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I. Introduction

"Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference."
—Robert Frost[1]

Lawyers seeking constitutional protection for reproductive rights have relied almost exclusively on a liberty/privacy theory under the Federal Constitution. In the wake of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] this theory may be seen as providing a *floor* of minimum protection—preventing states from banning abortion outright. But it is not strong enough to prevent states from enacting restrictions on the availability of abortion. Thus, the battle over reproductive rights may be seen as shifting from one phase ("Can abortion be *banned*?") to another ("How far can states go in restricting access to abortion?"). If proponents of reproductive freedom are to have any success in this second phase of abortion litigation, they must look beyond the lone theory that has so long sustained them. They must advance new theories under the Federal Constitution[3]—and they must also look to *state* constitutions. Except

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[1] Robert Frost, *The Road Not Taken*, *in* THE OXFORD DICTIONARY OF QUOTATIONS 295 (Angela Partington, ed., 4th ed. 1992).

[2] 112 S. Ct. 2791 (1992).

[3] If women are ever to become equal partners in our society, they must be granted full control over the very thing that makes them "different"—their capacity to reproduce. This is the essence of an equal protection argument that has yet to be advanced before the U.S. Supreme Court. My equal protection analysis, while directed primarily at state constitutional claims, is applicable in part to claims under the Federal Constitution. *See infra* notes 238-60 and accompanying text. Although the Supreme Court has never decided this issue, at least two of its members may be receptive to such an argument. Justice Harry Blackmun, in dictum, has recognized that restrictions on abortion raise equal protection implications. *Casey*, 112 S. Ct. at 2846-47 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part). Justice Ruth Bader Ginsburg, before her appointment to the federal bench, fought for gender equality in a series of cases that reached the U.S. Supreme Court. She filed an influential amicus brief for the American Civil Liberties Union in Craig v. Boren, 429 U.S. 190 (1976), the landmark decision in which the High Court first established "middle tier" or "heightened" scrutiny for gender-based discrimination. Two justices do not comprise a majority, of course, but their presence on the Court guarantees that such an argument will not fall upon deaf ears.

for a line of cases involving public funding of abortion,[4] state constitutions have, until now, been utterly neglected.[5]

This article will explore the use of state constitutions as an alternative or supplemental source of protection for reproductive

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[4] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (invoking the California Constitution's express right to privacy); Doe v. Maher, 515 A.2d 134 (Conn. Super. 1986) (invoking the equal protection and liberty provisions of the Connecticut Constitution); *In re* T.W., 551 So. 2d 1186 (Fla. 1989) (invoking the Florida Constitution's express privacy guarantee); Moe v. Secretary of Admin., 417 N.E.2d 387 (Mass. 1981) (recognizing an implied right to privacy in the substantive due process guarantees of the Massachusetts Constitution); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (recognizing an implied right to privacy in the New Jersey Constitution's liberty guarantee, and in the state equal protection clause); Hope v. Perales, 571 N.Y.S.2d 972 (N.Y. S. Ct. 1991) (invoking both the liberty and equal protection provisions of the New York Constitution), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993); Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247 (Or. 1983) (invoking the privileges and immunities clause of the Oregon Constitution); Women's Health Ctr., Inc. v. Panepinto, 1993 W. Va. LEXIS 228 (W.Va. Dec. 17, 1993) (invoking the equal protection and substantive due process guarantees of the West Virginia Constitution). A similar lawsuit was recently filed in Florida, Doe v. State, No. CL-93-2022-AJ (Fla. Cir. Ct.) (complaint filed March 1993) (invoking the state's express guarantees of privacy and equal protection in challenging a scheme that denies state Medicaid coverage for medically necessary abortions but funds childbirth expenses). *But see* Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (rejecting state equal protection and state equal rights amendment theories).

[5] American Academy of Pediatrics v. Van De Kamp, 214 Cal. App. 3d 831 (Cal. Ct. App. 1989) (striking down a parental consent statute as violating the California Constitution's express privacy guarantee); Preterm Cleveland v. Voinovich, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. May 27, 1992) (striking down a mandatory 24 hour delay and biased counseling provisions under liberty, equal protection, free speech, and freedom of conscience provisions in the Ohio Constitution), *rev'd*, 627 N.E.2d 570, *dismissed*, 624 N.E.2d 194, *reh'g denied*, 626 N.E.2d 693; Planned Parenthood Ass'n v. McWherter, No. 92C-1672 (Tenn. Cir. Ct. Nov. 19, 1992) (recognizing a right of "procreational autonomy" under the Tennessee Constitution and, based on that right, striking down a mandatory 72 hour delay on abortions for adult women; striking down a residency requirement under the state equal protection clause). *But see* Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992) (rejecting state equal protection, freedom-of-religion, and establishment-of-religion claims in a challenge to abortion access restrictions). These cases represent the first instances, outside the context of abortion funding disputes, in which state constitutional provisions have been successfully invoked to vindicate reproductive rights. As recently as 1991, lawyers were relying exclusively on the Federal Constitution in challenging abortion regulations. *See, e.g.*, Fargo Women's Health Org. v. Sinner, 819 F. Supp. 862 (D.N.D. 1993) (challenging biased "informed consent" requirements and a mandatory 24 hour delay). In the wake of *Casey*, such exclusive reliance on the Federal Constitution is no longer tenable.

rights. I will begin by demonstrating that state courts are free to find in their own constitutions a greater degree of protection for individual liberty than that found by federal courts in the United States Constitution.[6] I will then furnish a sketch of post-*Casey* America: fifty separate battlegrounds in which anti-choice legislators will test the limits of *Casey*'s "undue burden" standard by proposing ever more stringent obstacles to abortion.[7] Next, I will examine how a state constitution might be employed in challenging abortion regulations of the sort already upheld under the Federal Constitution.[8] Focusing on the example of a single state—Ohio—I will show how the unique history and text of a state constitution which may be employed to differentiate its protections from those afforded by the federal charter.[9] Finally, I will show that state constitutions not only contain federal analogues (e.g., liberty, privacy, and equal protection guarantees) of independent force,[10] but also feature provisions with no federal counterpart (e.g., "freedom of conscience" guarantees) that may be applicable to abortion regulations.[11]

II. State Courts Are Free to Find in Their Own Constitutions a Greater Degree of Protection for Individual Liberty Than That Found by Federal Courts in the U.S. Constitution

A. Historical Perspective

In the twentieth century, the U.S. Supreme Court became the nation's pre-eminent guardian of civil liberties by applying the Bill of Rights to the states.[12] But, as former Justice William Brennan admonished, "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective

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[6] *See infra* notes 12-75 and accompanying text.

[7] *See infra* notes 76-124 and accompanying text.

[8] *See infra* notes 125-324 and accompanying text.

[9] *See infra* notes 128-38 and accompanying text.

[10] *See infra* notes 159-309 and accompanying text.

[11] *See infra* notes 310-324 and accompanying text.

[12] Robert F. Utter & Sanford E. Pittler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 (1987).

force of state law—for without it, the full realization of our liberties cannot be guaranteed."[13]

After all, "the states *pioneered* the process of declaring fundamental rights."[14] America's first declarations of rights were penned by states,[15] and the "[f]ramers of the various state constitutions intended their charters as the primary devices to protect individual rights."[16] In fact, the Federal Bill of Rights was modeled after provisions in state constitutions.[17] The states "demanded and secured the [Federal] Bill of Rights as a price for ratifying the Constitution."[18] Moreover, at its inception, the Federal Bill of Rights "was perceived as a secondary layer of protection, applying only against the federal government."[19] By contrast, state constitutions "were conceived as the first and at one time the only line of protection of the individual against the excess of local officials."[20] Thus, state constitutions, construed by state courts, emerged as the "primary defenders of civil liberties and of equal rights."[21]

But when the Supreme Court "federalized" civil liberties jurisprudence by selectively incorporating the Bill of Rights into the Fourteenth Amendment, the states abdicated their historic role.[22] Rather than deciding claims on state constitutional grounds, state courts merely followed U.S. Supreme Court precedent.[23] During the 1950s and 1960s, for example, "only ten state court decisions relied on state constitutional provisions to protect individual rights."[24]

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[13] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[14] Harry F. Tepker, Jr., *Abortion, Privacy, and State Constitutional Law: A Speculation if (or When)* Roe v. Wade *is Overturned*, 2 EMERGING ISSUES IN ST. CONST. L. 173, 177 (1989) (emphasis added).

[15] Utter & Pittler, *supra* note 12, at 640.

[16] *Id.* at 636.

[17] California v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975).

[18] Tepker, *supra* note 14, at 177.

[19] Utter & Pittler, *supra* note 12, at 636.

[20] *Brisendine*, 531 P.2d at 1113.

[21] J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 188 (1984).

[22] Utter & Pittler, *supra* note 12, at 636.

[23] *Id.* at 636 (stating "state constitutional rights litigation [has] all but disappeared.").

[24] *Id.*

This judicial hibernation waned in the 1970s, when the U.S. Supreme Court began to interpret the Fourth Amendment ever more narrowly.[25] These decisions gradually inspired a rebellion among state court judges. Balking at what they perceived to be an unwarranted erosion of federal search and seizure protection, these judges turned to their state constitutions. Many found a greater level of protection than that discerned by the Supreme Court in the federal charter.[26] Soon this trend spread from the Fourth Amendment context to other constitutional issues, including the Fifth Amendment freedom from compelled self-incrimination,[27] the freedom of speech,[28]

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[25] *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (allowing warrantless "inventory" searches); United States v. Robinson, 414 U.S. 218 (1973) (allowing the incident-to-arrest exception to the Fourth Amendment to apply to the search of the person of a driver who was stopped on suspicion of driving with a revoked license); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (upholding "consent" searches); United States v. White, 401 U.S. 745 (1971) (holding that the Fourth Amendment is not implicated when electronic surveillance equipment is hidden inside the clothing of an informant who engages the defendant in conversation). This erosion continued into the eighties. *See* United States v. Ross, 456 U.S. 798 (1982) (extending the permissible scope of warrantless automobile searches to closed containers, including luggage carried within the car); Smith v. Maryland, 442 U.S. 454 (1981) (holding that when the police have made a lawful "custodial arrest" of the occupant of an automobile, they may, incident to that arrest, search the car's entire passenger compartment and the contents of any containers found therein).

