues, *see* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

59. 462 U.S. at 452 (O'Connor, J., dissenting).

60. *Id.* at 458. *See supra* notes 46-51 and accompanying text.

61. *Id.* at 459.

62. *Id.* at 462.

63. *Id.* at 464. For example, Justice O'Connor found that the second trimester hospitalization requirement, the parental consent requirement, and the informed consent requirements do not impose an undue burden on the woman's right to seek an abortion. *See Id.* at 467 (second trimester hospitalization requirement); *Simopolous*, 462 U.S. at 506 (parental consent requirement); *Ashcroft*, 462 U.S. at 476 (informed consent requirement).

64. *Akron*, 462 U.S. at 462.

65. *Id.* at 463.

er's health and in potential human life.[66] A state regulation, therefore, will easily be upheld if it is reasonably related to the state's interest in either the mother's health or the life of the fetus.

This approach is unacceptable because, though framed as a qualification on the right to seek an abortion, in actuality it operates nearly to eliminate that right. The state's interest would be compelling throughout the pregnancy, making it nearly impossible for the woman's right of privacy to overcome the compelling interest of the state. Additionally, this approach gives very little guidance as to just how burdensome a burden must be before it is deemed "undue," and who is to make such a determination. Therefore, this approach is not an appropriate solution to the *Roe* dilemma.

Third, the Court could shift its focus in abortion cases and view abortion as raising issues of inequality; that is, presenting the issue of a woman's right to take autonomous charge of her full life's course, of her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.[67] This approach is the most appropriate solution to the *Roe* dilemma—not only does the approach avoid the trimester analysis, it also avoids the substantive due process controversy, and, in addition, offers a unified theory for adjudication of women's rights issues.

III. AN ALTERNATIVE APPROACH: EQUAL PROTECTION DOCTRINE

Up to this point, the Supreme Court has compartmentalized two related areas of constitutional adjudication: reproductive autonomy and gender-based classifications. The Court has analyzed reproductive autonomy under a substantive due process/personal autonomy/right of privacy approach not explicitly linked to discrimination against women;[68] it has analyzed classifications by gender under an equal protection/sex discrimination approach.[69] This section will briefly explore the background and development of the equal protection/sex discrimination approach as it is now applied by the Supreme Court, and will suggest an alternative theory of equal protection analysis which, in addition to solving the dilemma created by *Roe*,[70] serves as a unified approach for women's rights issues.

A. The Current Equal Protection Doctrine as Applied to Gender Discrimination

The pivotal case for women's rights adjudication under the equal pro-

66. *Id.* at 460-61.

67. *See* Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-59 (1977).

68. *See supra* notes 6-41 and accompanying text.

69. *See infra* notes 71-98 and accompanying text.

70. *See supra* notes 42-56 and accompanying text.

tection doctrine came in *Reed v. Reed.*[71] Prior to this point, the Supreme Court had rejected virtually every effort to overturn sex-based classifications.[72] The Court's approach to women's issues prior to *Reed* is epitomized by the now notorious concurring opinion of Supreme Court Justice Bradley in *Bradwell v. Illinois,*[73] an 1872 decision affirming the right of a state to exclude women from the practice of law:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[74]

In the unanimous *Reed* decision, however, the Court announced that an Idaho statute giving men preference over women in administering estates, denied women the equal protection of the laws.[75] Thus, the *Reed* decision marked the first solid break from the Supreme Court's consistent rejection of women's complaints of unconstitutional gender-based discrimination.[76]

The *Reed* Court purported to apply the minimal rational classification standard; the appropriate standard of review of gender classifications was openly addressed in *Frontiero v. Richardson.*[77] In *Frontiero,* the Court faced the issue of whether married women in the military could be denied fringe benefits—such as family housing and health care allowances—accorded married men in military service. Although holding such a denial was a violation of the equal protection clause,[78] the Court was unable to reach a majority as to the basis for such a determination. Seven justices agreed the practice violated the equal protection clause, however, they differed as to the standard to be applied in reaching such a determination—the plurality[79] applied a strict scrutiny standard; the concurring justices[80] applied something less than strict scrutiny.[81]

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71. 404 U.S. 71 (1971).

72. *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

73. 83 U.S. (16 Wall.) 130 (1872).

