State Abortion Law After *Casey*: Finding "Adequate and Independent" Grounds for Choice in Ohio

I. INTRODUCTION

Since the landmark 1973 Supreme Court decision *Roe v. Wade*,[1] women in America have had the right to choose an abortion to terminate an unwanted pregnancy. This right, however, has never been absolute and recent Supreme Court decisions have allowed the most restrictive abortion laws enacted in twenty years to stand as constitutional. Because of these decisions, several antiabortion state legislatures have passed, and will pass, restrictive abortion laws in the next five years. State courts will then have the occasion to decide which regulations are constitutional.[2] While recent Supreme Court decisions invite individual states to pass restrictive abortion laws, they also allow for state courts to become more judicially active by carving more expansive abortion rights for women out of their state constitutions. Thus, there is one important question that arises as we near the dawn of a new century: will the state courts protect a woman's right to choose an abortion?

This Note explores ways in which the states have and may in the future control the abortion debate. Part II of this Note explains the background and history of United States Supreme Court decisions on abortion. Part III analyzes ways in which state courts interpret their own constitutions, differently than the federal constitution, to protect more abortion rights. Finally, Part IV examines how Ohio courts have interpreted the Ohio Constitution regarding abortion rights. This Part will then draw from the analysis of state court decisions to suggest ways that the Ohio Supreme Court could use the Ohio Constitution as a source to protect broader abortion rights than are protected by the United States Constitution.

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[1] 410 U.S. 113 (1973); *see also infra* subpart II.A.

[2] *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); *see* Davis v. Davis, 842 S.W.2d 588, 595 (Tenn. 1992) (stating that *Webster* "permitted the states additional leeway in regulating abortion"); *see also infra* Part II for a discussion of regulations that the Supreme Court has held valid in the abortion law context.

II. A BRIEF HISTORY OF THE UNITED STATES SUPREME COURT'S DECISIONS REGARDING ABORTION

A. *From* Roe *to* Webster*: The Evolution of the Court's Abortion Jurisprudence*

In 1973, the Supreme Court decided its seminal abortion case *Roe v. Wade*.[3] The Court in *Roe* held that state laws criminalizing abortion without regard to the particular stage of pregnancy or other government interests violated the Due Process Clause of the Fourteenth Amendment.[4] While there is no explicit textual privacy provision in the Constitution, the Court found that there are "zones of privacy."[5] It is within these "zones of privacy" that the Court found a woman's right to terminate her pregnancy with an abortion.

The *Roe* Court held that the right of personal privacy includes the right to make an abortion decision.[6] The privacy right is not, however, unqualified and the court must weigh it against important state interests.[7] The Court constructed a trimester framework to analyze the weight of various state interests versus the woman's right to choose an abortion. The Court found that a woman's privacy interest is most compelling in the first trimester of pregnancy and during that time the state may not deny a woman's right to choose an abortion.[8] The state has a compelling interest in the health of the pregnant woman at the end of the first trimester.[9] At this stage—the second trimester—the state may regulate the abortion procedure in ways that are "reasonably related to maternal health."[10] The state's interest in the potential life becomes compelling at the point of viability.[11] At this stage the state may

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[3] 410 U.S. 113 (1973).

[4] *Id.* at 147–64.

[5] *Id.* at 152–53. The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[6] *Roe*, 410 U.S. at 153–54. The United States Constitution does not contain any explicit textual language protecting a person's right of privacy. The Court instead looked to the Fourteenth Amendment Due Process Clause, to find that there are "zones of privacy" surrounding this provision of the Constitution. *See supra* note 5. It is within these "zones" that the right to privacy exists. It is from these "zones of privacy" that a woman gains a right to choose an abortion to terminate a pregnancy.

[7] *Roe*, 410 U.S. at 154.

[8] *Id.* at 162–64.

[9] *Id.* at 163.

[10] *Id.* at 163–64.

[11] *Id.* at 163.

regulate or even proscribe abortions except when an abortion is necessary to preserve the life or health of the mother.[12]

While some commentators have criticized the Supreme Court's decision in *Roe*,[13] it has remained the law of the land[14] for some twenty years. The Court recently reaffirmed the essential holding of *Roe* in *Planned Parenthood v. Casey*,[15] and the basic right of a woman to choose an abortion is still grounded in our nation's constitutional framework.

The Court has taken many opportunities since its *Roe* decision to revisit the abortion question. This has resulted in many modifications and permutations of the right recognized in *Roe*. Most of the Supreme Court's decisions dealing with abortion concern the issue of whether certain regulations, imposed by the states on the right to choose an abortion, are constitutional. Between 1973 and 1989, the Court generally presumed statutes regulating abortion to be invalid and consequently struck down most abortion restrictions.[16] To overcome this presumption, the state was required to prove that it had a compelling reason for adopting the regulation at issue.

The first abortion case after *Roe*, *Planned Parenthood v. Danforth*,[17] dealt with a state regulation that allowed the father of an unborn to veto a woman's choice to abort. The statute also allowed the parents of a pregnant minor absolute veto power over her right to choose an abortion.[18] The Court ruled as unconstitutional any law allowing a man to have veto power over a woman's

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[12] *Id.* at 163-64.

[13] *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) (stating that less controversy may have surrounded the Supreme Court's premier abortion decision if the Court had tied the right to sexual equality and equal protection instead of due process); Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1114 (1980); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); *see also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

[14] *Roe* has remained the law but with some large modifications. See *infra* notes 17-78 and accompanying text for a detailed discussion of *Roe's* progeny.

[15] 112 S. Ct. 2791 (1992). See *infra* notes 56-78 and accompanying text for a more detailed discussion of *Casey*.

[16] *See* TRIBE, *supra* note 13, at 15-16.

[17] 428 U.S. 52 (1976).

[18] *Id.* at 58.

abortion decision.[19] The Court also held that a state may not give the parents of a minor child ultimate veto power over her decision.[20]

In *City of Akron v. Akron Center for Reproductive Health, Inc.*,[21] the Court held that if a state requires parental consent before performance of an abortion, the state must also allow for a judicial bypass.[22] Under this approach, a judge decides if a minor is mature enough to make the abortion decision on her own.[23]

In *Thornburgh v. American College of Obstetricians and Gynecologists*[24] the Court struck down laws requiring the physician to give the woman descriptions about fetal development, informing her of the physical and psychological risks associated with abortion, and reminding her of remedies available for getting financial aid from the father should she choose to give birth.[25] In *Thornburgh*, as in the precedents following *Roe*, the Court used a strict scrutiny test requiring that any regulation of abortion must be narrowly tailored to further a compelling state interest.[26] The Court found that the requirement to give women seeking an abortion specific information was designed to dissuade women and imposed a rigid requirement irrespective of a particular woman's needs.[27]

While most of the Court's decisions invalidated states' attempts to regulate the abortion decision, there is one notable exception. The Court has upheld federal and state restrictions on public funding of abortions and abortion

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[19] *Id.* at 67–72. This result has been affirmed by Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

[20] *Danforth*, 428 U.S. at 72–75.

[21] 462 U.S. 416 (1983) [hereinafter Akron I], *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

[22] *Akron I*, 462 U.S. at 439–40. In Akron I, the Court determined the constitutionality of a regulation that would prohibit a physician from performing an abortion on a pregnant minor under age 15 unless she obtained informed, written consent of a parent or an order from a court with jurisdiction over the minor.

[23] *Id.* at 441.

[24] 476 U.S. 747 (1986), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); *see infra* notes 56–78 and accompanying text.

[25] *Thornburgh*, 476 U.S. at 759–65. The Court said, "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Id.* at 759. *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (upholding a very similar Pennsylvania statute).

[26] *Thornburgh*, 476 U.S. at 765–68.

[27] *Id.* at 762. The Court was persuaded that the Pennsylvania statute in question in *Thornburgh* was an attempt by the state to control a woman's abortion decision and stated that the requirement that the physician give the woman certain materials was "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.*

facilities.[28] Three cases came before the Supreme Court in 1977 that dealt with the issue of public funding for abortions and abortion services.[29] In the first case, *Beal v. Doe*,[30] the Court upheld the right of a state to have discretion whether to fund or not fund nontherapeutic abortions.[31] The Court held in *Maher v. Roe*[32] that a state may refuse to fund nontherapeutic abortions even though the state may choose to fund an indigent woman's childbirth expenses.[33] In *Poelker v. Doe*,[34] the Court held that states and cities could choose not to provide public employees or facilities to perform nontherapeutic abortions.[35] In 1980, the Court decided *Harris v. McRae*,[36] in which it extended its analysis in *Maher* to the federal government. The *Harris* Court found the Hyde Amendment,[37] a restriction on the use of federal Medicaid funds for abortion, to be constitutional.[38] These decisions dealing with funding of abortions and abortion services are notable exceptions to the Court's early presumption against the validity of state regulations of abortion.

In 1989, the Supreme Court's decisions diverged onto a new path of upholding state restrictions on abortion. It has been suggested that this divergence was the result of Reagan's appointment of three conservative antiabortion justices during his eight-year term as President, replacing three

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[28] At least one constitutional scholar has argued that, "The public funding of abortion decisions appear incongruous following so soon after the intrepid 1973 rulings. The Court did not adequately explain why the 'fundamental' choice principle and trimester approach embraced in *Roe* did not bar the sovereign, at least at the previability stage of pregnancy, from taking sides." Ginsburg, *supra* note 13, at 386.

[29] *See* Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977). These cases are discussed *infra* notes 30–35 and accompanying text.

[30] 432 U.S. 438 (1977) (holding that a regulation that limited funding of abortions by Pennsylvania's Medicaid program to those abortions that the state considered "medically necessary" is consistent with the Social Security Act).

[31] *Id.* at 443–45. "Nontherapeutic" abortions are those abortions that are elective and are not necessary to save the life or health of the pregnant woman.

[32] 432 U.S. 464 (1977).

[33] *Id.* at 474 (holding that the government may make a value judgment favoring childbirth over abortion and implement that judgment by the allocation of public funds).