[26] *See* Reeves v. State, 599 P.2d 727, 734 (Alaska 1979) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Robinson, 414 U.S. 218 (1973)); State v. Maher, 550 P.2d 1044, 1048 (Cal. 1976) (rejecting *Robinson*); State v. Clyne, 541 P.2d 71, 72 (Colo. 1975) (rejecting *Robinson*); State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. White, 401 U.S. 745 (1971)); Wagner v. Commonwealth, 581 S.W.2d 352, 356 (Ky. 1979) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in South Dakota v. Opperman, 428 U.S. 364 (1976)); State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975) (rejecting "consent" searches like those authorized by the U.S. Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973)); State v. Hygh, 711 P.2d 264 (Utah 1985) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Ross, 456 U.S. 798 (1982)); State v. Gunwall, 720 P.2d 808, 813-14 (Wash. 1986) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in Smith v. Maryland, 442 U.S. 735 (1979)).

[27] *See* State v. Disbrow, 545 P.2d 272, 280 (Cal. 1976) (rejecting the U.S. Supreme Court's restrictive Fifth Amendment analysis in Harris v. New York, 401 U.S. 222 (1971)); State v. Santiago, 492 P.2d 657, 662-63 (Haw. 1971) (rejecting the U.S. Supreme Court's restrictive Fifth Amendment analysis in *Harris*); Commonwealth v.

and, by the end of the 1980s, the right to privacy.[29]

Justice Brennan has called the resurgence of state law "the most important development in constitutional jurisprudence in our times."[30] Increased reliance on state constitutional provisions will likely shape the future of civil liberties litigation, especially with regard to privacy and reproductive freedom. But as states look once more to their own constitutions, they will need some guidance on how to construe state provisions vis-a-vis federal precedent.

B. Differing Approaches to State Constitutional Interpretation

Judges confronted with state constitutional claims must first consider the various approaches to state constitutional jurisprudence.

Triplett, 341 A.2d 62, 64 (Pa. 1975) (rejecting the U.S. Supreme Court's restrictive Fifth Amendment analysis in *Harris*).

[28] *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979) (finding California's free speech clause to confer broader protection than that guaranteed by the Federal First Amendment); Bock v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991) (finding Colorado's free speech clause to confer broader protection than that guaranteed by the Federal First Amendment); State v. Schmid, 423 A.2d 615, 626-27 (N.J. 1980) (finding New Jersey's free speech clause to confer broader protection than that guaranteed by the Federal First Amendment).

[29] *See* Ravin v. State, 537 P.2d 494, 504 (Alaska 1975) (invoking the state's express privacy guarantee in recognizing the right to smoke marijuana in one's home); *In re* Conservatorship of Valerie N., 707 P.2d 760, 771-72 (Cal. 1985) (holding sterilization statute void on privacy and liberty grounds); Severns v. Wilmington Medical Ctr., 421 A.2d 1334 (Del. 1980) (holding that state privacy right guarantees terminally ill person the right to refuse life-sustaining treatment); State v. Kam, 748 P.2d 372, 377 (Haw. 1988) (holding that Hawaii's Constitution affords greater privacy rights than those provided under the U.S. Constitution); Commonwealth v. Wasson, 842 S.W.2d 487, 493 (Ky. 1992) (striking down sodomy law on the grounds that it violated the Kentucky Constitution's right to privacy and equal protection and expressly rejecting the U.S. Supreme Court's restrictive privacy and equal protection analysis in Bowers v. Hardwick, 478 U.S. 186 (1986)); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424-26 (Mass. 1977) (holding that state privacy right guarantees terminally ill person the right to refuse life-sustaining treatment); *In re* Quinlan, 355 A.2d 647 (N.J. 1976) (holding the state privacy right guarantees a terminally ill person the right to refuse life-sustaining treatment); *In re* Welfare of Colyer, 660 P.2d 738, 742 (Wash. 1983) (holding the state privacy right guarantees a terminally ill person the right to refuse life-sustaining treatment).

[30] Brennan, *supra* note 13, at 497.

Scholars have documented several different modes of analysis. These include the "dual" approach,[31] the "primacy" approach,[32] and the

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[31] Where state and federal constitutions are identical or similar, some states accord the same construction to both. Historically, this "dual" approach emerged before the application of the Federal Bill of Rights to the states, when states nonetheless strove to render decisions conforming to U.S. Supreme Court precedent. Utter & Pittler, *supra* note 12, at 645. The inevitable result is "'absolute deferential harmony' with Supreme Court interpretations." *Id.* The dual approach has been harshly criticized as a "non-approach" because it substitutes the judgment of the federal court for the independent legal analysis of the state court concerning a state provision. *Id.* at 646. This approach propagates a "fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart." California v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975). State constitutions have a legislative history wholly separate from the Federal Constitution, and usually state provisions are more expansive as *positive* declarations of rights. State courts should recall the unique features of their state constitutions when construing them. Obviously, complete deference to U.S. Supreme Court construction denigrates the state court's role, and highest duty, to construe independently and enforce state provisions. Utter & Pittler, *supra* note 12, at 647. States employing the dual approach not only fail to develop a constitutional jurisprudence reflecting their unique history and heritage, they also confuse federal and state law. State courts adhering to this deferential mode of construction risk "that the Supreme Court, by interpreting the Federal Constitution, may later reverse or undermine the state court's ruling on its own constitution." *Id.* Such a result "contradicts the historical relationship between state and federal constitutions." *Id.*

[32] Under the "primacy" approach, courts faced with analogous state and federal claims consider the state claims first. Mark Silverstein, Note, *Privacy Rights in State Constutions: Models for Illinois*?, 1989 U. ILL. L. REV. 215. If the court finds the state provision is dispositive of the issue, it does not even consider the federal claims. *Id.* "Courts using this approach do not consider federal law and analysis as presumptively valid, viewing them instead as no more persuasive than decisions of sister state supreme courts." Utter & Pittler, *supra* note 12, at 647. Rather, the court adopting the primacy approach "assumes 'that the states are the primary sovereigns and that the state constitutions are the basic charters of individual liberties.'" *Id.* (quoting *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)). As the California Supreme Court noted, "such independent construction does not represent an unprincipled exercise of power, but a means of fulfilling our solemn and independent constitutional *obligation* to interpret the safeguards guaranteed by the [state] Constitution in a manner consistent with . . . [state] law. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 783-84 (Cal. 1981). Because state courts following the primacy approach do not feel constrained by federal law, they can fully vindicate their role to protect fundamental freedom through an expansive construction of state provisions. Among the advantages of using the primacy approach are the "development of a sound body of state constitutional law, protection of state decisions from federal review, and promotion of a healthy federalism, in which federal

"supplemental" approach.[33]

Under the "dual" approach, state courts treat their state constitutions as mere reiterations of the federal charter. In construing state provisions, they simply parrot U.S. Supreme Court precedent. This approach prompted an exasperated dissent by a justice of the Nebraska Supreme Court:

> When called upon to construe the Nebraska Constitution, this court should not exhibit some Pavlovian conditioned reflex in an uncritical adoption of federal decisions as the construction to be placed on [the parallel provisions of our own Constitution].[34]

It is inappropriate to assume that state and federal provisions are alike, given the unique legislative history, purpose, and text of state constitutions. By simply following federal precedent, state courts abdicate their duty to perform an *independent* interpretation of state

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and state courts respect each others' authority in their respective spheres." Utter & Pittler, *supra* note 12, at 647.

[33] The "supplemental" approach represents an accommodation between the dual and primacy modes of analysis. Courts first look to federal precedent for guidance. "If the Federal Constitution does not provide the requested relief, the supplemental approach directs the state court to turn to the state constitution as a potential supplement to the federal protections." Silverstein, *supra* note 32, at 217. While this approach presumes that federal precedent is valid, "state courts do not automatically follow the federal interpretation in construing state provisions." Utter & Pittler, *supra* note 12, at 649. This model stems from "a perceived need to foster uniformity and avoid conflict with federal precedent if at all possible," *id.* at 648, at least when the court is faced with analogous state and federal provisions. Right to Choose v. Byrne, 450 A.2d 925, 932 (N.J. 1982). However, "[w]here provisions of the federal and state Constitutions differ . . . or where a previously established body of state law leads to a different result, then we must determine whether an expansive grant of rights is mandated by our state Constitution." *Id.* Under this view, state constitutions serve as a "supplemental source of protection . . . [and] provide *greater* protection . . . than is provided by the federal Constitution. . . ." Robert A. Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOL. L. REV. 465, 475 (1985). By regarding federal law as a floor of minimum protection, upon which states can independently extend certain freedoms, this approach fosters a healthy respect for our federal system and for the unique roles of federal and state courts. Utter & Pittler, *supra* note 11, at 638.

[34] State v. Havlat, 385 N.W.2d 436, 447 (Neb. 1986) (Shanahan, J., dissenting).

constitutions,[35] and state courts abandon their historic role as guardians of liberty by following federal decisions that increasingly limit the scope of constitutional protection.[36]

By contrast, the "primacy" approach, which regards state constitutions as the primary source of freedom, epitomizes independent legal judgment by state courts. Under this approach, courts faced with analogous state and federal claims consider the state claims first. If the court finds the state provisions dispositive of the issue, it does not even consider the federal claims.[37] The primacy approach, however, is not well suited for most states at this early stage of state constitutional resurgence:

> [Most] states have a low level of state constitutional rights litigation. Some state courts have virtually no record of reliance on their state constitutions so that large sections of the country, including the Midwest, remain largely unaffected by the growing trend toward development of independent state constitutional jurisprudence.[38]

The "supplemental" approach, finally, offers a framework of analysis upon which most state courts will look favorably. Rather than dismissing entirely or adhering blindly to federal law, this

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[35] *See* State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983).

> The point is not that a state's constitutional guarantees are more or less protective in particular applications, but that they were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics. *State courts cannot abdicate their responsibility for these independent guarantees*, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law.

Id. State v. Coe, 679 P.2d 353 (Wash. 1984) ("*[S]tate courts have a duty to independently interpret and apply their state constitutions* that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts.") (emphasis added).

[36] Utter & Pittler, *supra* note 12, at 647.

[37] Silverstein, *supra* note 32, at 217.