74. *Id.* at 141.

75. 404 U.S. at 77.

76. *See supra* note 72 and accompanying text.

77. 411 U.S. 677 (1973).

78. *Id.* at 691.

79. Justices Brennan, Douglas, White and Marshall concluded classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect and, therefore, subject to strict judicial scrutiny. *Id.* at 688.

80. Justices Powell, Burger, C.J., and Blackmun refused to find sex-based classifications inherently suspect, citing for authority *Reed. Id.* at 691-92.

81. *Id.* at 692.

In *Craig v. Boren*,[82] challenging a statute differentiating between the ages of boys and girls permitted to buy 3.2 beer, a majority of the Justices finally agreed upon an "intermediate" standard of review for gender classifications—presumably intermediate between the rational classification and suspect classification standards. Thus, this first line of gender classification cases established the standard of review for such cases: in order to withstand judicial scrutiny a classification based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives."[83]

The *Reed-Frontiero-Craig* break from a century's precedent was not clear and clean, however. A second line of gender classification cases, also argued on a discrimination basis, proved more problematic for the Court. This line concerned sex-specific traits; most notably, pregnancy. In *Cleveland Board of Education v. LaFleur*,[84] the Court decided an issue brought by pregnant school teachers forced to terminate their employment, or take unpaid maternity leave, months before the anticipated birth date. Policies singling out pregnant women for disadvantageous treatment discriminated invidiously on the bases of sex, the teachers argued. The Court bypassed that argument, however, and instead rested its decision, holding mandatory maternity leaves unconstitutional, on due process grounds.[85]

Later that same year, in *Geduldig v. Aiello*,[86] the Court held that a state operated disability income protection plan could exclude pregnancy without offending the equal protection guarantees.[87] The classifications in these disability cases, according to the Court, were not gender-based on their face, and were not shown to have any sex-discriminatory effect. Indeed, the Court reasoned, "the program divides potential recipients into two groups—pregnant women and nonpregnant persons."[88] As noted by the Court, all nonpregnant persons, women along with men, were treated alike.[89]

Thus, the current doctrine of equal protection for gender classifications which discriminate against women demands an intermediate scrutiny of such classifications, and, at the same time, finds that laws governing reproductive biology—i.e., pregnancy—raise no gender classification

82. 429 U.S. 190 (1976).
83. *Id.* at 197.
84. 414 U.S. 632 (1974).
85. *Id.* at 639-50.
86. 417 U.S. 484 (1974).
87. *Id.* at 494.
88. *Id.* at 496-97 n.20.
89. *See also* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (challenge brought under Title VII held women unable to work due to pregnancy or childbirth could be excluded from disability coverage).

concerns. This is so because, from this view, social equality means that likes should be treated alike, and differences should be treated differently. It is this underlying assumption that gives rise to the "pregnancy" exception. The present standard, therefore, is that "similarly situated" persons should be treated the same, but, where there is a biological difference—i.e., the capacity to become pregnant—there is no similar situation and, therefore, no necessity for similar treatment.[90] This approach denies the core reality that sex-based biological differences are related to gender.

At the same time the Court was grappling with what standard should be applied in reviewing classifications that *discriminate* against women, a third line of cases began coming before the Court. The issue presented by this strand was the constitutionality of classifications that give *preferential* treatment to women, otherwise referred to as "benign" discrimination.

The benign discrimination cases of the early 1970's reflect the uncertainity of the Court with regard to the appropriate standard of judicial review to be given gender cases in general. Indeed, the early benign discrimination cases, for example, *Kahn v. Shevin,*[91] and *Schlesinger v. Ballard,*[92] were decided before the Court had reached agreement on what standard of review should be applied even in nonpreferential discrimination cases. Shortly after the *Craig* intermediate scrutiny standard was announced, however, the Court decided two benign cases which, taken together, are read to apply the same, or a similar, standard to benign discrimination classifications as had been applied to other discriminatory gender classifications.