[34] 432 U.S. 519 (1977).

[35] *Id.* at 521.

[36] 448 U.S. 297 (1980).

[37] Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979).

[38] *Harris*, 448 U.S. at 312–17. The Court stated that the government merely, "by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315.

Justices who were in the *Roe* majority.[39] This fundamental change in the makeup of the Court led to *Webster v. Reproductive Health Services*.[40]

Webster was a challenge to a Missouri state statute placing restrictions on performing abortions in public institutions even if the woman paid her own bill.[41] The preamble of the statute read, "[t]he life of each human being begins at conception."[42] The law also required physicians to complete fetal viability tests when the woman was twenty weeks or more pregnant.[43]

In *Webster* the newly shaped Court was asked to decide the fate of *Roe v. Wade*.[44] A splintered Court upheld *Roe*, but the plurality also upheld the restrictions on the use of public employees and facilities for the performance of nontherapeutic abortions.[45] Chief Justice Rehnquist, writing for himself and Justices White and Kennedy, concluded that the government has an interest in protecting potential life throughout pregnancy, not just at viability.[46] The plurality upheld the statute on the grounds that the right to terminate a pregnancy was merely a liberty interest—like driving a car or working—which merits no special governmental protection.[47] This change was significant, for before *Webster*, the right to choose an abortion was seen as fundamental—like the right to assemble, speak freely, or be secure in one's home.[48] A four-Justice dissent insisted that the right to end pregnancy was fundamental.[49]

Justice O'Connor became, for the first time in the abortion context, the "swing vote." She voted to affirm *Roe* but also voted to uphold the statute at issue. Justice O'Connor advocated her "undue burden" test, her own preferred test for scrutinizing abortion regulations. She concluded that the statute at issue should be upheld because it imposed no undue burden on a woman's right to choose an abortion.[50] While there was some debate after *Webster* about whether it actually changed abortion law, one constitutional scholar concluded,

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[39] TRIBE, *supra* note 13, at 15–16.

[40] 492 U.S. 490 (1989).

[41] *Id.* at 501.

[42] *Id.*

[43] *Id.*

[44] TRIBE, *supra* note 13, at 20–21. An amazing 78 amicus briefs were filed in *Webster*, a record number at the time. *Id.* at 21.

[45] *Webster*, 492 U.S. at 507–11.

[46] *Id.* at 517–20.

[47] *Id.* at 507–11; *see also* TRIBE, *supra* note 13, at 23.

[48] TRIBE, *supra* note 13, at 23.

[49] *Webster*, 492 U.S. at 539–41; *see also* TRIBE, *supra* note 13, at 23.

[50] *Webster*, 492 U.S. at 530–31. See *infra* subpart II.B. for a more thorough discussion of the undue burden test.

"if constitutional law is as constitutional law does, then after *Webster, Roe* is not what it once was."[51]

Since the *Webster* decision, the Court decided *Rust v. Sullivan*,[52] a case that pitted the medical establishment against the legal establishment. *Rust* involved a challenge of a federal rule, known as the "gag rule," which prohibited Title X fund recipients from providing patients with information, counseling, or referrals about abortion.[53] Because the law regulated how and what clinic counselors could tell a patient, it was labeled a "gag rule." The Court upheld the regulations and cited *Maher*[54] for the proposition that government may make a value judgment favoring childbirth over abortion and implement this judgment by allocation of public funds.

Two days into his presidency, President Clinton directed the Secretary of the Department of Health and Human Services to suspend the gag rule and to promulgate new rules affecting Title X fund recipients.[55] This effectively renders the Supreme Court's opinion in *Rust* moot insofar as it affects the gag rule. Though the lifting of the gag rule is a victory for the pro choice movement, the Supreme Court's latest decisions leave a long road of litigation ahead for both sides of the abortion debate.

B. *Analysis of* Planned Parenthood v. Casey

Following the *Webster* decision and the affirmance of the gag rule in *Rust*,[56] tensions mounted as antiabortion activists pressed the Court to overturn *Roe*. Similarly, abortion rights advocates pressed the Court to reaffirm *Roe*. Additionally, the *Webster* decision—while creating panic for abortion rights advocates who saw state legislatures furiously passing restrictive legislation—provided little guidance to courts seeking to define the boundaries of abortion

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[51] TRIBE, *supra* note 13, at 24.

[52] 111 S. Ct. 1759 (1991).

[53] *See* Public Health Services Act, 42 U.S.C. § 300a-6 (1992). This Act provides federal funds for family planning clinics to provide services for low-income patients.

[54] Maher v. Roe, 432 U.S. 464 (1977); *see also supra* notes 31-36 and accompanying text.

[55] *Text of President Clinton's Memos to the Secretary of Health and Human Services and the Secretary of Defense Concerning Abortion Rights*, The Reuter Transcript Report, Jan. 22, 1993, *available in* LEXIS, Nexis Library, Currnt File. Besides lifting the gag rule, President Clinton also reversed bans on fetal tissue research and directed the Secretary of Defense to lift the ban on all abortions in United States military facilities abroad, allowing abortion services when paid for entirely with non-Department of Defense funds. *See* Katherine Boo, *The Clinton Evolution; The Kvetching of Critics Misses His Real Domestic Achievements*, WASH. POST, June 20, 1993, at C1.

[56] For a discussion of *Webster* and *Rust*, see *supra* subpart II.A.

rights.[57] With the 1992 case *Planned Parenthood v. Casey*,[58] the Court had the opportunity to decide the fate of *Roe* and to more clearly delineate the constitutional bounds of the abortion right.

The Court in *Casey* accomplished three things. First, it unequivocally reaffirmed the "essential holding" of *Roe*.[59] Second, the Court rejected the trimester framework adopted in *Roe* and instead made viability the crucial point of judicial inquiry.[60] Third, the Court adopted the "undue burden" test for deciding the constitutionality of state regulations of abortion.[61]

The "essential holding" of *Roe*, as defined by Justice O'Connor in the joint opinion, has three parts. First, a woman has a right to choose an abortion before *viability* and to obtain it without *undue interference* from the state.[62] Second, the state has the power to restrict abortion after fetal viability if the law provides exceptions for pregnancies that endanger a woman's life or health.[63] Third, the state has legitimate interests from the outset of the pregnancy in protecting the health of the pregnant woman and the potential life.[64]

Perhaps the most striking aspect of the *Casey* joint opinion is that it creates a new form of stare decisis. Justice O'Connor's opinion ostensibly plays slave to stare decisis to uphold the "essential holding" of *Roe* while simultaneously overruling two post-*Roe* decisions.[65] Without overruling the decisions of *Akron I* and *Thornburgh*,[66] the Court would have had to invalidate Pennsylvania's informed consent, waiting-period, and record-keeping requirements.[67] The three-Justice joint opinion created a strange brand of stare decisis to accommodate both the reaffirmance of *Roe* and the new standard of review—the undue burden test.

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[57] *See* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992), *cert. denied, sub nom.* Stowe v. Davis, 113 S. Ct. 1259 (1993).

[58] 112 S. Ct. 2791 (1992).

[59] *Id.* at 2804. The vote for the reaffirmance was 5-4.

[60] *Id.* at 2817–18. "Viability" is defined as the point at which the fetus presumably has the capability of meaningful life outside the woman's womb. *See* Roe v. Wade, 410 U.S. 113, 163 (1973). Viability at the time of *Roe* was at approximately 28 weeks of pregnancy while at the time of *Casey* it was approximately 23 to 24 weeks. *Casey*, 112 S. Ct. at 2811.

[61] *Casey*, 112 S. Ct. at 2819.

[62] *Id.* at 2804.

[63] *Id.*

[64] *Id.*

[65] The Court overruled the holdings of Akron I, 462 U.S. 416 (1983) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). *See supra* subpart II.A.

[66] *See supra* notes 21–27 and accompanying text for a discussion of these cases.

[67] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816–17, 2822–26 (1992) (opinion of O'Connor, Kennedy, Souter, JJ.).

The undue burden test has been endorsed by Justice O'Connor since 1983.[68] In *Casey*, Justice O'Connor rejected the trimester framework as too "rigid"[69] and because it "undervalues the State's interest in potential life."[70] Under the undue burden test, abortion regulations before fetal viability are scrutinized for the amount of hardship they impose. Those restrictions of abortion that are "substantial obstacles" are struck down.[71] Burdens that are less than "substantial" are upheld if they are minimally rational.[72]

Though one might agree with the joint opinion that the trimester framework was too "rigid," the undue burden test may prove too elusive and unworkable. The *Casey* Court certainly did not provide more clearly defined boundaries of the abortion right. It is probable that with such a "fuzzy" standard as "undue burden," lower federal and state courts will see more abortion litigation—not less[73]—as states pass restrictive abortion laws that they hope will not be found to present an "undue burden." State courts will have to struggle with what exactly is an "undue burden."[74] Justice O'Connor herself identified the elusive nature of the new standard when she noted that, while the regulations in *Casey* were upheld, the decision was limited to the record before the Court and future evidence may show the same restrictions to be undue burdens.[75]

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[68] *See Akron I*, 462 U.S. at 453, 461–66 (O'Connor, J., dissenting).

[69] *Casey*, 112 S. Ct. at 2818.

[70] *Id.*

[71] *Id.* at 2820.

[72] *Id.* at 2820–22 (stating that state measures designed to persuade women to choose childbirth over abortion would be upheld if reasonably related to that goal).

[73] *See* Tamar Lewin, *The Supreme Court: Clinics Eager to Learn Impact of Abortion Ruling*, N.Y. TIMES, July 1, 1992, at A1 (discussing effects of the *Casey* decision on clinics and quoting Janet Benshoof, president of the Center of Reproductive Law and Policy, as saying, "When push comes to shove, we're left with a legal standard I can't figure out. It looks like we're going to have to relitigate every restriction [that's been struck down].").