[38] Sedler, *supra* note 33, at 474-75.

approach encourages state courts to draw distinctions between the state and federal charters, and to preserve their autonomy when construing a state provision that is different from its federal counterpart either textually or historically.[39]

C. Precedents in Which State Constitutional Provisions Were Construed to Afford Greater Protection for Individual Liberty Than Their Federal Counterparts

In construing their own constitutions, state court judges are free to find greater protection for individual liberty than that found by federal judges in the United States Constitution.[40] This is true even where the state and federal constitutions have similar or identical language.[41]

State courts in Alaska,[42] Arizona,[43] California,[44] Colorado,[45]

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[39] Utter & Pittler, *supra* note 12, at 638; Sedler, *supra* note 33, at 475.

[40] City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

[41] *Aladdin's Castle*, 455 U.S. at 293; *Pruneyard*, 447 U.S. at 81.

[42] Mickens v. City of Kodiak, 640 P.2d 818, 821 (Alaska 1982). The Alaska Constitution, unlike the U.S. Constitution, prohibits municipalities from restricting—in places where liquor is sold—forms of expression that would otherwise enjoy First Amendment protection. *Id.* Messerli v. State, 626 P.2d 81, 83 n.6 (Alaska 1980) (recognizing that the Alaska Constitution confers a right to privacy that is broader than its federal counterpart); Reeves v. State, 599 P.2d 727 (Alaska 1979) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Robinson, 414 U.S. 218 (1973)); Shagloak v. State, 597 P.2d 142, 144-45 (Alaska 1979) (recognizing that the Alaska Constitution imposes greater restrictions than the U.S. Constitution on the power of judges to impose harsher sentences on defendants convicted after changing their pleas from guilty to not guilty); Ravin v. State, 537 P.2d 494 (Alaska 1975) (invoking the state's express privacy guarantee in recognizing the right to smoke marijuana in one's home); Scott v. State, 519 P.2d 774, 785 (Alaska 1974) (recognizing a broader freedom from compelled self-incrimination under the Alaska Constitution than that discerned in the Federal Fifth Amendment by the U.S. Supreme Court); Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (recognizing a broader right to jury trials under the Alaska Constitution than that yet recognized by the U.S. Supreme Court under the Federal Constitution).

[43] Fiesta Mall Venture v. Meacham Recall Comm., 767 P.2d 719, 723 (Ariz. 1988) (recognizing that a state constitution may provide more expansive speech rights than those guaranteed by the U.S. Constitution); Pool v. Superior Court, 677 P.2d 261, 271 (Ariz. 1984) (recognizing broader protection from double jeopardy under the Arizona

Connecticut,[46] Delaware,[47] Florida,[48] Georgia,[49] Hawaii,[50] Illinois,[51]

Constitution than that found by the U.S. Supreme Court in the Federal Constitution).

[44] Academy of Pediatrics v. Van De Kamp, 263 Cal. Rptr. 46, 49 (1989) (Cal. C.A. Oct. 12, 1992) (recognizing that the express privacy guarantee contained in the California Constitution is broader than the federal right to privacy and striking down a parental-consent-for-abortion statute as violating the California Constitution's express privacy guarantee); *In re* Conservatorship of Valerie N., 707 P.2d 760 (Cal. 1985) (finding sterilization statute void on privacy and liberty grounds); State v. Ruggles, 702 P.2d 170 (Cal. 1985) (search and seizure) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Ross, 456 U.S. 798 (1982)); Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (1981); Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979) (finding California's free speech clause to confer broader protection than that guaranteed by the U.S. Constitution); State v. Maher, 550 P.2d 1044 (Cal. 1976) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Robinson, 414 U.S. 218 (1973)); State v. Disbrow, 545 P.2d 272, 280 (Cal. 1976) (rejecting the U.S. Supreme Court's restrictive Fifth Amendment analysis in Harris v. New York, 401 U.S. 222 (1971)).

[45] Bock v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991) (finding that Colorado's free speech clause confers broader protection than the U.S. Constitution); Conrad v. City of Denver, 656 P.2d 662, 674 (Colo. 1983) (holding that a government display of nativity scene violated the state constitution); State v. Clyne, 541 P.2d 71, 72 (Colo. 1975) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Robinson, 414 U.S. 218 (1973)).

[46] Daly v. DelPonte, 608 A.2d 93, 98 (Conn. 1992) (recognizing that Connecticut's equal protection clause is broader than its federal counterpart); State v. Morrill, 534 A.2d 1165, 1169 (Conn. 1987) (recognizing that the state constitution affords greater substantive protection than does the Fourth Amendment in setting the standard for determining probable cause to search); Doe v. Maher, 515 A.2d 134, 162 (Conn. 1986) (concluding that a state regulation modeled after a federal medicaid program which restricts abortion funding violates the state constitution); Cologne v. Westfarms Assoc., 469 A.2d 1201, 1206 (Conn. 1984) (recognizing that a state may provide speech rights more expansive than those guaranteed by the Federal Constitution).

[47] Severns v. Wilmington Med. Ctr., 421 A.2d 1334, 1347 (Del. 1980) (holding the state constitution affords a right to privacy which guarantees the guardian of a terminally ill person the right to assert the ill person's right to refuse life-sustaining treatment).

[48] *In re* T.W., 551 So.2d 1186, 1192 (Fla. 1989) (recognizing that Florida's Constitution extends the privacy right further than the Federal Constitution by allowing abortion for minors); State v. Sarmiento, 397 So. 2d 643, 647 (Fla. 1981) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. White, 401 U.S. 745 (1970)).

[49] Pel Assoc. v. Joseph, 427 S.E.2d 264, 265 (Ga. 1993) (striking down, under Georgia's free speech clause, nude-dancing restrictions of the sort upheld under the First Amendment in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)); Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992) (holding that the Georgia Constitution imposes more exacting search and seizure standards than the Federal Fourth Amendment, and refusing

Kentucky,[52] Louisiana,[53] Maryland,[54] Massachusetts,[55] Michigan,[56]

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to recognize a "good faith exception" like that prevailing in federal search and seizure jurisprudence).

[50] Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993) (recognizing, in dictum, that the state's equal protection clause may confer a right to same-sex marriage); State v. Kam, 748 P.2d 372, 377 (Haw. 1988) (holding that Hawaii's Constitution affords greater privacy rights than those provided under the Federal Constitution); State v. Kaluna, 520 P.2d 51, 58-59 (Haw. 1974) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Robinson, 414 U.S. 218 (1973)); State v. Santiago, 492 P.2d 657, 664 (Haw. 1971) (rejecting the U.S. Supreme Court's restrictive Fifth Amendment analysis regarding self-incrimination in Harris v. New York, 401 U.S. 222 (1971)).

[51] State v. McCauley, 595 N.E.2d 583, 585-86 (Ill. 1992) (recognizing heightened protections against compelled self-incrimination under the state constitution).

[52] Commonwealth v. Wasson, 847 S.W.2d 487, 491-501 (Ky. 1992) (expressly rejecting the U.S. Supreme Court's restrictive privacy analysis in Bowers v. Hardwick, 478 U.S. 186 (1986), by striking down the state's sodomy law on the grounds that it violated the state constitution's right to privacy and equal protection); Wagner v. Commonwealth, 581 S.W.2d 352, 355-56 (Ky. 1979) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis regarding search and seizure in South Dakota v. Opperman, 428 U.S. 364 (1976)).

[53] Banks v. Department of Pub. Safety & Corrections, 598 So.2d 515, 517 n.3 (La. Ct. App. 1992) (recognizing that the right to privacy set forth in the Louisiana Constitution affords greater protection than its federal counterpart); State v. Vanderlinder, 575 So. 2d 521, 523 (La. Ct. App. 1991) (recognizing that the right to privacy set forth in the Louisiana Constitution affords greater protection than its federal counterpart); State v. Church, 538 So. 2d 993, 996-97 (La. 1989) (striking down a sobriety check roadblock which "may meet Fourth Amendment standards," but violated the "higher standard of individual liberty" afforded under the Louisiana Constitution).

[54] Tyler v. State, 623 A.2d 648 (Md. Ct. App. 1993) (invoking the State Equal Rights Amendment to prohibit the state in a criminal prosecution from using peremptory challenges so as to exclude a person from service as a juror because of that person's sex).

[55] Commonwealth v. Ford, 476 N.E.2d 560, 564 (Mass. 1985) (holding that a more restrictive exclusionary rule exists under Massachusetts state law); Batchelder v. Allied Stores Int'l, 445 N.E.2d 590, 593 (Mass. 1983) (finding the Massachusetts free speech clause to confer broader protection than its federal counterpart); Moe v. Secretary of Admin., 417 N.E.2d 387, 392 (Mass. 1981) (holding that a state provision restricting medicaid funding of abortions violated the state due process guarantee); Superintendent of Belchertown State Schools v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977) (finding that a state privacy right guarantees a terminally ill person the right to refuse life-sustaining treatment).

[56] Sitz v. Department of State Police, 485 N.W.2d 135, 138 (Mich. Ct. App. 1992) (holding that the Michigan Constitution affords greater protection from unreasonable search and seizure than the Fourth Amendment, and invalidating sobriety checkpoints

Minnesota,[57] Montana,[58] New Hampshire,[59] New Jersey,[60] New York,[61] North Carolina,[62] Ohio,[63] Oregon,[64] Pennsylvania,[65] Rhode

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which were constitutional under the Fourth Amendment), *aff'd* 506 N.W.2d 209 (Mich. 1993); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337, 343 (Mich. 1985) (recognizing that a state may provide speech rights more expansive than those guaranteed by the U.S. Constitution); State v. Beavers, 227 N.W.2d 511, 514 (Mich. 1975) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis of search and seizure in United States v. White, 401 U.S. 745 (1971)); *cf.* Hobbins v. Attorney General, No. 93-306-178-CZ, slip op. at 17 (Mich. Cir. Ct. May 20, 1993) (recognizing, in dictum, the "right to choose to cease living" under both the U.S. and Michigan Constitutions and striking down, on other grounds, a ban on assisted suicide).

[57] O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in Zurcher v. Stanford Daily, 436 U.S. 547 (1978)).

[58] State v. Sierra, 692 P.2d 1273, 1276 (Mont. 1985) (recognizing that the Montana Constitution affords greater protection against unreasonable searches and seizures than the Fourth Amendment); State v. Sawyer, 571 P.2d 1131, 1133 (Mont. 1977) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in South Dakota v. Opperman, 428 U.S. 364 (1976)).