Califano v. Goldfarb[93] concerned social security provisions which qualified a widow for survivors' benefits automatically, yet required proof of a widower that his wife supplied three-fourths of the couple's support before the widower qualified for the same benefits. Review of the legislative history in this case indicated no purpose to act affirmatively to improve women's status in economic endeavor.[94] On the contrary, the disparate treatment Congress ordered for widows and widowers simply reflected longstanding "habit";[95] the discrimination encountered by wid-

90. Professor Catharine MacKinnon refers to this as the "differences" approach. C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979). *See infra* notes 99-101 and accompanying text.

91. 416 U.S. 351 (1974) (upholding an 1885 Florida law providing a $15.00 annual real property tax saving for widows, along with the blind and the totally disabled).

92. 419 U.S. 498 (1975) (holding that it was not a denial of equal protection to hold a male naval officer to a strict "up or out" system (out when twice passed over for promotion), while guaranteeing a female officer thirteen years before mandatory discharge for lack of promotion).

93. 430 U.S. 199 (1977).

94. *Id.* at 212-17.

95. *Id.* at 222.

ower Goldfarb was "merely the accidental byproduct of [the legislators'] traditional way of thinking about females."[96]

Califano v. Webster[97] reviewed a classification establishing a more favorable social security benefit calculation for retired female workers than for retired male workers. The legislative history of this classification, contrary to *Goldfarb*, indicated the scheme had been enacted in direct response to adverse discriminatory conditions encountered by gainfully employed women—specifically, lower wages for "women's work" and early retirement employers routinely forced on women, but not on men.[98]

Taken together, *Goldfarb* and *Webster* establish the following standard for gender classifications which give preferential treatment to women: (1) Where, as in *Webster*, legislation directly addresses past discrimination and serves to ameliorate it, differential treatment of the sexes, at least as a temporary measure, is constitutional. (2) Where, as in *Goldfarb*, disparate treatment is rooted in traditional stereotyping and is not deliberately and specifically aimed at redressing past discrimination, differential treatment based on sex is unconstitutional. Thus, the Court will uphold a preferential gender classification only if such classification was in fact adopted by the legislature for remedial reasons rather than out of prejudice about "the way women are" and, even then, only if the classification is closely tailored to the remedial end.

As this brief overview of women's rights cases demonstrates, the Court has viewed explicit gender-based classifications, pregnancy issues, benign discrimination differentiation, and abortion and contraception cases each in their separate and largely independent cubbyholes. The Court needs to take each of these issues out of their individual compartments, acknowledge their practical interrelationships, and treat these matters as presenting various facets of a single issue—gender equality and the role of women in society.

B. A "New" Equal Protection Approach: Gender Equality and the Role of Women in Society

An alternative approach, advocated by Professor Catharine MacKinnon, among others,[99] attempts to deal with the pervasive totality of gender-based discrimination. MacKinnon describes gender discrimination as a systematic construct that defines women as inferior to men and that "cumulatively disadvantages women for their differences from men, as

96. *Id.* at 223.

97. 430 U.S. 313 (1977).

98. *Id.* at 317-20.

99. *See* MacKinnon, *supra* note 90. *See also* Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

well as ignores their similarities."[100] MacKinnon contrasts this approach, which she labels an "inequality" approach, to the current equal protection doctrine, which she labels a "differences" approach.[101]

Fundamental to the inequality approach is the notion that if women are to achieve fully equal status in American society, including a sharing of power traditionally held by men and a retaining of control of their bodies, our understanding of gender classifications must encompass a strong constitutional equality guarantee regarding a woman's right to take autonomous charge of her life, of her ability to function as an independent, self-sustaining, equal citizen.[102] This approach requires a broadening of the meaning of equality; it requires the concept of equality to include all choices people have in their lives. Viewed in this way, equality means the right not to have one's life bifurcated between career and family; it means the right to control one's own social roles.[103]

From an inequality perspective, the test in any challenge would be "whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status."[104] If the classification is determined to contribute to the continued oppression of women, the court must then consider whether the law has a substantial impact on perpetuating the inequality of women. If so, the court must engage in traditional strict scrutiny analysis to see whether the law is justified by a compelling state interest.