[74] One month after the *Casey* decision the Oklahoma Supreme Court, in *In re* Initiative Petition No. 349 State Question No. 642, 838 P.2d 1 (Okla. 1992), *cert. denied*, Oklahoma Coalition to Restrict Abortion, Inc. v. Feldman, 113 S. Ct. 1028 (1993), was asked to determine the validity of Initiative Petition No. 349. Initiative Petition No. 349 would criminalize abortion except in these four circumstances: (1) grave impairment of the woman's physical or mental health; (2) rape (as defined in OKLA. STAT. tit. 21, § 1111 (1991)); (3) incest (as defined in OKLA. STAT. tit. 21, § 885 (1991)); and (4) grave physical or mental defect of the fetus. Instead of tackling the undue burden test, the court found the initiative petition unconstitutional on its face by not allowing a woman to make a private abortion decision at any time during pregnancy.

[75] *Casey*, 112 S. Ct. at 2825–26.

Neither side in the abortion debate found much solace in the *Casey* decision.[76] For pro choice advocates, *Casey* rendered *Roe* a shell of its former self. Antiabortionists felt betrayed by conservative appointees who did not join to overrule *Roe*.[77] The *Casey* decision was not a clear victory or defeat for either side of the abortion debate but a compromise—like the *Roe* decision—only granting more power to the state in favor of coercion.[78]

C. *The Freedom of Choice Act*

While the United States Constitution protects the right to terminate a pregnancy with an abortion, the right still seems tied to the whims and fluctuations of the high Court.[79] With the first Democratic leadership in the country in twelve years, the Clinton administration will have the opportunity to appoint pro choice Justices committed to maintaining the essential *Roe* right.[80] The Democratic-dominated Congress, however, has its own opportunity to make its mark on abortion law by passing the "Freedom of Choice Act."[81]

The purpose of the Freedom of Choice Act is to protect the reproductive rights of women. The Congressional findings state that the Court no longer uses the strict scrutiny standard as enunciated in *Roe* and this has allowed states to unduly restrict a woman's right to choose an abortion.[82] The Act would prohibit a state from restricting a woman's right to end a pregnancy before fetal viability[83] or at any time if necessary to protect the woman's life or health.[84] The Act thus seeks to preserve the core of rights established in *Roe* while still allowing a state to require parental consent with some kind of bypass

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[76] *See* Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 33 (1992).

[77] *Id.*

[78] *Id.* at 34.

[79] For an eloquent and passionate portrayal of the dramatic effect one vote could have on this liberty interest, see *Casey*, 112 S. Ct. at 2854–55 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[80] President Clinton has, in fact, appointed Ruth Bader Ginsburg to the Supreme Court. Justice Ginsburg, in her confirmation hearing, unequivocally stated that she believes that a woman has a constitutional right to control her own reproduction. Justice Ginsburg has in the past, however, criticized *Roe* as sweeping too far and mobilizing the right-to-life movement and reaction in Congress and state legislatures. She has also criticized the decision because it narrowly defined the issue as between the fetus' interests and a woman's interests. *See* Ginsburg, *supra* note 13.

[81] Freedom of Choice Act of 1993, S. 25, 103d Cong., 1st Sess. (1993).

[82] *Id.* § 2(a)(1)–(2).

[83] *Id.* § 3(a)(1).

[84] *Id.* § 3(a)(2).

procedure,[85] to deny state funds to pay for the procedure,[86] and to protect a person conscientiously opposed to abortion from having to participate in performance of abortions.[87]

While the Act would allow states to refuse to pay for abortions for Medicaid recipients, it would also permit many state restrictions such as waiting periods, record-keeping requirements, and gag orders. Pro choice political activists support passage of the bill as a safeguard against the one-person vote needed to overturn *Roe*.[88] Because the future of the bill and of the makeup of the Supreme Court is uncertain, pro choice activists and litigators should look to the state legislatures and state court systems to protect the abortion right.

III. STATE CONSTITUTIONAL MODELS FOR PROTECTION OF A WOMAN'S RIGHT TO PRIVACY

Under the precedent of recent Supreme Court opinions, state regulations of abortion will be upheld as long as they do not impose an "undue burden."[89] These decisions have renewed the zeal of antiabortion lobbyists and state legislators as they attempt to pass restrictive abortion legislation in the states.[90] Because it is unclear exactly what restriction would constitute an undue

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[85] *Id.* § 3(b)(3).

[86] *Id.* § 3(b)(2).

[87] *Id.* § 3(b)(1).

[88] *See* Rorie Sherman, *Shaping the Abortion Debate: The War to Heat Up*, NAT'L L.J. Nov. 30, 1992, at 1 ("[O]nly an act of Congress can stop the expected flood of state abortion-regulation bills. Pro-abortion rights lawyers . . . are now hopeful that the Freedom of Choice Act will pass.").

[89] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2819 (1992); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) [hereinafter Akron II] (opinion of Kennedy, J.); Hodgson v. Minnesota, 497 U.S. 417, 458-59 (1990) (O'Connor, J., concurring in part and concurring in judgment in part); Webster v. Reproductive Health Servs., 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in judgment). For a more detailed explanation of the undue burden test, see *supra* subpart II.B.

[90] *See* Lewin, *supra* note 73, at A1 (quoting Burke Balch, state legislative director for the National Right to Life Committee, as saying that antiabortion groups in many states will seek passage of laws similar to the one upheld in *Casey*). The states most likely to pass laws restricting or prohibiting abortion rights are Alabama, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin. *State-By-State Look at Abortion*, The Gannet News Service, Apr. 3, 1992, *available in* LEXIS, Nexis Library, Gns File.

burden,[91] antiabortion state legislatures will experiment with laws that stop short of completely banning abortion.

A state court may use one of three possible constitutional constructions to provide more protection of privacy rights than under the federal constitution.[92] First, the court can find that the state constitution contains an explicit textual privacy provision not found in the federal constitution.[93] Similarly, the court may find that the state constitution contains a provision with no analogy in the federal constitution. Second, the court may find that the language of a particular provision of the state constitution is broader and therefore more protective of individual privacy rights than the language of its federal counterpart. Third, the state may find that although the state constitution's language is substantially identical to the United States Constitution, the state has a history of interpreting analogous provisions more broadly than does the United States Supreme Court. Although each of these methods is explored individually below, courts often employ these methods in tandem to reach a decision that a state constitution is more protective of individual rights than the federal constitution.

State courts will hear many cases that deal with these restrictive abortion laws over the next several years. While the state courts could wrestle with the undue burden test, some states have and will continue to create their own constitutional doctrine based on their own state constitutions.[94] Some state courts may seize upon the opportunity given them by *Webster* and *Casey* to recapture broader fundamental rights for their own people[95] than are protected

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[91] *See supra* notes 68–78 and accompanying text.

[92] It has been suggested that, in general, state courts use three principal modes of state constitutional analysis. In the "lock-step" approach, state courts follow the letter of Supreme Court decisions when interpreting parallel state constitutional provisions. The "reactive posture" refers to a state court generally following federal precedent but granting more rights under its own constitution in certain isolated cases. In the "beyond-the-reactive" approach, state courts undertake an independent state constitutional analysis. Kimberley A. Chaput, *Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts*, 70 OR. L. REV. 593, 607 (1991). The approach asserted in this Note was developed from a study of how state courts deal specifically with abortion issues. Thus, the more general framework outlined above will not be discussed.

[93] See *supra* notes 5–6 and accompanying text for an explanation of the foundation for a federal constitutional right to privacy.

[94] A decision by a state supreme court which diverges from United States Supreme Court precedent on a subject must be supported by "adequate" and "independent" state constitutional grounds if it is to withstand challenge. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[95] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan persuasively argues that "state

by the federal constitution. What follows is a brief survey of how several states have interpreted their own state constitutions in the context of abortion rights. This Note will then conclude with an application of this survey of state constitutional law to Ohio's Constitution and propose a judicial response to abortion cases in Ohio.

A. *Explicit Textual Privacy Provision*

Unlike the federal constitution, at least ten state constitutions contain explicit textual privacy provisions.[96] A fundamental liberty has the greatest recognition, and thus protection from governmental intrusion, where a constitution provides specific textual recognition.[97] Thus, courts in states with explicit textual privacy provisions may find it easier to deviate from the Supreme Court's abortion rulings. Thus far only two state courts have interpreted explicit textual privacy provisions to specifically protect abortion rights.[98] These two states are California[99] and Florida.[100] The decision of the

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courts no less than federal are and ought to be the guardians of our liberties." *Id.* at 491. Justice Brennan explains that state bills of rights, before the enactment of the Fourteenth Amendment, were the primary restraints on state action. He goes further to argue that state constitutions should again become an independent source of protection for individual liberties. *Id.* at 501-03; *see also* Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982) (finding that state constitutions can be interpreted as providing broader individual rights and stating, "Although the federal Constitution may remain as the basic charter, state Constitutions may serve as a supplemental source of fundamental liberties").

[96] *See* ALASKA CONST. art. I, § 22; ARIZ. CONST. art II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art I, § 23; HAW. CONST. art I, § 6; ILL. CONST. art I, §§ 6, 12; LA. CONST. art I, § 5; MONT. CONST. art II, § 10; S.C. CONST. art I, § 10; WASH. CONST. art I, § 7. Recall that the privacy right protected by the United States Constitution is based on "zones of privacy" found in the Fourteenth Amendment. See *supra* part II for further explanation.

[97] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 789-90 (1986) (White, J., dissenting), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

[98] Rachel N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 435 n.110 (1992).

[99] *See* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 784 (Cal. 1981). The California Supreme Court held unconstitutional a California statute that withheld Medi-Cal benefits from poor women seeking to obtain abortions. The court interpreted the California Constitution, which states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and *privacy*." CAL. CONST. art. I, § 1 (emphasis added). The court found that the federal right to privacy is narrower than the right to privacy approved by the voters when they approved an amendment which added the textual privacy provision to article I. *Meyers*, 625 P.2d at 784.

Florida Supreme Court provides an excellent example of how a state court can use its own constitution and judicial reasoning to broaden the privacy right for women in its own state.