[59] State v. Laurie, 606 A.2d 1077, 1080 (N.H. 1992) (recognizing that the New Hampshire Constitution confers more stringent protections against compelled self-incrimination than the Federal Fifth Amendment); State v. Camargo, 498 A.2d 292 (N.H. 1985) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Ross, 456 U.S. 798 (1982)).

[60] Greenberg v. Kimmelman, 494 A.2d 294 (N.J. 1985) (establishing an independent and stricter standard for equal protection analysis); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (abortion funding); State v. Schmid, 423 A.2d 615 (N.J. 1980) (finding New Jersey's free speech clause to confer broader protection than that guaranteed by the U.S. Constitution); *In re* Quinlan, 355 A.2d 647 (N.J. 1976) (state privacy right guarantees terminally ill person the right to refuse life-sustaining treatment); State v. Johnson, 346 A.2d 66 (N.J. 1975) (rejecting "consent" searches like those authorized by the U.S. Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

[61] Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993), *appeal dismissed*, 82 N.Y.2d 680, *appeal denied*, 82 N.Y.2d 68 (1993) (striking down a provision which fails to allow funded abortions for women with incomes below the federal poverty line but funds prenatal care); State v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (holding that the New York Constitution contains greater protection against improper searches and seizures by the police than is currently afforded by U.S. Supreme Court precedent).

[62] State v. Felmet, 273 S.E.2d 708, 712 (N.C. 1981) (recognizing that a state may provide speech rights more expansive than those guaranteed by the U.S. Constitution); State v. Carter, 370 S.E.2d 553, 555-56 (N.C. 1988) (recognizing that the North Carolina Constitution confers greater protection against unreasonable search and seizure than the Federal Fourth Amendment).

Island,[66] Tennessee,[67] Texas,[68] Utah,[69] Vermont,[70] Washington,[71] and

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[63] State v. Brown, 588 N.E.2d 113, 115 (Ohio Ct. App. 1992) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in New York v. Belton, 453 U.S. 454 (1981)); *Voinovich*, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. May 27, 1992) (striking down an abortion statute that contained a mandatory 24-hour delay and biased counseling provisions of the sort upheld by the U.S. Supreme Court in *Casey*, by invoking liberty, equal protection, free speech, and freedom of conscience provisions in the Ohio Constitution).

[64] State v. Dixson, 766 P.2d 1015 (Or. 1988) (refusing to adopt a broad "open fields" exception to warrantless searches and seizures and rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in Oliver v. United States, 466 U.S. 170 (1984)); Kay v. David Douglas Sch. Dist., 715 P.2d 875 (Or. App. 1986) (religious invocation in high school commencement exercise violates the Oregon Constitution's religion clause); State v. Moyle, 705 P.2d 740 (Or. 1985) (free speech rights); State v. Kennedy, 666 P.2d 1316, 1323-26 (Or. 1983) (recognizing broader protection from double jeopardy under the Oregon Constitution than that found by the U.S. Supreme Court in the Federal Constitution); State v. Davis, 666 P.2d 802 (Or. 1983) (state constitutional basis for search and seizure exclusionary rule).

[65] Commonwealth v. Danforth, 576 A.2d 1013, 1022 (Pa. 1990) (recognizing greater restrictions on blood, breath, and urine tests under the Pennsylvania Constitution than those found by the U.S. Supreme Court in the Federal Fourth Amendment); Commonwealth v. Grossman, 555 A.2d 896, 899 (Pa. 1989) (holding that the warrant requirement in the Pennsylvania Constitution is "more exacting" than its counterpart in the U.S. Constitution); Western Pa. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.2d 1331, 1333-34 (Pa. 1986) (recognizing that a state may provide speech rights more expansive than those guaranteed by the U.S. Constitution); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975) (rejecting the U.S. Supreme Court's restrictive Fifth Amendment analysis in Harris v. New York, 401 U.S. 222 (1971)).

[66] Pimental v. Department of Transp., 561 A.2d 1348, 1350 (R.I. 1989) (recognizing that state supreme courts have the right and power to impose higher standards on searches and seizures under state constitutions and that the Federal Constitution only establishes a minimum level of protection).

[67] Davis v. Davis, 842 S.W.2d 588, 598-603 (Tenn. 1992) (recognizing a right of "procreational autonomy" in the Tennessee Constitution's implicit privacy guarantee, and applying it in the context of a divorcing couple's fight over possession of frozen embryos); Planned Parenthood Ass'n v. McWherter, No. 92C-1672 (Tenn. Cir. Ct. Nov. 19, 1992) (construing the right of procreational autonomy under the Tennessee Constitution and, based on that right, striking down a mandatory 72-hour delay on abortions for adult women as well as a residency requirement under the state equal protection clause).

[68] Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis for inventory searches in South Dakota v. Opperman, 428 U.S. 364 (1976)); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (relying on a state constitutional provision that requires the legislature to establish and support free public schools and invalidating a

West Virginia[72] have recognized and acted upon this principle.

The Rhode Island Supreme Court, referring to the state and federal constitutions, observed that citizens enjoy a "double-barrelled source of protection which safeguards their privacy from unauthorized and unwarranted intrusions" by the government.[73] It stressed that state courts, when interpreting their own constitutions, have the right and the power to implement standards of individual liberty which are higher than those required by the Federal Constitution.[74]

In a similar context, the Supreme Court of Hawaii observed:

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public education finance system which had survived Federal Equal Protection challenges in San Antonio Indep. Sch. Dist. v. Rodriguez, 441 U.S. 1 (1973)).

[69] State v. Hygh, 711 P.2d 264, 272 n.1 (Utah 1985) (Zimmerman, J., concurring) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in United States v. Ross, 456 U.S. 798 (1982)).

[70] Doe v. Celani, No. S81-84 (Vt. Super. Ct. 1986) (abortion funding) (slip opinion unavailable; cited in Janice Steinschneider, Note, *State Constitutions: The New Battlefield for Abortion Rights*, 10 HARV. WOMEN'S L.J. 284, 287 (1987)).

[71] State v. Griffith, 808 P.2d 1171, 1174 (Wash. 1991) (recognizing that the Washington Constitution confers greater protection for privacy interests than the Federal Fourth Amendment); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1280, 1286 (Wash. 1989) (recognizing that a state may provide speech rights more expansive than those guaranteed by the U.S. Constitution); State v. Gunwall, 720 P.2d 808, 814 (Wash. 1986) (rejecting the U.S. Supreme Court's restrictive Fourth Amendment analysis in Smith v. Maryland, 442 U.S. 735 (1979)); *In re* Colyer, 660 P.2d 738 (Wash. 1983) (state privacy right guarantees terminally ill person the right to refuse life-sustaining treatment).

[72] Women's Health Ctr., Inc. v. Panepinto, 1993 W. Va. LEXIS 228 (W. Va. Dec. 17, 1993) (striking down restrictions on public funding of abortion under equal protection and substantive due process theories advanced under the West Virginia Constitution); State v. Bonham, 317 S.E.2d 501, 503 (W. Va. 1984) (recognizing that the West Virginia Constitution imposes greater restrictions on the power of judges to issue harsher sentences to those whose convictions are sustained after exercising their statutory right to a trial de novo in the court of appeals and expressly rejecting the U.S. Supreme Court's restrictive due process analysis in Colten v. Kentucky, 407 U.S. 104 (1972)); Peters v. Narick, 270 S.E.2d 760, 764-65 (W. Va. 1980) (applying strict scrutiny in gender-discrimination cases based on state remedies guarantee).

[73] Pimental v. Department of Transp., 561 A.2d 1348, 1350 (R.I. 1989) (citation omitted).

[74] *Id.* at 1350; *see supra* note 66.

> [W]hile this results in a divergence of meaning between words which are the same in both state and federal constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence *where the result is greater protection of individual rights under state law than under federal law.*[75]

The future of reproductive freedom in this country may depend largely on the willingness of state court judges to find a heightened level of protection for individual liberty in their state constitutions.

*III. Post-*Casey *America: Fifty New Battlegrounds*

A. Casey's *"Undue Burden" Standard*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[76] the U.S. Supreme Court held that the substantive liberty guarantee in the Fourteenth Amendment, while barring states from banning abortion outright,[77] nevertheless leaves them ample latitude in restricting access to abortion.[78] In so holding, the Court established a new standard—the "undue burden" test—for gauging the constitutionality of abortion regulations.[79] Under this standard, strict scrutiny will be applied only to those regulations that impose a "substantial obstacle" in the paths of women seeking abortions.[80]

In applying this standard, the Court showed that only the most onerous restrictions will be deemed to represent an "undue burden." Faced with a variety of provisions, the Court struck down only a husband-notification requirement.[81] It upheld a mandatory 24-hour

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[75] State v. Kaluna, 520 P.2d 51, 58 n.6 (Haw. 1974) (emphasis added).

[76] 112 S. Ct. 2791 (1992).

[77] *Id.* at 2804.

[78] *Id.* at 2820-21.

[79] *Id.*

[80] *Id.* at 2821.

[81] *Casey*, 112 S.Ct. at 2829-30.

delay,[82] as well as a requirement that prospective patients receive—under the guise of "informed consent"—a state-printed brochure designed to dissuade them from having an abortion.[83]

One would imagine that from a woman's perspective these provisions *do* impose "substantial" obstacles in the path to an abortion. The 24-hour delay, by effectively requiring two separate trips to the clinic,[84] imposes special hardships on poor and rural women, many of whom must travel great distances to reach the clinic

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[82] *Id.* at 2825-26.

[83] *See id.* at 2824 ("[w]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.").