Thus, the inequality test departs from the current equal protection analysis in that it does not require any comparison between allegedly similarly situated classes of people.[105] This departure is necessary because laws governing reproductive biology, by definition govern ways in which men and women are not similarly situated.[106] Additionally, this test requires a strict scrutiny analysis of gender classifications contributing to the oppression of women, rather than the intermediate scrutiny analysis currently applied to gender cases. Thus, from this view, variables as to which men and women are not comparable, such as pregnancy or sexuality, would be the first to trigger strict scrutiny.[107]

From this "new" equality perspective then, "[t]he abortion question [is] not merely a 'women versus fetuses' issue; it [is] also a feminist issue, an issue going to women's position in society in relation to men."[108]

100. *See* MacKinnon, *supra* note 90 at 116.
101. *Id.* at 102. *See supra* note 90 and accompanying text.
102. *See* Karst, *supra* note 67 at 57-59.
103. *See* Karst, *supra* note 67 at 58.
104. *See* MacKinnon, *supra* note 90 at 117.
105. *See supra* note 90 and accompanying text.
106. *See* Law, *supra* note 99 at 1009.
107. MacKinnon, *supra* note 90 at 118.
108. Karst, *supra* note 67 at 58.

The focus of equal protection here is not a right of access to contraceptives, or a right to an abortion, but a right to take responsibility for choosing one's own future.[109] It is the right to respect one's own ability to make responsible choices in controlling one's own destiny; the right to be an active participant in society.[110]

IV. DISCUSSION AND ANALYSIS

Once the underlying assumption regarding the scope of equality is broadened—from one meaning that likes should be treated alike and differences should be treated differently,[111] to one meaning that persons have the right to control one's own social roles, the right to control one's own future[112]—conceptualizing the abortion question as an equality issue follows quite naturally. Women are the persons who must bear children and who, in our society, most often assume primary, and in many cases sole, child-rearing responsibilities. Such responsibilities so substantially affect women in terms of their health, careers, and lifestyles, that it seems natural to argue that women should have the right to make and execute the basic decisions involved in bearing or not bearing children. Without the full capacity to limit her own reproduction, a woman is not being allowed to make responsible choices in controlling her own destiny or to be an active participant in society in relation to men. Viewed in this way, abortion prohibition is solidly linked with discrimination against women.[113]

Additionally, an equality approach alleviates the necessity of continuing the unworkable privacy trimester test for determining when strict scrutiny is triggered.[114] Rather, the "inequality" test is substituted, which asks whether the practice contributes to the maintenance of a deprived position based on gender.[115] If the classification is determined to contribute to the continued oppression of women, the court must then consider whether the law has a substantial impact on perpetuating the inequality of women. If so, strict scrutiny applies to determine whether the law is justified by a compelling state interest.[116] From this approach then, the interest of the woman becomes the central focus on the inquiry.

In the context of the abortion decision, limitations on abortion procedure clearly contribute to the oppression of women and have a substantial impact on perpetuating the inequality of women.[117] Thus, from

109. *See generally* Karst, *supra* note 67.
110. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).
111. *See supra* note 90 and accompanying text.
112. *See supra* notes 102-03 and accompanying text.
113. *See* Karst *supra* note 67 at 58.
114. *See supra* notes 10-17 and accompanying text.
115. *See supra* note 104 and accompanying text.
116. *Id.*
117. *See supra* notes 111-13 and accompanying text.

an equality approach, all statutes limiting abortion procedure would be subject to strict scrutiny review. But the equality approach does more than simply raise the level of judicial scrutiny; the equality approach also changes the weight of the asserted interests in abortion cases. For example, under the privacy doctrine, the weight of the asserted interest—whether woman's, state's or fetus'—is determined according to the period of the pregnancy during which an abortion is sought. From an equality perspective, however, the trimester approach is eliminated and the central concern is the woman's equality right. The woman's right is expressly considered the predominant interest at all times throughout the pregnancy.

Thus perceived, the other asserted interests of protecting maternal health and fetal life necessarily diminish. The woman's equality right will easily trump the state's asserted interest in protecting maternal health as such a regulation is paternalistic and contributes to the oppression of women. Similarly, the woman's equality right will prevail over the state's asserted interest in protecting fetal life. Rather than vesting the *state* with the discretion to determine "moral personhood," the equality approach recognizes the *woman* as a person competent to make this normative judgment.[118] From this approach then, the woman's equality right remains the central focus of the inquiry, with the woman perceived as a competent, responsible person capable of making difficult moral and ethical decisions.