The Florida Supreme Court interpreted the Florida Constitution's textual privacy provision in *In re T.W., a Minor*.[101] In 1980, the people of Florida voted to amend their state constitution to add an explicit right of privacy.[102] The Florida Supreme Court in *In re T.W.* found that the citizens of Florida, by adopting the privacy amendment, wanted more protection from governmental intrusion of their privacy than the federal constitution provides.[103] Under Florida law, the right of a woman to end her pregnancy is a fundamental right.[104] The court further found that the appropriate standard of review of a regulation affecting privacy is the "compelling state interest" standard.[105]

At issue in *In re T.W.* was a parental consent statute.[106] The Florida court established that several state interests were involved in a minor's abortion decision. The state, upon viability of the fetus, has a compelling interest in the potentiality of human life.[107] Upon viability, the state may protect its interest in potential life by regulating abortion as long as the woman's health is not endangered.[108] In the case of parental consent statutes the state has additional

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[100] *See In re* T.W., a Minor, No. 74-143, 1989 Fla. LEXIS 1226, (Fla. Oct. 12, 1989). For a more detailed discussion of this case, see *infra* notes 101–16 and accompanying text.

[101] *Id.*

[102] FLA. CONST. art. I, § 23 provides in pertinent part: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein . . . ."

[103] *In re T.W.*, 1989 Fla. LEXIS 1226, at *13.

[104] *Id.* at *17.

[105] *Id.* at *16. The standard was articulated as follows: "[The standard] shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Id.* *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (adopting the undue burden test, a "minimal rationality" test, which allows abortion regulations to stand unless they impose "substantial obstacles" to the exercise of the right to an abortion; restrictions that are not "substantial" are lawful if at least minimally rational). *See supra* subpart II.B., notes 68–72 and accompanying text.

[106] FLA. STAT. ch. 390.001(4)(a) (1988).

[107] *In re T.W.*, 1989 Fla. LEXIS 1226, at *20. Compare to *Casey* where the Court held that the state's interest in potential life is compelling throughout the pregnancy. *See supra* subpart II.B. The Florida Supreme Court defines viability as the "point when the fetus becomes capable of meaningful life outside the womb through standard medical measures," or approximately the second trimester. *Id.* at *21.

[108] *Id.* at *21.

interests in protection of the immature minor and preservation of the family unit.[109]

The Florida Supreme Court found that none of these interests were sufficient to override a minor woman's privacy right as protected by the Florida Constitution's XXIII Amendment.[110] The Florida court faulted the Supreme Court's "relaxed" standard which was applied to parental consent and notice statutes. The United States Supreme Court had found that the state interest in protecting the minor or preserving the integrity of the family need only be "significant" and not "compelling" to be valid.[111] The Florida Supreme Court held that the Florida Constitution required every restriction of abortion rights to further a "compelling" state interest in order to be lawful.[112] The court further held that the interests of protection of minors and preserving family integrity were not sufficiently compelling to justify parental consent.[113]

To be valid, a regulation must further a compelling state interest *and* must utilize the least intrusive means to do so. The Florida court found that the parental consent requirement also failed the second prong of the review standard.[114] Because the statute did not provide for a lawyer for the minor or a record hearing, the court found that the statute did not adequately provide for procedural safeguards against the intrusion the state sought to impose on the minor's privacy right.[115] The court held that in a proceeding in which a minor could be completely deprived of authority to exercise her fundamental right to

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[109] *Id.* at *22.

[110] *Id.*

[111] *See* Akron I, 462 U.S. 416, 427 n.10 (1983) ("[T]he Court repeatedly has recognized that, in view of the unique status of children under the law, the States have a 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult.'") (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976)).

[112] *In re T.W.*, 1989 Fla. LEXIS 1226, at * 24.

[113] *Id.* at *25-26. To reach this conclusion the court found particularly relevant Florida laws that allowed an unwed pregnant minor to consent to adoption. *See* FLA. STAT. ch. 63 (1987). The court also reached this conclusion on the basis of Florida laws allowing an unwed pregnant minor to consent to medical services for herself or her child. *See* FLA. STAT. ch. 743.065 (1987). The court stated the following:

> In light of this . . . authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned.

In re T.W., 1989 Fla Lexis 1226 at *25.

[114] *Id.* at *26.

[115] *Id.* at *26-27.

privacy, the Florida Constitution requires she be represented by counsel and a record hearing be held to memorialize a trial judge's reasons for denying a petition for waiver of parental consent.[116] Thus, under Florida state constitutional law, the parental consent statute was unconstitutional because it did not further a compelling state interest through the least intrusive means.

The Florida court in *In re T.W.* utilized an explicit textual privacy provision in the Florida Constitution to strike down a parental notification statute. The court used the explicit provision as a means to "overrule" the Supreme Court's precedent. With this provision, the Florida Supreme Court was able to fashion a more stringent standard—the compelling interest standard—than the Supreme Court's rational relationship test by which to judge abortion regulations. Even without an explicit textual privacy provision, state constitutions may contain broader language which allows state courts to find adequate and independent grounds for protection of abortion rights.

B. *Broader Language*

Unlike the Florida Constitution, most state constitutions do not contain explicit textual privacy provisions.[117] Courts in these states may instead rely on language in their state constitutions that sweeps more broadly than the federal counterpart to protect more individual rights. An example of a constitution with broader language is the New Jersey Constitution as interpreted in *Right to Choose v. Byrne*.[118]

Right to Choose dealt with a challenge, by Medicaid-eligible women and care providers, to a New Jersey statute which prohibited the use of state Medicaid funds for abortions except where necessary to save the life of the mother.[119] The statute contained no provision to fund abortions to protect the *health* of the pregnant woman. The plaintiffs challenged the law on both equal protection and free exercise of religion grounds under both the United States and New Jersey Constitutions.[120] The New Jersey Supreme Court held that the restriction on funds violated a woman's right to equal protection under the law

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[116] *Id.* at *27–29. The court stated that requiring a minor, untrained in the law, to handle her own case alone "is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try." *Id.* at *28.

[117] See *supra* note 96 for a list of state constitutions that do contain privacy provisions.

[118] 450 A.2d 925 (1982).

[119] *Id.* at 927. The law at issue was N.J. STAT. ANN. § 30:4D-6.1 (West 1981).

[120] *Right to Choose*, 450 A.2d at 929.

of New Jersey.[121] The court also held that the appropriate standard of review is strict scrutiny or the compelling state interest standard.[122]

The trial court had held that the statute violated the Equal Protection Clause of the federal constitution. During the interim between the trial and appeal, the United States Supreme Court decided *Harris v. McRae*[123] in which the Court held that the denial of Medicaid funds for abortion does not violate the federal constitution. Because of the Supremacy Clause, the New Jersey court had to reverse the lower court as to the violation of the federal constitutional issue. Thus, the court had to deal only with the New Jersey Constitution's boundaries regarding abortion rights.

Before the New Jersey court turned to the substantive issues, it discussed the role of state courts in the federal system. The court held that in some cases, states may accord greater "respect" to certain fundamental rights than the federal constitution.[124] The court held that where analogous provisions of the federal and state constitutions differ, or where a state has a previously established body of state law precedent that leads to a different result than federal precedent, the state may then determine that a more expansive grant of rights is supported by the state constitution.[125] The court did concede, however, that a court must use caution to declare rights under the state constitution that differ significantly from those under the federal constitution because it is "generally advisable" to maintain uniform interpretation of identical constitutional provisions.[126] The court thus went on to examine whether and how the New Jersey Constitution differs from the federal constitution.

The New Jersey Supreme Court had previously recognized that the New Jersey Constitution may provide greater protection than the federal constitution for some rights.[127] To establish the background for the court's finding that the New Jersey Constitution protects broader abortion rights than the federal constitution, the court first noted that the New Jersey Constitution contains

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[121] *Id.* at 934–35.

[122] *Id.* Note that the Florida Supreme Court has also held that the appropriate standard of review of abortion restrictions is the compelling state interest standard. *See supra* note 105 and accompanying text.

[123] 448 U.S. 297 (1980); *see also supra* notes 36–38 and accompanying text.

[124] *Right to Choose*, 450 A.2d at 931 ("Although the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete.").

[125] *Id.* at 932.

[126] *Id.*

[127] *Id.*; *see* State v. Alston, 440 A.2d 1311, 1319–20 (N.J. 1981) (discussing standing to challenge searches and seizures); *In re* Grady, 426 A.2d 467, 474 (N.J. 1981) (discussing right to sterilization).

more expansive language than its federal counterpart.[128] Second, the court found that the New Jersey equal protection clause has historically supported the right to privacy.[129] Third, the court referred to "long standing principles" of state law which protect a woman's right to choose an abortion to end a pregnancy.[130]

Even though the New Jersey court found that it has long protected privacy rights of individuals, the court conceded that it frequently applies the same standard of review to the state constitution as the Supreme Court applies to the federal constitution.[131] The court explained that the federal Supreme Court analyzed equal protection issues under two tiers of judicial review—strict scrutiny and the rational relationship test.[132] Strict scrutiny is applied only to cases which involve a fundamental right or members of a suspect class. Relying on federal Supreme Court precedent, the court held that neither poverty nor pregnancy gives rise to membership in a suspect class.[133] The court also relied on federal precedent when it held that funding for an abortion is not a fundamental right. Relying on the federal Supreme Court's *Roe* precedent the court held, however, that the right to choose whether to have an abortion is a fundamental right of all pregnant women including those entitled to Medicaid reimbursement for medically necessary treatment.[134] Thus, because a fundamental right was at issue, the court applied strict scrutiny or the compelling state interest standard.

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[128] *Right to Choose*, 450 A.2d at 933. The New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1. The United States Constitution provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[129] *Right to Choose*, 450 A.2d at 934.