[84] Mandatory delays are invariably accompanied by "informed consent" counseling requirements. For example, in Pennsylvania and Ohio, a woman must receive certain state-printed materials and, in addition, complete a face-to-face informational meeting with a physician, at least 24 hours before the procedure is performed. *See* OHIO REV. CODE ANN. § 2317.56(B) (Anderson 1992); Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3203-3220. Under these provisions, it is impossible to combine—in *one* visit—both the informed consent counseling and the abortion procedure itself. Most, if not all, women will have to visit the abortion clinic twice: first, for the informational visit, and second, for the abortion itself. Other physicians, including family practitioners or physicians outside the OB/GYN specialty, will not be able to satisfy the informational requirements imposed by the statute. The Ohio requirements mandate that the physician describe: (1) the particular abortion procedure to be used; (2) the medical risks associated with that procedure; (3) the medical risks associated with abortion generally; (4) the probable gestational age of the fetus; and (5) the medical risks associated with carrying the pregnancy to term. *See, e.g., id.* at § 2317.56 (B)(1) (Anderson 1992). Family practitioners and physicians outside the OB/GYN specialty will not be able to satisfy these informational requirements. Thus, the woman will be left with little choice but to visit the abortion clinic for the requisite "counseling." This is true for two additional reasons. First, many women who obtain abortions in one state actually reside in another state, *see* Lisa Belkin, *Woman Behind the Symbols in Abortion Debate*, N.Y. TIMES, May 9, 1989, § 1, at 18; they cannot rely on local physicians to satisfy the requirements of a foreign statute. Second, referring physicians cannot be counted on to provide the state-printed brochure typically required under these statutes. Such brochures must be *purchased* from the government of the state where the abortion is performed. *See, e.g.*, OHIO REV. CODE § 2317.56 (D). Physicians who do not actually perform abortions have no reason to incur the expense of purchasing these brochures. Thus, mandatory 24-hour delays effectively require most, if not all, women to make two separate trips to the clinic—once for the informational visit, and a second time for the abortion procedure itself.

and cannot afford the cost of an overnight stay.[85] The "informed consent" materials confront the woman with pictures of the fetus "at two-week gestational increments" so that she can see its "probable anatomical and physiological characteristics" deep into the third trimester.[86] These materials are transparently designed to traumatize the woman and to convey a message that the government (indeed, that her *doctor*)[87] disapproves of her choice.[88]

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[85] A requirement prompting multiple trips to the clinic will necessarily compound the burdens and costs already borne by women seeking abortions. Take, for example, the facts prevailing in Ohio. In a recent challenge to *Casey*-type restrictions there, the unrefuted testimony established that 77 of Ohio's 88 counties have no abortion provider; that one third of Ohio patients travel over 50 miles one way to reach a clinic; that the need for traveling long distances causes women to delay or forego obtaining an abortion; that the burdens of travel fall heaviest upon the poorest, youngest, and least sophisticated women; that lengthy travel results in child care expenses, time lost from work, and physical and emotional strain; that all of the foregoing problems are compounded by the burdens and delays associated with multiple trips to the clinic; that multiple trips will cause women to obtain abortions later in their pregnancies; that the later an abortion is performed, the greater the risk of complications and death; and that, faced with the prospect of multiple trips, some women will be forced to incur lodging costs for an overnight stay—thereby losing confidentiality because of the need for explaining their overnight absence to family, friends, and employers. Affidavit of Stanley K. Henshaw, Ph.D., *Voinovich*, 1992 Ohio LEXIS 1 (Ohio C.P. May 18, 1992). Thus, mandatory delays have the necessary effect of subjecting women to substantially greater costs, burdens, and medical risks.

[86] *Casey*, 112 S. Ct. at 2836.

[87] Typically, the state-printed brochure must be delivered to the woman by her *doctor*. *See, e.g.*, OHIO REV. CODE § 2317.56 (B)(3)(b). The fact that her doctor is delivering this "information" may suggest to the woman that the doctor disapproves of her decision to abort. Affidavit of John Fletcher, Ph.D., *Voinovich*, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. May 18, 1992).

[88] "Informed consent" provisions of the type enacted in Pennsylvania, 18 PA. CONS. STAT. § 3205 (1992), Ohio, OHIO REV. CODE ANN. § 2919.12 (Baldwin 1994), Mississippi, Miss. Code Ann. § 41-41-33 (1993), and North Dakota, N.D. Cent. Code § 14-02.1-02, typically require that each woman seeking an abortion receive state-printed materials containing pictures or descriptions of the fetus "at two-week gestational increments" so that she can see its "probable anatomical and physiological characteristics"; information about the possibility of fetal survival; a list of agencies and services that are available to assist the woman through pregnancy and childbirth; an explanation of the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care; and information about the father's obligation to provide child support payments. *See, e.g.*, OHIO REV. CODE § 2317.56 (B), (C). In addition to receiving these state-printed materials, the woman must also complete a face-to-face counseling session with a physician—and all of this must occur more than 24 hours before the abortion can

The significance of the undue burden test may be seen in one, simple fact: It was used in *Casey* to uphold *precisely* the type of restrictions that the Court struck down in 1983[89] and 1986.[90] At that time, the Court had little patience for schemes by the government to disseminate anti-abortion sentiments "[u]nder the guise of informed consent."[91] In refreshingly frank language, the Court observed:

> *The printed materials . . . seem to us to be nothing less than an outright attempt to wedge the [state's] message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician.* The mandated description of fetal characteristics at two-week intervals, no matter how objective, is plainly overinclusive. This is not medical information that is always relevant to the woman's decision, and *it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice.*[92]

In *Casey*, this frankness is replaced by a sudden inability to discern the heavy-handed preaching that the Court previously found so

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be performed. *See, e.g.*, OHIO REV. CODE § 2317.56 (B). No matter how objectively it is conveyed, the state-mandated "information" will necessarily communicate an anti-abortion message from the government. In particular, the pictures of fetal development and the information about fetal survival are designed to inspire, and will certainly create, feelings of guilt, shame, and anxiety in the woman, thereby dissuading her from having an abortion. Affidavit of Jay Katz, M.D., *Voinovich*, 1992 Ohio LEXIS 1 (Ohio C.P. May 18, 1992). Thus, these provisions exploit the informed consent dialogue, using it as an opportunity for disseminating an anti-abortion message—a government-sponsored, doctor-delivered message—that interferes with a woman's reproductive decisionmaking.

[89] City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (striking down a mandatory 24-hour delay).

[90] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down biased counseling provisions, including a requirement that each woman seeking an abortion receive a state-printed brochure containing pictures or descriptions of fetal development).

[91] *Thornburgh*, 476 U.S. at 763.

[92] *Id.* at 762-63 (emphasis added).

objectionable.[93]

Thus, by means of the undue burden test, *Casey* substantially lowered the floor of minimum protection for reproductive autonomy, which the federal right to privacy had long sustained. The precise level of this "floor" is undetermined—and efforts are already underway in state legislatures to lower it as far as the undue burden test will permit.[94] Our question is whether the heightened protections formerly conferred by the Federal Constitution can be restored by means of state constitutional provisions.

B. Testing the Limits of the "Undue Burden" Standard: Harsher Restrictions Loom on the Horizon

Inevitably, *Casey* will be viewed by some state legislators as an invitation to enact comparable, if not harsher, restrictions on access to abortion.[95] Indeed, many states have recently imposed mandatory delays and biased counseling requirements of the sort upheld in *Casey*.[96] Some states even require delays of forty-eight

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[93] *Casey*, 112 S. Ct. at 2823.

> It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Id.

[94] *See infra* part III.B.

[95] *See* Estelle H. Rogers, *Change of Venue: Abortion Regulation in the States*, 3 TEX. J. WOMEN & L. 123 (1994) (charting recent legislative developments).

[96] These states include Alabama, Idaho, Maine, Mississippi, North Dakota, Ohio, Oklahoma, and Tennessee. *The Status of Women's Reproductive Freedom*, REPROD. FREEDOM IN THE STATES. (Center for Reprod. Law & Policy, New York, N.Y.), Dec. 1992 at 3-9 [hereinafter IN THE STATES]. Comparable legislation is in conference committee, but has yet to be enacted, in Michigan. *Id.* at 7. In 1992, *Casey*-type provisions were narrowly defeated in the Nebraska and South Carolina legislatures. *Id.* at 8, 10. However, this year such restrictions were adopted by Nebraska lawmakers. *In the States: Legislative Action*, REPROD. FREEDOM NEWS (Ctr. for Reprod. L. & Pol'y, New York, N.Y.), June 18, 1993 at 7.

hours[97] and seventy-two hours[98] for all women seeking abortions. Certain states have enacted virtual bans on abortion.[99] Likewise, abortion bans have been proposed in ballot initiatives in several states.[100]

Though the most extreme of these measures have been

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[97] Maine enacted a 48 hour mandatory waiting period for all women seeking abortions, which was subsequently struck down by a federal district court. Women's Community Health Ctr., Inc. v. Cohen, 477 F. Supp. 542, 550 (Me. 1979).

[98] The Tennessee legislature enacted a 72 hour delay in 1992. IN THE STATES, *supra* note 96, at 10-11. That provision was struck down by a state trial court judge in Planned Parenthood Ass'n, Inc. v. McWherter, No. 92C-1672, slip op. at 19-20 (Tenn. Cir. Ct. Nov. 19, 1992). In 1992 the Colorado legislature rejected efforts to enact a 72 hour waiting period. IN THE STATES, *supra* note 96, at 4.

[99] Sweeping restrictions on abortion have been enacted in Louisiana, Utah, UTAH CODE ANN. § 76-7-302 (1993), and Guam. In these jurisdictions, abortions are banned except to save a woman's life; Louisiana and Utah also permit an exception in cases of rape or incest. IN THE STATES, *supra* note 96, at 6, 11, 12. On September 22, 1992, the U.S. Court of Appeals for the Fifth Circuit invalidated the Louisiana statute. Sojourner v. Edwards, 974 F.2d 27 (5th Cir. 1992). Proponents of the Louisiana measure are currently seeking review of that decision by the U.S. Supreme Court. IN THE STATES, *supra* note 96, at 6. The court found Utah's statute less restrictive than Pennsylvania's, held against the plaintiffs who challenged it and awarded costs and fees to defendants. *See* Utah Women's Health Clinic v. Leavitt, 1994 U.S. Dist. LEXIS 2279 at *8, *39 (D. Utah Feb. 1, 1994). On November 30, 1992, the U.S. Supreme Court refused to review a ruling by the U.S. Court of Appeals for the Ninth Circuit striking down Guam's statute. IN THE STATES, *supra* note 96, at 12. In South Dakota, a bill banning abortion was defeated by only one vote in the state senate in 1991. *Id.* at 10.