Moreover, conceptualizing abortion as an equality issue avoids the problematic privacy right/substantive due process issue;[119] the right to receive "equal protection of the laws" is clearly grounded in constitutional text.[120] Finally, the "new" equality approach provides a single, unified right for women's issues—specifically, reproductive choice—instead of several discrete constitutional rights, for example, to procreate, to use contraceptives, and to obtain an abortion.[121]

Theoretically, therefore, the "new" equality approach seems to provide a reasonable, and preferable alternative to the *Roe* dilemma. The following sections of this Article will consider the equality approach a bit more critically, comparing the doctrines of privacy and equality in the context of post-*Roe* abortion decisions, and reflecting on the potential problems created by adoption of the equality approach.

*A. A Comparison of Privacy and Equality Doctrines in the Post-*Roe *Abortion Context*

The *Roe* privacy doctrine asks the court to consider whether: (1) the

118. *See* McCoy, *Logic v. Value Judgment in Legal and Ethical Thought*, 23 VAND. L. REV. 1277 (1970).

119. *See supra* notes 18-21, 44-45 and 57-58 and accompanying text.

120. U.S. Const. amend. XIV, sec. 1.

121. *See supra* notes 71-98 and accompanying text.

state's regulation of procedure, during the second trimester, is reasonably related to maternal health, or (2) the state's regulation of procedure, during the third trimester, is reasonably related to protecting potential human life.[122] The equality principle advocated here considers whether the state can meet the burden of proving that a regulation: (1) has no significant impact in perpetuating the inequality of women or, if it does further oppression of women, whether it (2) is the best means for meeting a compelling state purpose.[123]

As noted above,[124] it is clear that, from an equality stance, the women's right to an abortion is constitutionally quaranteed. Thus, the question at this point is whether the equality principle adequately addresses the subsidiary abortion issues raised post-*Roe*—specifically, abortion procedure[125] and abortion funding.[126]

The abortion procedure regulations typically attempt to attach a number of conditions to the right to an abortion, for example, requiring consent of the woman's spouse or parents, or regulating the physicians who perform abortions. Spousal consent requirements have been struck down by the Court under the privacy doctrine as unconstitutional because, since the state lacks the power to regulate abortion during the first trimester, it cannot require a spouse's consent to an abortion during that period.[127] From an equality approach, it is clear that a regulation requiring spousal consent for an abortion would be unconstitutional as such a regulation is a paternalistic one, reminisicent of the *Bradwell* era,[128] where legislators regarded the male more as the female's guardian than as her peer.

As to the question of parents' or judges' consent to abortion for minors, the issue is more difficult. Under a privacy approach, the Court has held that the state cannot impose a blanket requirement that an unmarried minor obtain parental consent before having an abortion during her first trimester.[129] However, as the Court held in *Bellotti v. Baird*,[130] the state can require parental consent for an abortion if it also provides an alter-

122. *See supra* notes 10-17 and accompanying text.

123. *See supra* note 104 and accompanying text.

124. *See supra* notes 119-20 and accompanying text.

125. Abortion procedure decisions include: Planned Parenthood of Kansas City, Mo., v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reprod. Health, 462 U.S. 416 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

126. Abortion funding decisions include: Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 US. 438 (1977).

127. *See, e.g., Danforth*, 428 U.S. at 69.

128. Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1872); *see supra* notes 73-74 and accompanying text.

129. *See Danforth*, 428 U.S. at 74.

130. 443 U.S. at 622.

native procedure—a judicial proceeding—in which the maturity of the minor can be established.[131] The purpose of the alternative procedure is to ensure that the parental consent provision does not "amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in *Danforth*."[132]

From an equality stance, the central issue is whether the regulation contributes to the continued oppression of women. As contrasted to spousal consent, it is much less clear that a parental consent requirement does perpetuate the inequality of women. Arguably, in view of the unique status of children under the law, the state has a significant interest in regulations aimed at protecting children that is not present in the case of an adult. Thus, as long as the regulation in question is sufficiently tailored to furthering the legitimate end of supervising the welfare of minors, and is not a pretext for perpetuating the inequality of women, it likely will be found constitutional.