[130] *Id.*

[131] *Id.*

[132] *Id.* Applying strict scrutiny, the challenged legislation will be upheld as long as a *compelling* state interest supports the classification and no less restrictive alternative is available. The rational relationship test requires only that the government classification be rationally related to a *legitimate* state interest. Even though the federal Supreme Court has also used a middle-tier or "intermediate" scrutiny, the New Jersey court chose to discuss it separately in a later portion of the decision.

[133] *Id.*

[134] *Id.*

While the state argued that it had a compelling interest in the protection of potential life,[135] the court disagreed and found the state's interest to be *legitimate* but not *compelling* as required by the strict scrutiny standard.[136] Further, the statute denied equal protection to those women for whom an abortion was medically necessary but whose lives were not endangered.[137] The court held that the statute impermissibly gave priority to potential life at the expense of maternal health.[138] Because the statute denied equal protection to those exercising their constitutional right to choose a medically necessary abortion, it was invalidated using the strict scrutiny standard of the state equal protection clause.

The *Right to Choose* decision is intriguing for several reasons. First, it is one of just a few cases in which a court has attempted to fashion the right to an abortion from an equal protection clause. Second, the New Jersey court boldly rejected precedent of the United States Supreme Court to fashion its own interpretation of its own constitution regarding the right to an abortion. Many state courts simply adopt the will of the federal Supreme Court with little or no real analysis of their own constitution or its history or precedent.[139] The New Jersey court boldly pronounced that the New Jersey Constitution is an independent font of individual rights that extend beyond those rights protected under the federal constitution.

C. *State History and Precedent as a Source of State Constitutional Interpretation*

Some state courts rely on their own historical precedent to protect more privacy rights than does the Supreme Court. The state courts rely on their past interpretation of their state constitutions for analysis independent of the Supreme Court. This type of constitutional interpretation involves a more complex and convoluted analysis than do the two types of analyses previously discussed. A well-reasoned and apt example of this third type of analysis is contained in a decision rendered by the Supreme Judicial Court of Massachusetts in *Moe v. Secretary of Administration.*[140]

In this case the court decided that a state law restricting availability of Medicaid funds only to those abortions necessary to save the life of the

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[135] *Id.* at 935. The state also conceded that its purpose was to influence the woman's decision about whether to have an abortion or go through with childbirth. *Id.* at 934.

[136] *Id.* at 935 (citing Roe v. Wade, 410 U.S. 113, 163-65 (1973)) (emphasis added).

[137] *Id.* at 934.

[138] *Id.* at 935.

[139] *See* Doe v. Maher, 515 A.2d 134 (Conn. 1986).

[140] 417 N.E.2d 387 (Mass. 1981).

pregnant woman while not funding medically necessary abortions violated the due process provision of the Massachusetts Declaration of Rights.[141] The court began its constitutional analysis by surveying a long line of its own cases that protect a broad right of privacy.[142] The court recognized that its decisions considering the Massachusetts due process guarantee "sometimes impelled us to go further than the United States Supreme Court."[143] After establishing its own history of protecting a wide range of privacy rights, the court then turned to the constitutional application at issue.

The court recognized that the regulation at issue in *Moe* was substantially identical to that scrutinized in *Harris v. McRae*.[144] At the plaintiff's urging, the court held that the Massachusetts Declaration of Rights grants a greater degree of protection of abortion rights than does the federal constitution as interpreted in *Harris*.[145] The court was particularly persuaded by the argument that when a state decides to alleviate some of the hardship of poverty, it may not then dispense funds in such a way as to burden the exercise of a fundamental right.[146]

The court analyzed several Supreme Court decisions which examined the constitutional limitations on the manner in which a state may allocate welfare and poverty benefits. These decisions considered the limitations on state denial of benefits in the context of First and Fifth Amendment liberties.[147] Ultimately the court summed up its constitutional analysis by stating: "Our prior decisions demonstrate that our Declaration of Rights affords the privacy rights asserted here no less protection than those guaranteed by the First or Fifth Amendments

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[141] *Id.* at 397.

[142] *Id.* at 398–99; *see* Custody of A Minor, 389 N.E.2d 68, 72 (Mass. 1979) (recognizing as a "cardinal precept of [Massachusetts] jurisprudence" that family life is a private realm the state cannot enter); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977) (holding that the "constitutional right to privacy . . . is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life"); Framingham Clinic, Inc. v. Selectmen of Southborough, 367 N.E.2d 606, 612 (Mass. 1977) (invalidating a zoning law designed to exclude abortion clinics from town and emphasizing the "negative constitutional principle" underlying privacy law); Doe v. Doe, 314 N.E.2d 128, 130-32 (Mass. 1974) (preventing a husband from vetoing a wife's abortion decision).

[143] *Moe*, 417 N.E.2d at 399.

[144] *Id.* at 399–400. For a discussion of *Harris*, see *supra* notes 28–38 and accompanying text.

[145] *Moe*, 417 N.E.2d at 400.

[146] *Id.* at 401.

[147] *Id.* at 401–02. The Supreme Court has held that the state may not impose an indirect obstacle on a student group's free speech and associational rights. Healy v. James, 408 U.S. 169 (1972).

of the Federal Constitution."[148] The court adopted the reasoning of Justice Brennan's dissent in *Harris* to find that the regulation deprives an indigent woman of her freedom to choose abortion over childbirth and thus infringes the due process right guaranteed by the state constitution.[149]

The court then turned to the balancing of interests. While the court could have followed *Roe's* test which would require the state to show that the regulation was narrowly tailored to further a compelling state interest, it instead turned to its own balancing principles.[150] The court found that the state interest involved in *Moe* was the preservation of potential life. Against this interest the court weighed the pregnant woman's interest in choosing a medically necessary abortion.[151] The court held that the "nine months of enforced pregnancy inherent in effectuating these regulations are only a prelude to the ultimate burden the State seeks to impose."[152] The restriction on Medicaid funds for medically necessary abortions was struck down as unconstitutional under the Massachusetts Declaration of Rights.[153]

The *Moe* decision of the Supreme Judicial Court of Massachusetts is just one example of how a judicially activist court may use its own precedent and reasoning to broaden rights beyond those protected by the federal constitution. Courts that have a history of interpreting privacy rights broadly in the areas of involuntary life-saving medical treatment or other private family decisions may apply these precedents to abortion cases. State courts can thus rely on their own judicial reasoning to broaden the scope of personal privacy in the context of abortion.

Based on the foregoing, a state court may be able to use a textual privacy provision in its state constitution as a tool for finding a broader right to abortion than is protected by the federal constitution. State courts may also find that their state constitutions contain more sweeping language than does the federal constitution and this allows them to protect more individual liberties. A state court may go further and find that its own precedent and state history protect a broader privacy right than does the federal constitution. All of these tactics deal with interpretation of state constitutions to provide broad privacy rights. These methods may be used by other state courts to protect broad

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[148] *Moe*, 417 N.E.2d at 402.

[149] *Id.*

[150] *Id.* at 402–03. For a more detailed discussion of *Roe's* balancing, see *supra* notes 3–12 and accompanying text. *See also In re* T.W., A Minor, No. 74-143, 1989 Fla. LEXIS 1226 (Fla. Oct. 12, 1989); *supra* notes 100–16 and accompanying text.

[151] *Moe*, 417 N.E.2d at 404.

[152] *Id.*

[153] *Id.*

privacy rights as they grapple with restrictive abortion laws passed by state antiabortion legislatures.

IV. APPLICATION TO OHIO CONSTITUTION

Several state courts have grappled with challenges to legislative restrictions on the exercise of a woman's right to choose an abortion. The Ohio Supreme Court has yet to decide a case in which it defined the extent to which the Ohio Constitution protects a right to abortion. The court will more than likely have a chance to determine the boundaries of abortion rights in Ohio within the next year as the case *Preterm Cleveland v. Voinovich*[154] winds its way to the Ohio Supreme Court. This Part will analyze the *Preterm* decisions and then apply the framework set forth in Part III to the Ohio Constitution.

A. *A Recent Case Interpreting Ohio's Constitution:* Preterm Cleveland v. Voinovich

The most recent and most restrictive abortion law passed in Ohio to date is commonly known as "House Bill 108."[155] Governor Voinovich signed the bill into law in July of 1991.[156] House Bill 108 creates several conditions that must be satisfied before an abortion may be performed. The law creates a mandatory twenty-four hour waiting period before an abortion may be performed or induced.[157] At least twenty-four hours before the abortion the physician must give the woman specific information,[158] in a private setting, and must give her adequate opportunity to ask questions about the abortion.[159] Abortion providers must also purchase and provide the pregnant woman copies of a pamphlet[160]

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[154] No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1 (Franklin County C.P. May 27, 1992), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. July 27, 1993).

[155] OHIO REV. CODE ANN. § 2317.56 (Baldwin 1992). This law is substantially similar to the Pennsylvania law that the Supreme Court upheld almost in its entirety in *Casey*. *See supra* notes 58-75 and accompanying text.

[156] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *1.

[157] OHIO REV. CODE ANN. § 2317.56(B)(1) (Baldwin 1992).

[158] *Id.* The physician must inform the woman of the following: "(a) The nature and purpose of the particular abortion procedure to be used and the medical risks associated with that procedure; (b) The probable gestational age of the embryo or fetus; (c) The medical risks associated with the pregnant woman carrying her pregnancy to term." *Id.*

[159] *Id.* § 2317.56(B)(2).

[160] OHIO REV. CODE ANN. § 2317.56(C)(1)–(2) (describing the materials that must be given to the woman twenty-four hours prior to the abortion). The statute provides in pertinent part:

published by the state that describes the embryo and fetus at two-week intervals and provides a list of agencies that offer alternatives to abortion.[161] The statute also requires the woman to sign a consent form which certifies that she received the published materials and that she consents to the abortion voluntarily.[162]

In January of 1992, House Bill 108 was challenged as violating several provisions of both the Ohio and United States Constitutions in *Preterm Cleveland v. Voinovich*.[163] The common pleas court granted the plaintiff's request for declaratory and injunctive relief, holding that House Bill 108 violated several provisions of both the Ohio and United States Constitutions.[164] The court of appeals reversed this decision, holding that the law violates neither the Ohio nor the United States Constitution.[165] Analyzing the manner in which these courts interpreted the Ohio Constitution will provide a useful illustration of how the Ohio Supreme Court could interpret the Ohio Constitution in the future.