[100] In Arizona, the electorate rejected a ballot referendum in 1992 that would have banned abortion. IN THE STATES, *supra* note 96, at 3. In Colorado, the state supreme court recently thwarted efforts by anti-choice groups to place an abortion ban on the ballot. *Id.* at 4. Likewise, the Oklahoma Supreme Court in August 1992 ruled that a statewide initiative banning abortion could not appear on the November ballot because, if passed, it would violate *Casey*. *In re* Petition No. 349, 838 P.2d 1 (Okla. 1992). Anti-choice supporters of this initiative are seeking U.S. Supreme Court review. IN THE STATES, *supra* note 96, at 9. In 1990, Oregon voters defeated a statewide ballot referendum proposing a ban on abortion. *Id.* at 10. In Wyoming, anti-choice activists did not obtain the requisite signatures needed to place an abortion ban on the ballot in 1992, but have collected the quantity of names needed to submit the measure for approval in the 1994 election. *Id.* at 12. In October 1993, the Wyoming measure survived a pre-election challenge filed in state court. REPROD. FREEDOM NEWS (Ctr. for Reprod. L. & Pol'y, New York, N.Y.) Oct. 22, 1993 at 12.

defeated,[101] the great volume of this legislative activity shows that even more agitation may be expected in *Casey*'s wake.[102] This is true not only because of the abiding preoccupation with abortion in so many state capitols, but also because the very *novelty* of the undue burden standard will prompt efforts to test its limits.

Two separate questions will arise in this new round of legislation and litigation. First, will application of the undue burden standard vary from state to state? Second, what are the outer limits of permissible regulation under the new standard?

The first question may be phrased more precisely as follows: Once the Supreme Court determines that a particular regulation is *not* an undue burden, does this finding apply in all fifty states? What about variations in local circumstances? In gauging the impact of a twenty-four hour waiting period, for example, shouldn't we consider the number of abortion clinics within the particular state, their geographic distribution, and the number of miles a woman must travel to reach a clinic? Even if upheld in Pennsylvania, where clinics are scattered throughout the state, might not such a provision create an undue burden in North Dakota, which has only *one* clinic?

This question has yet to be resolved. The Supreme Court seemed to indicate that local circumstances do *not* matter when it denied certiorari in a Mississippi suit where *Casey*-type provisions, including a twenty-four hour delay, were upheld.[103] Obviously, denials of certiorari are not reliable indicators of where the Court is headed, but the Mississippi case would have been a perfect vehicle for addressing this question. The challenged provisions were

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[101] *See supra* notes 96-100. *But see* Barnes v. State, 992 F.2d 1335 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 468 (1993) (upholding a Mississippi statute requiring minors to obtain written permission from both parents before having an abortion, finding this requirement not to be an "undue burden").

[102] *See, e.g.*, Utah H.R. 129, 50th Legis., Gen. Sess. (1994).

[103] Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 656 91992) (upholding Mississippi's informed consent statute as "substantially identical" to the Pennsylvania provisions upheld in *Casey*). More recently, Justice Souter rejected efforts in the *Casey* litigation to revive the plaintiffs' facial challenge by means of a new trial—in which additional evidence would be adduced in an attempt to satisfy the new "undue burden" standard. 114 S. Ct. 909 (in chambers opinion, Souter, Circuit Justice 1993). The Third Circuit denied plaintiffs a new trial, and Justice Souter, acting in his capacity as Circuit Justice for the Third Circuit, refused to stay enforcement of those provisions in the Pennsylvania statute that were upheld in its 1992 decision. *Id.*

virtually identical to those at issue in *Casey*, while the local circumstances in Mississippi are very different from Pennsylvania. In Pennsylvania, for example, nearly sixty percent of the women seeking abortions in 1988 lived within an hour's drive to a clinic.[104] In Mississippi, on the other hand, seventy-nine of the eighty-two counties have no abortion provider.[105] Nearly half of all women obtaining abortions there must travel over 100 miles one way.[106] Thus, mandatory delays pose a greater burden on women in Mississippi than on women in Pennsylvania. Might not such a burden be "undue?"[107]

The second question involves the outer limits of permissible regulation under the new standard. Biased counseling provisions and mandatory delays of twenty-four hours are now approved. On the other end of the spectrum, outright bans on abortion are impermissible. What remains is a vast expanse of middle ground or uncharted territory. The only guidepost that currently exists is the husband-notification provision invalidated in *Casey*.[108] This leaves state legislators wide latitude to test the limits of the undue burden standard, concocting ever more stringent restrictions in what will become a new generation of abortion cases.

The most likely scenario is that states will enact, in a ratchet-like manner, a series of increasingly restrictive provisions, using as their starting point the various statutes already upheld by the Supreme Court. Thus, if a twenty-four hour delay is permissible,[109] why not impose a seventy-two hour wait? The Tennessee legislature has already enacted such a measure.[110] If viability testing may be

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[104] *Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990).

[105] *See* Linda Greenhouse, *Justices Decline to Hear Mississippi Abortion Case*, N.Y.TIMES, Dec.8, 1992, at A22.

[106] *Id.* at 79.

[107] It seems likely that these questions will be resolved in the context of as-applied, rather than facial challenges. Justice Souter indicated as much in refusing to stay enforcement of the Pennsylvania provisions upheld in *Casey*, 114 S.Ct. 909 (in chambers opinion, Souter, Circuit Justice 1993).

[108] *Casey*, 112 S. Ct. at 2830-31.

[109] *Id.* at 2825-26.

[110] TENN. CODE ANN. §§ 39-15-202(b)(6)(d)(1) (1993). That provision was struck down by a state trial court judge in Planned Parenthood Assoc., Inc. v. McWherter, slip op. at 19-20, No. 92C-1672 (Tenn. Cir. Ct. Nov. 19, 1992) (recognizing a right of

required at twenty weeks gestation,[111] why not fifteen weeks? If the state is free to exploit "informed consent" counseling as a vehicle for disseminating an anti-abortion message,[112] why not require every patient to view a state-produced videotape containing pictures of aborted fetuses?

Within ten years, the outer boundaries of the undue burden standard will have come into focus. In the meantime, defenders of reproductive freedom should consider alternatives to the liberty/privacy theory that has so long sustained them.

C. Fighting Back: The Search for New Legal Theories

Except for a line of cases vindicating the right of indigent women to public funding of abortion,[113] state constitutions have been utterly neglected, until quite recently, by lawyers working to advance the cause of reproductive freedom. Within the past year, however, lawyers in Tennessee,[114] California,[115] and Ohio[116] have successfully invoked their state constitutions in challenging restrictions on abortion. These recent victories demonstrate that state court judges, in construing their state constitutions, may be willing to recognize a higher degree of protection for reproductive autonomy than that afforded by the Federal Constitution.

In Tennessee, the court recognized a right of "procreational autonomy" under the state constitution in striking down a seventy-two

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"procreational autonomy" under the Tennessee Constitution).

[111] Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

[112] *See Casey*, 112 S. Ct. at 2823-24.

[113] *See supra* note 4 and accompanying text.

[114] Planned Parenthood Ass'n, Inc. v. McWherter, No. 92C-1672 (Tenn. Cir. Ct. Nov. 19, 1992).

[115] American Academy of Pediatrics v. Van De Kamp, No. A040911 (Cal. Ct. App. Oct. 12, 1992).

[116] *Voinovich*, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. May 27, 1992), *reversed*, 627 N.E.2d 570, *dismissed*, 624 N.E.2d 194, *reh'g denied* 626 N.E.2d 693 (the trial court struck down a mandatory 24 hour delay and biased counseling provisions under liberty, equal protection, free speech, and freedom of conscience provisions in the Ohio Constitution, but was subsequently reversed).

hour waiting period.[117] In Ohio, the court invalidated a twenty-four hour delay and biased counseling requirements under state constitutional guarantees of liberty,[118] equal protection,[119] freedom of speech,[120] and "freedom of conscience."[121] The court also relied upon the *Federal* Equal Protection Clause.[122] In California, the court relied on that state's express right to privacy in striking down a parental consent statute.[123]

These cases show that viable new theories *are* available, and that they fall into three groups:

(1) state constitutional provisions with direct counterparts in the Federal Constitution (e.g., liberty and equal protection);
(2) state constitutional provisions with no federal counterpart (e.g., express privacy and "freedom of conscience" guarantees); and
(3) provisions in the Federal Constitution not yet presented to the Supreme Court as a basis for abortion rights (e.g., equal protection).

This article will now demonstrate how all of these theories might be employed in vindicating the reproductive autonomy of women.[124]

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[117] Planned Parenthood Ass'n, Inc. v. McWherter, No. 92C-1672, slip op. at 19-20 (Tenn. Cir. Ct. Nov. 19, 1992).

[118] *Voinovich*, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. May 27, 1992).

[119] *Id.* at 13-15.

[120] *Id.* at 11-13.

[121] *Id.* at 10-11.

[122] *Id.* at 15, 28.

[123] American Academy of Pediatrics v. Van De Kamp, 263 Ca. Rptr. 46, 49 (Cal. Ct. App. 1989).

[124] My equal protection analysis, though directed primarily at state constitutional claims, is applicable in part to claims under the Federal Constitution. *See infra* notes 238-60 and accompanying text.

IV. How a State Constitution Might Be Employed in Challenging Abortion Regulations of the Sort Already Upheld Under the Federal Constitution

A. The Example of Ohio

In explaining how a state constitution might be employed in challenging restrictions on abortion, we will focus on the example of a single state—Ohio. Many states have shown a special reluctance to interpret their constitutions independently.[125] Ohio courts have long treated their state constitution as a mere reiteration of the federal charter.[126] Moreover, Ohio has often been the scene of fierce abortion battles.[127] Thus, Ohio provides a good illustration of the challenges to be faced by lawyers who employ state constitutions in the cause of reproductive freedom.

B. The Unique Text and History of Ohio's Constitution

When invoking a state constitution, the first task is to emphasize its unique text and history.[128] This is necessary in order to overcome the pervasive judicial tendency to view state constitutions as empty reiterations of the federal charter.

In fact, state constitutions depart dramatically from the federal text. This is particularly true of their protections for fundamental rights. The federal Bill of Rights is phrased negatively, as a restraint on governmental power. The First Amendment, for example, begins: "Congress shall make no law . . . "[129] and each succeeding provision in the Bill of Rights is framed as a "Thou Shalt Not." Most state constitutions, on the other hand, express these guarantees in

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[125] Sedler, *supra* note 33, at 474-75.

[126] *See infra* notes 139-58 and accompanying text.

[127] *See, e.g.*, Akron Ctr. for Reprod. Health, Inc. v. Ohio, 462 U.S. 416 (1983) (Akron I) (requiring 24-hour delay on abortions); Ohio v. Akron Ctr. for Reprod. Health, Inc., 479 U.S. 502 (1990) (Akron II) (requiring parental consent).