With regard to the rights of physicians performing abortions, the Court, from a privacy approach, has held that the physician must be given adequate discretion in exercising medical judgment, and in determining how any abortion should be carried out.[133] Thus, the state cannot require the physician performing the abortion to exercise the same care to preserve the life and health of the fetus as would be required in a situation where the fetus was intended to be delivered alive,[134] or require the physician to adopt the abortion technique providing the best opportunity for the fetus to be born alive as long as different techniques were not required to preserve the health or life of the mother,[135] or require that all abortions performed after the first trimester of pregnancy be performed in a hospital.[136] The Court's reasoning in these decisions reaffirms the trimester approach announced in *Roe*—the state has no authority to interfere with the medical judgment encompassing a woman's right to an abortion during the first trimester.

From an equality perspective, the focus shifts from whether there is a reasonable medical basis for the regulation, to whether the regulation

131. *Id.* at 643. The Court stated:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Id. at 643-44. *See also Matheson*, 450 U.S. at 398 (statute requiring parental *notice* does not violate the constitutional right of an immature, dependent minor).

132. 443 U.S. at 644.

133. *See Akron*, 462 U.S. at 427; *Colautti*, 439 U.S. at 387; *see also Ashcroft*, 462 U.S. at 512.

134. *Colautti*, 439 U.S. at 387.

135. *Id.*

136. *Akron*, 462 U.S. at 433.

impermissibly perpetuates the inequality of women. From this view, it is clear that any regulation interfering with the woman's abortion right inhibits her equality right to take responsibility and make decisions governing her future life and social roles. Thus, because such procedural regulations do further the oppression of women, strict scrutiny applies, and such regulations can be sustained only upon a showing of a compelling state interest. It is likely, therefore, that such regulations would be held unconstitutional from an equality approach.

The cases discussed above all involved statutes attempting to regulate the abortion decision—by way of spousal consent, parental consent, or medical procedure requirements. Such regulatory attempts at restricting the abortion decision have met with varied success. Undoubtedly, however, the most successful attempts at limiting access to abortion have come indirectly, through limitations on funding for abortions sought by those women who cannot afford an abortion without financial assistance.

The issue of public funding for abortion reached the Supreme Court in 1977.[137] With regard to this issue, the Court has held that the state can limit Medicaid funding for abortions to those abortions certified as "medically necessary,"[138] and is not required to provide Medicaid funding for nontherapeutic abortions even though it provides funding for childbirth.[139] This is so, the Court has stated, because *Roe* did not establish an "unqualified 'constitutional right to an abortion.' "[140] That is, *Roe* established a woman's right to be free from unduly burdensome interference in her decision whether to terminate a pregnancy,[141] but this does not establish a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Thus, although the government may not affirmatively place obstacles in the path of a woman's exercise of her freedom of choice, *Roe* does not require that the state remove those obstacles not of its own creation—such as indigency.[142]

From an equality perspective, the abortion funding cases would likely be unconstitutional because, by requiring that the abortion be certified as "medically necessary," the decision to abort is taken away from the women and her physician and rests with a certification board. Such a limitation on the abortion right clearly affects the continued inequality of women, and will fail unless justified by a compelling state interest. Sim-

137. The Court first addressed the issue in a trilogy of cases, Beal v. Doe, 432 U.S. 438 (1977), Maher v. Roe, 432 U.S. 464 (1977), and Poelker v. Doe, 432 U.S. 569 (1977), and considered the issue most recently in Harris v. McRae, 448 U.S. 297 (1980).

138. *See Maher*, 432 U.S. at 469.

139. *Id.* at 466.

140. *Id.* at 473.

141. *Id.* at 473-74.

142. *See McRae*, 448 U.S. at 315.

ilarly, withholding funds for nontherapeutic abortions has a significant impact in perpetuating the inequality of women. The asserted state interest in preferring childbirth over abortion cannot be considered compelling; thus, under a strict scrutiny analysis, this holding is unconstitutional. Further, although the Court states that the denial of public support for nontherapeutic abortions does not pose an obstacle to the right to choose to terminate a pregnancy,[143] it clearly does. That denial removes from poor women desiring to abort a pregnancy the right not merely to secure an abortion, but, more importantly, to have some control over their reproductive capacities and, accordingly, over their lives.[144]Again, from an equality stance, such a regulation cannot survive constitutional scrutiny.