Like the New Jersey Supreme Court in *Right to Choose*, both the common pleas and appeals courts in *Preterm Cleveland* recognized that state courts can, based on state constitutions, extend personal liberties beyond those protected by

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> (1) Materials that inform the pregnant woman about family planning information, of publicly funded agencies that are available to assist her in family planning, and of public and private agencies and services that are available to assist her through her pregnancy, upon childbirth, and while her child is dependent, including, but not limited to, adoption agencies . . . .
>
> (2) Materials that inform the pregnant woman of the probable anatomical and physiological characteristics of the zygote, blastocyte, embryo, or fetus at two-week gestational increments for the first sixteen weeks of her pregnancy and at four-week gestational increments from the seventeenth week of her pregnancy to full term, including any relevant information regarding the time at which the fetus possibly would be viable . . . . If the materials use a pictorial, photographic, or other depiction to provide information . . . the materials shall include, in a conspicuous manner, a scale or other explanation . . . that can be used to determine the actual size of the zygote, blastocyte, embryo, or fetus at a particular gestational increment . . . .

Id.

[161] *Id.* § 2317.56(B)(3)(b)-(c).

[162] *Id.* § 2317.56(B)(4)(a)-(b).

[163] Preterm Cleveland v. Voinovich, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1 (Franklin County C.P. May 27, 1992), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. July 27, 1993).

[164] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1.

[165] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770. This court decided the case based only on a facial challenge to House Bill 108. Because of the undue burden test, abortion rights litigants should raise both "facial" and "as applied" challenges to abortion laws.

the federal constitution. The common pleas court noted that the federal constitution provides a floor of minimum protection of individual rights and that where there are textual differences between the state and federal constitutions, the state can create its own interpretation.[166] The appellate court stated that it was "obvious" that the Ohio Constitution could grant greater rights than are conferred by the United States Constitution.[167] However, the court of appeals further found that Ohio courts have had "little occasion" to apply Ohio constitutional provisions rather than parallel federal constitutional provisions since the latter have generally been construed to impose the same or greater restrictions on state action.[168] Each court did, however, analyze the challenge to House Bill 108 under the Ohio Constitution.

The common pleas court in *Preterm Cleveland* used all three methods of state constitutional analysis outlined above. The court first determined that Ohio's Constitution contains a "freedom of conscience" provision, which is not found in the United States Constitution. The plaintiffs in *Preterm Cleveland* argued that by requiring abortion providers to distribute state-created pamphlets and by imposing procedural obstacles to obtaining an abortion, House Bill 108 violates the freedom of conscience guarantee of the Ohio Constitution.[169] The court found that the only analogous federal provisions are the Establishment[170] and Free Exercise[171] clauses of the First Amendment. The court observed that while the federal constitutional provisions are "tied to religion," the Ohio

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[166] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, *4–5. The court cited City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) and PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

[167] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *5 (citing State v. Brown, 588 N.E.2d 113 (1992), *cert. denied*, Ohio v. Brown, 113 S. Ct. 182 (1992), which held that Ohio courts are free to deviate from U.S. Supreme Court precedent when interpreting analogous provisions of the Ohio Constitution).

[168] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *6.

[169] The Ohio Constitution provides in pertinent part:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; *nor shall any interference with the rights of conscience be permitted* . . . .

OHIO CONST. art. I, § 7 (emphasis added).

[170] "Congress shall make no law respecting an *establishment of religion* . . . ." U.S. CONST. amend. I (emphasis added).

[171] "Congress shall make no law . . . prohibiting the *free exercise [of religion]* . . . ." U.S. CONST. amend I (emphasis added).

Constitution embraces the more sweeping concept of "conscience."[172] The court held that the freedom of conscience guarantee prevents the state from interfering in decisions that involve "deeply-held moral" and philosophical convictions and that a woman's decision to abort her pregnancy is such a "deeply-held moral" decision which affects the direction of her life.[173]

In contrast, the court of appeals found that "nothing in either the language or the history" of the freedom of conscience clause supported the trial court's holding.[174] This court held that the right to conscience is connected to religion and is not to be taken in a secular context.[175] The court noted that the secular concepts of "moral" and "philosophical" choices are protected by the freedom of conscience clause only when predicated upon "bona fide religious beliefs."[176] Thus, the court held that House Bill 108 does not infringe upon any religious rights and thus is not facially invalid under Article I, Section 7 of the Ohio Constitution.[177]

The common pleas court also relied on the second method of analysis, broader language, to invalidate House Bill 108. The court determined that the free speech guarantee[178] of the Ohio Constitution sweeps more broadly than its federal counterpart. The court found that Ohio's free speech provision contains two distinct clauses, only the second of which corresponds to the federal provision. The court concluded that the drafters of the Ohio Constitution intended to offer greater protection to speech than is afforded by the First Amendment.[179] The court relied on Ohio's free speech provision as well as decisions of other courts to find that House Bill 108 violates the free speech

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[172] Preterm Cleveland v. Voinovich, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1, at *14 (Franklin County C.P. May 27, 1992) ("Freedom of conscience necessarily includes moral and philosophical views that lay outside the confines of established religion."), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. July 27, 1993).

[173] *Id.* at *15.

[174] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *23.

[175] *Id.*

[176] *Id.* at *24.

[177] *Id.* at *25. The court decided to "afford proper perspective" to the constitutional rights involved so as to allow the state to promote its interest and require a woman to be "fully informed."

[178] The Ohio Constitution provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." OHIO CONST. art. I, § 11.

[179] Preterm Cleveland v. Voinovich, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1, at *16 (Franklin County C.P. May 27, 1992), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. July 27, 1993).

guarantee by compelling abortion providers to distribute certain state-created pamphlets and by requiring physicians to communicate in state-mandated ways.

The court of appeals reversed the common pleas court on this issue, holding that nothing in House Bill 108 prohibits anyone from freely speaking, writing, or publishing their thoughts on anything—including abortion.[180] The court reasoned that while House Bill 108 requires the dissemination of state-printed materials, the law does not prohibit an abortion provider from giving a woman any other materials.[181] The court also seemed persuaded that because the statute requires the information provided to be "objective and nonjudgmental" and to include only "accurate scientific information," that the state-mandated materials do not restrict free speech.[182] Thus, the court of appeals held that House Bill 108 does not violate Ohio's freedom of speech guarantee.

The common pleas court again used a broader language analysis to hold that House Bill 108 violates the liberty and privacy guarantees of the Ohio Constitution and is thus facially unconstitutional.[183] The court determined that the liberty right in Ohio[184] differs from its federal analogue because it is neither tied to nor limited by a due process clause.[185] The court held that a right to

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[180] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *27.

[181] *Id.* The court stated that requiring the distribution of the pamphlet does not interfere with the freedom of speech any more than does the availability of a civil action for defamation. *Id.* at *28.

[182] *Id.* at *27. The court again alluded to the fact that the plaintiffs did not properly challenge the effect of the law but only posed a facial challenge to House Bill 108. The court stated as follows:

> Plaintiffs' concern that the Department of Health may not comply with the statutory mandate that the material be objective and nonjudgmental and include only accurate scientific information does not give rise to a violation of the freedom of speech provisions . . . . This court will not presume that the Department of Health will not comply with the mandate of the statute, and any such contention is premature in any event.

Id. at *28–29.

[183] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *13.

[184] The Ohio Constitution provides: "All men are, *by nature*, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." OHIO CONST. art. I, § 1 (emphasis added).

[185] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *7. The U.S. Constitution provides: "Nor shall any state deprive any person of life, liberty, or property, without *due process of law*." U.S. CONST. amend. XIV § 1 (emphasis added). Compare to the language of the Ohio Constitution as set forth *supra*, note 184.

privacy is implicit in the Ohio Constitution's liberty guarantee and that this right is sufficiently broad to protect abortion rights.[186]

The court of appeals, in a somewhat confusing discussion, reversed the court of common pleas on this issue. First, the court of appeals recognized that Article I, Section 1 of the Ohio Constitution grants "extensive rights" to the individual.[187] This provision renders the Ohio Constitution broader, the court reasoned, than the federal constitution because it "appears to recognize so-called 'natural law'" which is not expressly recognized in the United States Constitution.[188] Interestingly, the court did not first find that the Ohio Constitution contains a right to privacy[189] and then hold that this right to privacy includes the right to choose an abortion to terminate pregnancy. Instead, the court held that "it would seem almost axiomatic" that the right to choose an abortion is subject to constitutional protection.[190]

Even though the appellate court held that the Ohio Constitution contains broader language, it nevertheless reversed the holding of the common pleas court. The Court of Appeals applied the undue burden standard as explicated in *Casey*, rather than the compelling state interest test, to hold that House Bill 108 does not abridge a woman's right to choose an abortion.[191] The court decided that it had "little choice" but to apply the undue burden standard to its interpretation of the Ohio Constitution *except* for when the Ohio Constitution affords greater restrictions upon state action than does the federal constitution.[192] The court summarily decided that the undue burden test rather than the compelling state interest test applied to abortion restrictions under the Ohio Constitution.[193] Because the House Bill 108 provisions are substantially

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[186] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *10–13.

[187] Preterm Cleveland v. Voinovich, No. 92AP–791, 1993 Ohio App. LEXIS 3770, at *8 (Ohio Ct. App. July 27, 1993) (citing Palmer v. Tingle, 45 N.E. 313 (Ohio 1896)).

[188] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *9.

[189] The court did, however, find that Ohio recognizes a common law right to privacy as held in Housh v. Peth, 133 N.E.2d 340 (Ohio 1956). *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *11.

[190] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *10.

[191] *Id.* at *18–19. In fact, the court explicitly stated that because of broader language in the Ohio Constitution, the court did not have to balance rights using the undue burden test but could apply a different standard of its own choosing. *Id.* at *11, n.5.