[128] *See* State v. Jewett, 500 A.2d 233 (Vt. 1985) (outlining an approach to briefing state constitutional theories).

[129] U.S. CONST. amend. I.

affirmative, rather than negative, language. Compare, for example, the free speech clause of the Ohio Constitution—"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"[130]—to its counterpart in the Federal Constitution—"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[131] These textual differences are so striking that a court, when presented with the contrast, should hesitate before pronouncing that both be given the identical construction.[132] If a court were interpreting contractual terms, would it conclude, as readily as some courts have,[133] that these clauses are coextensive?

Thus, textual differences between the state and federal charters may be employed in urging a more expansive interpretation of the state provision. But even if the state provision is identical to its federal counterpart the unique history of the state constitution—the factual circumstances prompting its creation, the legislative deliberations surrounding its composition, and the ratification debates that led to its adoption—may justify a broader construction.

Accordingly, lawyers planning to utilize a state constitution must perform historical research into its origins. Just as James

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[130] OHIO CONST. art. I, § 11.

[131] U.S. CONST. amend. I.

[132] *See infra* Part IV. D. 3. a. As is apparent, Ohio's free speech provision contains two distinct clauses, one that is phrased in "positive" language, and one that is phrased in "negative" language. State free speech provisions may be grouped into three categories: those that emulate the exclusively "negative" language of the Federal First Amendment, *see, e.g.*, HAW. CONST. art. I, § 4; those that confer speech rights in sweeping "affirmative" language, *see, e.g.*, ALASKA CONST. art. I, § 5; and those, that combine affirmative and negative clauses; *see, e.g.*, R.I. CONST. art. I, § 21.

[133] *See* State v. Lacey, 465 N.W.2d 537, 540 (Iowa 1991); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337, 344 (Mich. 1985); SHAD Alliance v. Smith Haven Hall, 488 N.E.2d 1211, 1214 (N.Y. 1985); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1334 (Pa. 1986); Jacobs v. Major, 407 N.W.2d 832, 841 (Wis. 1987). A number of states have recognized, however, that the "positive" language in the free speech clauses of their state constitutions confers broader protection than the Federal First Amendment. *See, e.g.*, Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979); Block v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991); State v. Schmid, 423 A.2d 615 (N.J. 1980), *appeal dismissed*, 455 U.S. 100 (1982); Ferner v. Toledo-Lucas County Convention & Vistors' Bureau, Inc., 610 N.E.2d 1158, 1162 (Ohio Ct. App. 1992).

Madison and Thomas Jefferson are cited by litigants advancing a particular interpretation of the Federal Constitution, "founding fathers" of the state constitution should likewise be identified and invoked. In most states, unfortunately, the historical record will hardly be accessible. The sources are few and far between, and they are not likely to include an equivalent to *The Federalist Papers*.

Nevertheless, the search is well worth pursuing. In Ohio, for example, one finds intriguing evidence that the state's early politics were dominated by settlers from Virginia who brought with them a Jeffersonian passion for individual liberty.[134]

Equally intriguing is the libertarian spirit that animated the drafters of Ohio's first Constitution.[135] That charter, drafted in 1802,

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[134] Soon after the Northwest Ordinance was passed July 13, 1787, the State of Virginia acquired some four million acres of land north of the Ohio River. This tract became known as the Virginia Military District because the Gov. of Virginia awarded plots of land to soldiers for their valiant service in the Revolution. *See* R.C. Downes, *Frontier Ohio: 1788 to 1803*, 3 OHIO HIST. COLLECTIONS 81 (1935). As a result, Virginians dominated the early settlement of Ohio and exerted great influence over the political climate of the Territory. Pioneers from Virginia founded such Ohio cities as Manchester (1791) and Chillicothe (1796), which became the political center of the Territory. "Around Chillicothe as a center of Virginian settlers gathered some of the noted men of Ohio's early history, such men as Tiffin the first governor; McArthur, a later governor; Worthington a United States Senator from Ohio, and Baldwin speaker of the lower house of the legislature." R.E. CHADDOCK, OHIO BEFORE 1850: A STUDY OF THE EARLY INFLUENCE OF PENNSYLVANIA AND SOUTHERN POPULATIONS IN OHIO 236 (1908). The earliest laws of the Territory were copied from existing laws in Virginia, Pennsylvania, and Kentucky. *Id.* at 237.

By 1799, the Territory had grown sufficiently populous to create the first territorial legislature as prescribed by the Northwest Ordinance. Virginian settlers who followed the ideals of Thomas Jefferson dominated the legislature. *Id.* at 241-42. Increasingly dissatisfied with the territorial regime and especially with the unbridled power of Governor Arthur St. Clair, who enjoyed an absolute veto over legislative acts, these men led Ohio's quest for statehood. "Jefferson was the guiding spirit of these men, the friend of the West. The spirit of individual liberty and opposition to a paternal control was in the air among the people moving into the Northwest Territory." *Id.* at 235. The legislature galvanized an intense political movement that succeeded in passing the enabling act to form the State of Ohio on Apr. 30, 1802. *Id.*

[135] The delegates to the first constitutional convention of Ohio met in Chillicothe on Nov. 1, 1802. "It was their purpose to remedy the supposed evils of the former system and to introduce a thoroughly democratic form of government in harmony with the ideas and needs of the people." CHADDOCK, *supra* note 134, at 62. Once again, the Virginians assumed leadership at this critical juncture in Ohio's history. Edward Tiffin, a Virginian, was selected to preside over the convention. *Id.* at 63. Of 20 delegates

provided a more inclusive enumeration of rights and imposed more restraints on governmental power over individual liberty than did the Federal Bill of Rights.[136] Moreover, during the second constitutional convention of 1851, the delegates not only preserved the declaration of rights but moved it to a position of prominence, at the very front of the new Constitution.[137] It has remained there, undiluted, ever

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whose backgrounds were traced, nine were from Virginia. *Id.* at 62. These Virginians exerted considerable influence over the convention by chairing major committees. A study of the committees shows clearly the control that Jefferson's followers exerted over both the proceedings and the convention's result. *Id.* at 63. During the debates of Ohio's first convention, "[a] central theme . . . was the placing of all the agencies of the State subject to the will of the people who had been so long deprived of a real share in political life." R.C. Downes, *Ohio's First Convention*, 25 NORTHWEST OHIO Q. 12, 17 (1953).

[136] Ohio's first Constitution, drafted in 1802, proclaimed that "every free government, being founded on [the people's] sole authority, [is] organized for the great purpose of protecting their rights and liberties, and securing their independence. . . ." OHIO CONST. art. VIII, § 1 (1802). As one historian has marveled, "[j]udging by modern standards, [the Ohio Constitution is a] liberal document. Judging by the standards of [1802] it was radical." DOWNES, *supra* note 134, at 1. In fact, when compared with other state constitutions during the same time period, Ohio's first Constitution "shows advances toward a more radical democratic view." CHADDOCK, *supra* note 134, at 66. The theme of individual liberty permeated the 1802 document. It declared, for example, "[A] frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." OHIO CONST. art. VIII, § 18 (1802). General search warrants and standing armies in times of peace were declared "dangerous to liberty." *Id.* at §§ 6 and 20 (1802). The Ohio Constitution followed the Federal Bill of Rights in protecting freedom of speech and assembly, and trial by jury. *Id.* at §§ 6, 19, 8. However, the 1802 Constitution was distinctive from the federal document in a number of respects. Among positive rights guaranteed to the people, the Ohio charter provided for redress in courts with "due course of law." *Id.* at § 7 (1802). Moreover, the 1802 Constitution conferred a "freedom of conscience" provision which remains to this day more expansive than the Federal Free Exercise and Establishment clauses. *Id.* at § 3 (1802). Among restraints on governmental power, the charter prohibited poll taxes. *Id.* at § 23. In the area of criminal law, it prohibited disproportionate punishment, excessive bail, and treating prisoners with "unnecessary rigor." *Id.* at §§ 14, 13, 10. Remarkably, more than 60 years before the passage of the Thirteenth Amendment, the Ohio Constitution prohibited slavery. *Id.* at § 2.

[137] During the second constitutional convention of 1851, the delegates agreed to keep the spirit of the declaration of rights intact:

> Resolved, that the [bill of rights] . . . of the Constitution of this State, embracing the well settled and long established principle of self-government . . . against the encroachments of power, *and*

since.[138]

This research demonstrates that state constitutions have their own unique histories and therefore must be construed independently. Judges confronted with such history will be less likely to treat the state constitution as a meaningless echo of the federal charter. In addition, the historical record may well establish a factual basis for construing the state constitution more broadly than its federal counterpart.

C. Long-standing Neglect of the Ohio Constitution by State Court Judges

Perhaps the greatest challenge in utilizing state constitutions is overcoming a judicial tradition in which state provisions are regarded as coextensive with their federal counterparts. This approach to state constitutional interpretation—dubbed the "dual" approach—prevails in many states, and was described earlier in this article.[139] It is particularly pervasive in the Midwest.[140] Once again, Ohio provides a good illustration of the problems posed by this tenacious doctrine.

When presented with state and federal constitutional claims,

> *securing to all the largest liberty* . . . accords, in its principles, with the cherished sentiments of the people of Ohio, and ought . . . to be continued without material alteration as their bill of rights.

1 J.V. SMITH, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 1850-51, at 69 (1851; reprinted 1933). Thus, though the 1851 delegates streamlined the provisions and made some moderate textual changes, the Bill of Rights and its enduring principles of liberty remained intact. Perhaps the best testament to their commitment to individual liberty was the decision to move the Bill of Rights from Article VIII to the most prominent location of all: Article I, the very beginning of the document. *Id.* Since the 1851 Constitution has endured to the present, the libertarian spirit that animated its drafters should be borne in mind by those who construe its provisions.

[138] *See* State v. Nieto, 131 N.E. 663, 666 (Ohio 1920) (Wanamaker, J., dissenting) (stating that the delegates to Ohio's second constitutional convention in 1851 demonstrated the importance of the state Bill of Rights by moving it to the front of the new constitution).

[139] *See supra* text accompanying note 31; *see also* State v. Hovlat, 385 N.W.2d 436, 447 (Neb. 1986) (Shanahan, J., dissenting); *supra* text accompanying note 34.