It appears, therefore, that in abortion procedure cases, an equality approach reaches essentially the same results as the privacy approach, however, the justification is somewhat stronger and more soundly reasoned. In the context of abortion funding cases, an equality approach comes out differently than a privacy approach, and holds unconstitutional attempts to proscribe an indigent woman's right to procure an abortion. By making the interests of the woman the central focus of the inquiry, the equality approach allows the decision maker to focus on appropriate issues of reproductive choice and responsibilty, rather than balancing the comparatively abstract interest of encouraging childbirth. Thus, the "new" equality approach provides a reasonable, and preferable alternative to the *Roe* dilemma.

B. Critical Reflections: Problems Created by Adoption of the Equality Approach

Although the equality approach provides a preferable analysis to regulations limiting a woman's right to an abortion, two criticisms of the

143. *See Maher*, 432 U.S. at 474.

144. Justice Marshall made the point most forcefully in his dissenting opinion to the funding cases:

> The right of every woman to choose whether to bear a child is, as *Roe v. Wade* held, of fundamental importance. An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. *All chance to control the direction of her own life will have been lost.*

432 U.S. 440, 458-59 (1977) (Marshall, J., dissenting) (emphasis added).

approach advocated here deserve brief examination. First, the standard by which regulations are to be judged under the equality approach, whether a challenged policy or practice contributes to the oppression of women, makes it exceedingly difficult to determine what perpetuates sex-based deprivation and even more difficult to prove such deprivation. Although it seems clear that most restrictions on abortion fall within this standard, the question of oppression outside the abortion area will likely prove more problematic. The difficulty in applying the equality standard is in determining how deep the inquiry must go—how much evidence needs to be gathered. A subjective standard, such as the test suggested here, may be requiring too much judicial review—may be too subjective—thereby providing inadequate protection of the equality right; standards that rely exclusively on judicial discretion are likely to provide weak protection for the asserted right. It would be helpful, therefore, if a more reliable, comparative standard were developed, facilitating the equality approach inquiry.

Second, realistically, in the next few years, finding support for a woman's right to obtain an abortion from a majority of the members of Justices on the United States Supreme Court, seems unlikely. With President Reagan's appointment of two Justices already[145] and the presence on the Court of four Justices aged seventy-seven or over,[146] it is conceivable that President Reagan, during the remainder of his second term, could appoint a majority of the Court. Assuming those appointees adhere to Reagan's philosophy opposing the right to an abortion, it is possible that the opportunity for women to choose to have an abortion could be eliminated by the same body that affirmed that right just over a decade ago in *Roe* and reaffirmed it as recently as 1986 in *Thornburgh*.

V. CONCLUSION

The basis for the Supreme Court's decision in *Roe v. Wade* was a constitutional right of privacy. It is clear, however, that such a basis does not withstand close scrutiny. Indeed, a brief overview of the development of the privacy right demonstrates that privacy remains a nebulous concept which is not amenable to precise definition. Gathered loosely under its banner is a collection of widely differing legal concepts which are tenuously united by an underlying philosophy that the government should interfere as little as possible in people's private lives. Yet, a right as

145. Justices O'Connor and Scalia are Reagan appointees.

146. Justices Blackmun, Brennan, Powell and Marshall, all of whom voted with the majority in *Thornburgh* as well as *Roe*, are between the ages of 77 and 80, although none has indicated any plans to retire. Were President Reagan to have an opportunity to replace one of these four, or Justice Stevens, 66, the voting lineup might change.

controversial as that of a woman to procure an abortion deserves a strong, well defined constitutional basis—one capable of providing adequate protection to such an important women's right.

To secure this right, the Court must acknowledge that the abortion issue is a women's rights issue; it must align abortion prohibitions with discrimination against women. Further, the law must embrace a version of equality that focuses on the real issues—the right of a woman to control her own body and reproductive capacities, the right of a woman to take responsibility for her destiny.

This Article advocates an "inequality" approach to equal protection analysis, suggesting that such an approach is appropriate, indeed preferable, for resolving the dilemma created by the *Roe* analysis. The inequality approach allows the decision maker to focus on the real issue in the abortion cases—women's rights—rather than diluting the equality concern with privacy language.