[192] *Id.* at *18.

[193] *Id.* If the court recognized that it need not follow Supreme Court precedent because of the Ohio Constitution's broader language, it is unclear how it felt constrained to apply the undue burden standard. The court should have first decided whether Ohio's constitutional language, precedent, and history support a broader interpretation of abortion law. The court then should have determined which standard would be appropriate for a

similar to the Pennsylvania provisions at issue in *Casey*, the court held that the law did not impose an undue burden on a woman's right to an abortion and thus is constitutional.[194]

The common pleas court again employed the broader language analysis to invalidate House Bill 108 under Ohio's equal protection guarantee. The plaintiffs in *Preterm Cleveland* argued that House Bill 108 deprives women of equal protection of the law under the Ohio Constitution.[195] The plaintiffs argued that the direct impact of any measure regulating or restricting abortion falls on a class consisting exclusively of women. The court noted that neither the Ohio nor the United States Supreme Court have used an equal protection analysis as a means of invalidating abortion restrictions.[196] The court recognized, however, that several other states have used their own state equal protection provisions to invalidate abortion restrictions.[197]

While the equal protection clause of the Ohio Constitution had never been invoked in the abortion context, the court found nothing in its text or history to prevent "interpretation consistent with decisions from other states."[198] Relying

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reading consistent with the Ohio Constitution's broader language. The actual result of the court of appeals is a mystery.

[194] *Id.* at *19–22. Note that the challenge in *Preterm Cleveland* was a facial challenge to the law. The results may be different if a plaintiff attempts to prove that the actual effect of the law in an isolated case is unconstitutional.

[195] Preterm Cleveland v. Voinovich, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1, at *18 (Franklin County C.P. May 27, 1992), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. July 27, 1993).

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

OHIO CONST. art. I, § 2.

[196] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *19–20.

[197] *See* Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (invalidating state restrictions on the use of public funding for abortions based on Article I, paragraph 1 of the New Jersey Constitution); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981) (holding that state law which restricted use of Medi-Cal funds for abortion violates the California Constitution). See also *supra* part III for a more detailed discussion of how several states have utilized their own constitutions to invalidate state regulation of abortion.

[198] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *19–20. The court cited several state court decisions that have utilized their own state equal protection provisions protect a woman's right to choose an abortion. *See* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981); Doe v. Maher, 515 A.2d 134 (Conn. 1986); *Right to*

on the language of the Ohio Constitution, the court found that the statute violated the equal protection clause because it "imposes burdens upon women's reproductive choices that are not imposed upon the reproductive choices of men, and also because it hinders the ability of women to participate fully and equally in society."[199]

The court of appeals again disagreed with the common pleas court and held that House Bill 108 does not violate the equal protection guarantee of the Ohio Constitution.[200] The court noted that the Ohio Supreme Court has often held that the equal protection guarantee of the Ohio Constitution is essentially identical to that of the federal constitution.[201] The court then discussed U.S. Supreme Court precedent on equal protection.

The court of appeals relied on federal precedent to hold that regulations concerning abortion do not constitute gender-based classifications. The United States Supreme Court has held that an exclusion of pregnancy from a disability benefits plan is not gender-based discrimination under the Fourteenth Amendment.[202] Because these restrictions do not involve a gender-based classification, they are subject to a mere rationality standard in which the regulations will be upheld if they further a legitimate state interest. The court cited with approval the holding of *Casey* that the state has a legitimate goal of protecting the life of the unborn and may enact legislation that expresses a preference for childbirth over abortion.[203] Thus, the court held that for precisely the reasons that the Pennsylvania statute in *Casey* did not violate the Fourteenth Amendment, House Bill 108 does not violate the Equal Protection Clause of the Fourteenth Amendment or of the Ohio Constitution.

While the common pleas court invalidated House Bill 108 in its entirety, the court of appeals upheld the validity of the statute in its entirety and completely overruled the common pleas court. These two decisions constitute

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Choose, 450 A.2d 925; Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (N.Y. App. Div. 1993).

[199] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *20.

[200] Preterm Cleveland v. Voinovich, No. 92AP-791, 1993 Ohio App. LEXIS 3770, at *36-37 (Ohio Ct. App. July 27, 1993).

[201] *Id.* (citing Conley v. Shearer, 595 N.E.2d 862, 866-67 (Ohio 1992); Beatty v. Akron City Hosp., 424 N.E.2d 586, 591-92 (Ohio 1981); State *ex rel.* Heller v. Miller, 399 N.E.2d 66, 67 (Ohio 1980); Kinney v. Kaiser Aluminum & Chem. Corp., 322 N.E.2d 880, 882 (Ohio 1975)).

[202] *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 133-40 (1976); Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974) (stating that while only women can become pregnant, not every legislative classification concerning pregnancy is a sex-based classification and thus these classifications are subject only to the rational basis test).

[203] *Preterm Cleveland*, 1993 Ohio App. LEXIS 3770, at *40-42 (citing Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992)).

the only decisions that analyze to any extent the bases and boundaries of abortion rights in Ohio. The next section will provide a proposed analysis which the Ohio Supreme Court or other state supreme courts with similar constitutional provisions may use to interpret state constitutions and to evaluate abortion rights.

B. *Proposal for Interpretation of the Ohio Constitution*

The Ohio Supreme Court has not yet interpreted the Ohio Constitution as it applies to abortion rights. The *Preterm Cleveland* case will likely be appealed to the Ohio Supreme Court. When the Ohio court hears this or a similar case, it may use the Ohio Constitution to protect more privacy rights for Ohio citizens than are protected by the federal constitution. What follows is a model for analysis of the Ohio Constitution as it applies to abortion rights.

Part III of this Note delineated a framework for analyzing whether a given state constitution protects more privacy rights than does the federal constitution. Using this framework, one must first analyze whether the Ohio Constitution contains an explicit textual privacy provision. If it does not, the constitution must be examined for provisions that may contain a right to privacy but contain no analogue in the United States Constitution. Second, one must determine if the Ohio Constitution contains language that sweeps more broadly than the federal constitution. Third, one must analyze the history and precedent in Ohio to determine whether Ohio's history supports the finding that Ohio's Constitution protects broader abortion rights than does the federal constitution. Using this framework, a court could conclude that Ohio's Constitution does indeed protect more abortion rights than does the United States Constitution.

The Ohio Constitution contains no explicit textual guarantee of privacy. Therefore, the mode of analysis employed by the California and Florida Supreme Courts[204] is inapplicable to the Ohio Constitution. The Ohio Constitution does, however, contain a unique provision, the "freedom of conscience" provision, with no federal counterpart.

The freedom of conscience clause is contained in Article I of the Ohio Constitution.[205] The first part of the article is religious in nature and accords a right to "worship Almighty God according to the dictates of one's own *conscience*."[206] This portion of the provision closely mirrors the

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[204] See *supra* subpart III.A and notes 96–116 and accompanying text for a more thorough discussion of the interpretation of explicit textual privacy provisions.

[205] OHIO CONST. art. I, § 7. See *supra* note 169 for full text.

[206] OHIO CONST. art. I, § 7 (emphasis added).

Establishment[207] and Free Exercise[208] Clauses of the federal constitution. If the article contained only this first provision, the argument that it should protect a woman's right to an abortion would be very weak.

The article contains another clause, however, that arguably extends beyond the religion-based First Amendment analysis. The last sentence of Article I states, "nor shall any interference with the rights of conscience be permitted."[209] The trial court in *Preterm Cleveland*[210] was persuaded that "conscience" refers to more than the tenets of established religion.[211] Conscience involves deeply moral and philosophical beliefs of the individual.[212] Because a woman's decision is such a personally moral, philosophical decision, it should be protected by Ohio's freedom of conscience provision. Justice Stevens recently stated:

> A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul." The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. . . . *[A] woman's decision to terminate her pregnancy is nothing less than a matter of conscience.*[213]

A woman's decision to terminate her pregnancy is a deeply moral choice that fundamentally alters her life. Thus, Ohio's freedom of conscience provision should protect a woman's right to choose abortion to terminate her pregnancy.

While the first clause of Article I of the Ohio Constitution—that tied to religion—has been interpreted by the Ohio Supreme Court, the freedom of conscience clause has not been accorded any special interpretation. Historically, Article I has been interpreted to follow federal First Amendment precedent

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[207] *See supra* note 170 and accompanying text.

[208] *See supra* note 171 and accompanying text.

[209] OHIO CONST. art. I, § 7. See *supra* note 169 for full text.

[210] Preterm Cleveland v. Voinovich, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1 (Franklin County C.P. May 27, 1992), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. July 27, 1993). See also *supra* subpart IVA for more detailed discussion of this case.

[211] *See supra* notes 172–73 and accompanying text.

[212] *Id.*

[213] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2840 (1992) (Stevens, J., concurring in part and dissenting in part) (citing Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 781 (1986), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992)) (emphasis added).

closely.[214] The court has not recently rendered an opinion dealing expressly with the freedom of conscience provision in a nonreligious context. The state's own precedent would weigh against a broader reading of this clause.

The history of the clause should not, however, be dispositive. If Article I was meant to do nothing more than mimic federal constitutional law, the framers would not have inserted the last clause dealing solely with the freedom of conscience. The first clause covers the independent First Amendment religious freedoms. Thus, a strong argument exists to support the fact that the framers of the Ohio Constitution intended more freedom for individual choice by inserting the freedom of conscience clause. An Ohio court could correctly find that because a woman's decision to abort her pregnancy is a deeply moral and personal decision of conscience, the freedom of conscience clause of the Ohio Constitution protects such a decision. By imposing a waiting period and requiring that a woman receive state-mandated materials, House Bill 108 reflects the state legislature's lack of respect for a woman's deeply personal, moral, and philosophical choice. The law is thus not only patronizing but also interferes with a woman's own decisionmaking process. The freedom of conscience clause of the Ohio Constitution should be interpreted broadly to protect a woman's right to an abortion and thus to invalidate those portions of House Bill 108 that interfere with a woman's own decision to obtain an abortion.

Even without an explicit textual privacy provision or a unique constitutional provision, a state court may find that its state constitution contains language that sweeps more broadly than its federal counterpart. The privacy right, which encompasses a woman's right to choose an abortion, has been found in the Due Process Clause of the Fourteenth Amendment.[215] Ohio's Constitution has a similar clause which protects a more general notion of liberty.[216] The most obvious difference between the two clauses is that the

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[214] *See* Pater v. Pater, 588 N.E.2d 794 (Ohio 1992) (holding that a court may not restrict noncustodial parent's right to expose her child to religious beliefs unless conflict between parents' religious beliefs affect the child's welfare); State v. Biddings, 550 N.E.2d 975 (Ohio 1988) (holding that criminal defendant who objects to taking of blood sample for DNA testing based on religious beliefs may be ordered to provide blood sample if state has a compelling and paramount interest); *In re* Milton, 505 N.E.2d 255 (Ohio 1987) (holding that a patient could refuse medical treatment because of religious belief), *cert. denied, sub nom.* Ohio Dep't of Mental Health v. Milton, 484 U.S. 820 (1987). All of these decisions were based jointly on the First Amendment of the U.S. Constitution and Article I, Section 7 of the Ohio Constitution.

[215] U.S. CONST. amend. XIV, § 1 provides the following: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.*

[216] "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing,

Ohio liberty provision is not connected to a due process clause. Additionally, the Ohio clause speaks more broadly of "freedom" and "independence" and "seeking and obtaining happiness." Thus, Ohio's liberty guarantee is more broad than the liberty guarantee of the Fourteenth Amendment.[217]

Perhaps the most intriguing possibility for the expansion of abortion rights in Ohio is the Equal Protection Clause. Both of the courts rendering decisions in *Preterm Cleveland* spoke to the issue of whether Ohio's equal protection clause protects a woman's right to an abortion. While the common pleas court relied on an independent state constitutional analysis to hold that the right to an abortion is protected by the Ohio equal protection clause,[218] the court of appeals flatly rejected this interpretation and relied on federal precedent to hold that Ohio's equal protection clause does not protect a woman's right to choose abortion.

Some commentators have opined that contrary to the holding of the United States Supreme Court, regulation of abortion is inherently gender-based regulation.[219] They argue that because only women can become pregnant, any restriction on the right of women to freely control their reproduction is an impingement upon a woman's right to equality. Because such a regulation is based on gender, an intermediate level of scrutiny applies under an equal protection analysis. Others have argued that not every legislative classification

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and protecting property, and seeking and obtaining happiness and safety." OHIO CONST. art. I, § 1.

[217] *See* Preterm Cleveland v. Voinovich, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1 (Franklin County C.P. May 27, 1992), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. July 27, 1993); *see supra* notes 166-169 and accompanying text.

[218] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *19-20 (noting that there is nothing in the text or history of the Ohio Constitution to prevent an interpretation consistent with other states).

[219] *See* Ginsburg, *supra* note 13, at 182 (citing with approval other authors who have argued that abortion regulations concern women's position in society in relation to men and stating that: "It is not a sufficient answer to charge it all to women's anatomy—a natural, not man-made, phenomenon. Society, not anatomy, 'places a greater stigma on unmarried women who become pregnant than on the men who father their children.'"); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 73, n.385 (1992) (stating that because only women bear children, state limitations on a woman's procreative choice discriminate on the basis of gender); Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman's Womb is Not A Man's Castle*, 55 BROOKLYN L. REV. 1359, n.17 (1990); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985) (urging that a woman's right to an abortion and abortion funding should not be grounded in "privacy" but instead in the relationship of women to men).

concerning pregnancy is a sex-based classification and absent a showing that the classification is a mere pretext, the classification will stand.[220]

The Ohio Supreme Court may use Ohio's equal protection clause to protect broader abortion rights than does the federal constitution through one of two different methods. First, the court may find that the right to abortion is a *fundamental* right under the Ohio Constitution and as such is subject to strict scrutiny or the compelling state interest standard.[221] Second, the court may hold that restrictions concerning a woman's procreative freedom create a classification based on gender. Thus, even under federal precedent, the law would be subject to heightened or intermediate scrutiny.

The United States Supreme Court in *Roe v. Wade* recognized that a woman's right to choose an abortion is a fundamental right.[222] The Court has recently diminished the scope of the right to an abortion and has rendered it a mere liberty interest and not a fundamental right.[223] Because Ohio's Constitution contains broader language in its liberty and equal protection guarantees, it is logical that the Ohio Supreme Court could conclude that the right to abortion in Ohio is a fundamental right to be accorded the strictest judicial scrutiny.[224] This in turn would go far to ensure that women's personal liberty and reproductive autonomy are protected.

The Ohio Supreme Court could also hold that any law regarding a woman's reproductive choice creates a gender-based classification. The court would then apply heightened judicial scrutiny to the law to determine its validity. Intermediate scrutiny requires that the law promote important government objectives and must be substantially related to achieving those objectives.[225] While promoting childbirth over abortion may be a *legitimate*

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[220] *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

[221] Strict scrutiny requires the state-created classification to further a compelling state interest using the least restrictive means possible. *See* Right to Choose v. Byrne, 450 A.2d 925 (1982). Also, see *supra* notes 117–39 and accompanying text for a discussion of how the New Jersey Supreme Court has interpreted the New Jersey Constitution's equal protection clause to protect a woman's right to choose an abortion.

[222] Roe v. Wade, 410 U.S. 113 (1973).

[223] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

[224] Other state courts have held that the right to an abortion is a fundamental right and have applied the compelling state interest standard of judicial scrutiny to any regulation of abortion. *See supra* note 105 and accompanying text (discussing *In re* T.W., a Minor, No. 74-143, 1989 Fla. LEXIS 1226 (Fla. Oct. 12, 1989)); *supra* note 197 and accompanying text (discussing Right to Choose v. Byrne, 450 A.2d 925, (N.J. 1982)); *see also* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981).

[225] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

governmental objective,[226] the Ohio Supreme Court could readily hold that this is not an *important* government objective. Thus, any abortion restriction which seeks to promote childbirth over abortion would be unconstitutional under intermediate scrutiny because promoting childbirth is not an important but rather only a legitimate government interest.

Because the Ohio equal protection clause contains language broader than its federal parallel, the Ohio Supreme Court is free to apply its own unique interpretation. It could hold that under the Ohio Constitution, the right to an abortion is a fundamental right and that all regulation of abortion is subject to strict scrutiny. Further, the court has the opportunity to right what many commentators have argued is wrong by declaring that restrictions of a woman's right to abortion impinge on her procreative choice and thus create a gender-based classification triggering an equal protection analysis. Equal protection analysis may more aptly protect women's abortion rights than does *Roe*'s due process analysis.[227] The court would then require that the state have an important government interest and that any classification be substantially related to that interest before the classification will survive intermediate judicial scrutiny. Clearly, the Ohio Supreme Court has ample opportunity to fashion a unique Ohio constitutional interpretation of abortion rights under the equal protection clause.

Using the third mode of analysis, a court could find that the history of Ohio constitutional law supports the finding that the Ohio Constitution protects broader abortion rights than does the United States Constitution. The common pleas court in *Preterm Cleveland* found that since the 1896 case *Palmer v. Tingle*,[228] the Ohio Supreme Court has recognized that "liberty" in Ohio means more than freedom from physical restraint.[229] *Palmer* protected the "sanctity of the individual" and "noninterference by the government."[230] If Ohio's law has historically respected an individual's freedom to act without government interference, this would support the notion that Ohio law supports a broad right to privacy.

Ohio courts have interpreted the liberty provision to contain a right of privacy. Though an early decision protected a student's desire to dress as he pleased,[231] more recent decisions limit protection to areas that are

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[226] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2823-24 (1992).

[227] *See supra* note 219.

[228] 45 N.E. 313 (Ohio 1896).

[229] Preterm Cleveland v. Voinovich, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1, at *10 (Franklin County C.P. May 27, 1992) (citing *Palmer*, 45 N.E. at 314), *rev'd*, No. 92AP-791, 1993 Ohio App. LEXIS 3770 (Ohio Ct. App. 27, 1993).

[230] *Id.*

[231] *See* Jacobs v. Benedict, 301 N.E.2d 723 (Ohio C.P. 1973)

"fundamental" or "implicit in the concept of ordered liberty."[232] A woman's right to choose an abortion is a fundamental right comparable to the right to have consensual, adult sex[233] or to rear a child in the manner one sees fit.[234] This right is supported widely by the history of Ohio's constitutional precedent. Thus, an Ohio court could justifiably hold that Ohio's Constitution, because of its history, protects a broader privacy right to abortion than does the federal constitution.

V. CONCLUSION

The right to choose an abortion has now been protected by the United States Constitution for twenty years. This right is inextricably linked to the freedom and independence women need to fully participate in modern American society. While the Supreme Court has not overturned *Roe v. Wade*, recent decisions seriously undermine the effectiveness of the *Roe* decision in vindicating a woman's right to choose an abortion. It may take years for pro choice litigants to prove that some regulations actually impose an "undue burden."

State courts have a powerful opportunity to afford more personal liberty to women based on their state constitutions. This Note illustrates that state courts can employ several different modes of interpretation when analyzing their state constitutions. Through a thorough and systematic analysis of the state constitution, many state courts may find that "adequate" and "independent" grounds exist to deviate from recent Supreme Court holdings. State courts should take this opportunity to champion the rights of women in their states.

Natalie Wright[*]

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[232] *Preterm Cleveland*, 1992 Ohio Misc. LEXIS 1, at *12.

[233] *See* Saunders v. Clark County Zoning Dep't, 421 N.E.2d 152, 154 (Ohio 1981).

[234] *See* City of Columbus v. Scott, 353 N.E.2d 858 (Ohio Ct. App. 1975).

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