[140] Sedler, *supra* note 33, at 474-75.

Ohio courts consistently followed, until recently, the deferential "dual" approach.[141] This excerpt from an Ohio Supreme Court opinion was a typical response:

> We look to federal case law to decide the right . . . under both the state and federal provisions. The Ohio Constitution's guarantees . . . are substantially equivalent to the United States Constitution's guarantees. . . . [D]ecisions by the United States Supreme Court can be utilized to give meaning to the guarantees of . . . the Ohio Constitution.[142]

Scholars lambasted Ohio's "reflexive obedience to the U.S. Supreme Court's view,"[143] its reluctance "to utilize independent state grounds for state constitutional decisions,"[144] its corresponding "[lack of expertise] in interpreting its [own] constitution,"[145] and the resulting "fail[ure] to develop a body of state civil liberties law."[146]

In 1992, the Ohio Supreme Court simultaneously issued two opinions, *State v. Brown*[147] and *State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals*,[148] departing from the "dual" approach in one, and adhering to it in the other.

In a rare display of independence,[149] the Court acknowledged

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[141] *See generally* Mary C. Porter & Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984) (showing several instances where the Ohio Supreme Court failed to invoke Ohio State constitution, and relied instead on the Federal Constitution).

[142] State *ex rel.* Heller v. Miller, 399 N.E.2d 66,67 (Ohio 1980).

[143] *E.g.*, Porter & Tarr, *supra* note 141, at 148.

[144] Robert F. Williams, *State Constitutional Law in Ohio and the Nation*, 16 U. TOL. L. REV. 391, 402-03 (1985).

[145] Porter & Tarr, *supra* note 141, at 154.

[146] *Id.*

[147] 588 N.E.2d 113 (Ohio 1992).

[148] 588 N.E.2d 116 (Ohio 1992).

[149] On only one previous occasion had a majority of the Ohio Court expressly recognized its power to depart from U.S. Supreme Court precedent when interpreting analogous provisions of the Ohio Constitution. State v. Chatton, 463 N.E.2d 1237, 1241 n.4 (Ohio 1984) (dictum) ("[N]onetheless, even should a good faith exception to the exclusionary rule be recognized for Fourth Amendment purposes, the question remains whether we would likewise recognize such an exception under Section 14, Article I of

in *Brown* that it is free to deviate from U.S. Supreme Court precedent when interpreting analogous provisions of the Ohio Constitution.[150] And, for the first time, the Ohio Supreme Court actually did depart from U.S. Supreme Court precedent, holding that Article I, § 14 of the Ohio Constitution affords greater protection against unreasonable search and seizure than the Federal Fourth Amendment.[151] The Court's decision was unanimous.[152]

Brown's impact remains uncertain, however, because *Rear Door Bookstore*, issued the same day, expressly rejects the notion that Ohio's free speech clause is any broader than the Federal First

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the Ohio Constitution.").

[150] *Brown*, 588 N.E.2d at 115 n.3.

[151] *Id.* at 114 n.1.

[152] In *Brown*, the Ohio Supreme Court addressed the permissible scope of an automobile search incident to arrest, under both the U.S. and Ohio Constitutions. The criminal defendant, Henry Brown, had been stopped for driving under the influence of alcohol. Brown was arrested and placed in custody in a patrol car. After confining Brown in the patrol car, the officer searched the passenger compartment of Brown's automobile. During the course of this search, the officer opened a small unlocked container in which he found LSD. *Id.* at 116. Brown was indicted on one count of drug possession of LSD. His lawyer filed a motion to suppress the LSD found in his car, arguing that this evidence was obtained by means of an unconstitutional search. *Id.* at 114. In determining the constitutionality of this search, the Ohio Supreme Court was faced with a U.S. Supreme Court precedent, New York v. Belton, 453 U.S. 454 (1981), which greatly expanded the permissible scope, under the Fourth Amendment, of automobile searches incident to arrest. In *Belton*, the U.S. Supreme Court specifically recognized that it is permissible for an officer—after arresting the occupants of an automobile and leading them away from the car—to return to the car and search its contents, including any closed containers he may find. *Id.* at 455-56, 462. In *Brown*, the Ohio Supreme Court recognized the general applicability of *Belton*, but identified certain distinguishing facts. 588 N.E.2d at 115. The Court acknowledged that these distinguishing facts made it unclear whether the search of Brown's automobile was permissible under *Belton*. Noting that it was free to construe the Ohio Constitution as imposing more stringent constraints on police conduct than that imposed by the U.S. Constitution, the Ohio Supreme Court specifically held that it would *decline* to follow *Belton* insofar as it authorized the type of search performed in Brown's car, "If *Belton* does stand for the proposition that a police officer may conduct a detailed search of an automobile solely because he has arrested one of its occupants, on any charge, we *decline* to adopt its rule." *Id.* at 352 (second emphasis added). In so holding, the Ohio Supreme Court expressly recognized that it is free to depart from U.S. Supreme Court precedent in construing analogous provisions of the Ohio Constitution. More important, the Ohio Supreme Court for the first time specifically *departed* from U.S. Supreme Court precedent in construing a counterpart provision in the Ohio Constitution.

Amendment: "Appellants have cited no Ohio case, nor has our research discovered any authority, for the proposition that the free speech guarantees accorded by the Ohio Constitution are broader than those provided under the United States Constitution."[153] In so holding, the Court issued a rebuke to those who would advocate a broader reading of the Ohio Constitution: "We have no reluctance in declining to follow New York's dubious leadership to enlarge Ohio's Constitutional protections [for free speech] to encompass the activities occurring within the Rear Door Bookstore."[154]

Taken together, these decisions offer both hope and discouragement to those who would invoke the Ohio Constitution as a supplemental source of protection for reproductive freedom.[155] Though recent decisions by lower courts evince a strong willingness

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[153] *Rear Door Bookstore*, 588 N.E.2d at 123-24.

[154] *Id.* at 124.

[155] *Rear Door Bookstore*'s impact is limited somewhat by the fact that it was not actually *authored* by any justice of the Ohio Supreme Court. Instead, the opinion is that of the Tenth District Court of Appeals, which the Ohio Supreme Court merely affirmed and published as an appendix to its one-sentence order. *Rear Door Bookstore*, 588 N.E.2d at 117. Moreover, under Ohio law, only the syllabus "states the controlling point or points of law decided." OHIO SUP. CT. R. 1(B). The Supreme Court's syllabus in *Rear Door Bookstore* contains no reference to the appellate court's restrictive interpretation of Ohio's free speech clause. Moreover, in a more recent decision, the Ohio Supreme Court appeared to recognize that Ohio's provision is slightly broader than the Federal First Amendment:

> The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. *The Constitution of Ohio is even more specific*; it guarantees to every citizen freedom to 'speak, write, and publish his sentiments on all subjects.' It follows that a citizen of Ohio is free to have 'sentiments on all subjects.'

State v. Wyant, 597 N.E.2d 450, 457 (Ohio 1992) (quoting OHIO CONST. art. I, § 11) (emphasis added)), *vacated on Federal Constitutional grounds*, 113 S.Ct. 2954 (1993). *Accord* Urbana *ex rel.* Newlin v. Downing, 539 N.E.2d 140, 153 (Ohio 1989) (Brown, J., dissenting) (the state constitutional right to freedom of speech is broader than the federal right and "authorize[s] the expression of *any* sentiment on *any* subject so long as the expression does not cause harm") (emphasis in original). Thus, there exists at least some fragile authority for asserting that Ohio's free speech clause is not merely coextensive with its federal counterpart.

to breathe life into the Ohio Constitution,[156] the state supreme court has in recent months continued its halting, inconsistent approach to interpreting the state charter.[157]

These decisions show that efforts to develop the state constitution are generating considerable agitation in Ohio's courts. The next few years will be critical in determining whether conservative states like Ohio join the growing number of jurisdictions where state constitutions are enjoying a renaissance.[158]

D. Breathing Life into State Constitutional Provisions Long Overshadowed by Their Federal Counterparts

This article will now demonstrate how state guarantees of liberty, privacy, equal protection, and free speech may be used in challenging abortion restrictions of the sort upheld in *Casey*.

1. Liberty/Privacy

Casey-type restrictions violate state constitutional guarantees of liberty and privacy by abridging the bodily integrity and personal

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[156] *See, e.g.*, Ferner v. Toledo-Lucas County Convention & Visitor's Bureau, Inc., 610 N.E.2d 1158, 1162 (Ohio Ct. App.) (holding that the state free speech clause is broader than the Federal First Amendment); *Voinovich*, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. May 27, 1992) (striking down abortion restrictions under liberty, equal protection, free speech, and freedom of conscience guarantees in the Ohio Constitution).

[157] *Compare* Eastwood Mall, Inc. v. Slanco, 68 Ohio St. 3d 221 (Ohio 1994) (holding that the free speech clause of the Ohio Constitution affords no greater access to shopping malls for speech activities than the Federal First Amendment) *and* State v. Wyant, 68 Ohio St. 3d 162 (Ohio 1994) (holding that the state free speech clause imposes no greater restrictions on legislative power to enact "ethnic intimidation" statutes than does the Federal First Amendment) *with* Arnold v. Cleveland, 67 Ohio St. 3d 35, 42 (Ohio 1993) (asserting that "the Ohio Constitution is a document of independent force," which may be construed to afford greater protection for civil liberties than the U.S. Constitution). Dissenting in *Slanco*, Justice Craig Wright criticized the Court's inconsistency in construing the state charter, observing that "this court has taken one step forward but two steps backward in recent cases involving the interpretation of the Ohio Constitution." 68 Ohio St. 3d at 225.

[158] *See supra* notes 42-72 and accompanying text.

autonomy of women, and by placing undue burdens on the capacity of women to make procreative and medical decisions free from unwarranted governmental intrusion. Before turning to an analysis of the liberty and privacy guarantees under the Ohio Constitution, let us first examine how such provisions have been employed in other jurisdictions.

a. In Other Jurisdictions, Courts Have Found Enhanced Protection for Reproductive Freedom in State Constitutional Guarantees of Liberty and Privacy

In some jurisdictions, courts have found enhanced protection for reproductive freedom in state constitutional guarantees of liberty and privacy. In California[159] and Florida,[160] the courts relied upon express privacy guarantees contained in their state constitutions.[161] In New Jersey[162] and Connecticut,[163] the courts found an implied

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[159] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (applying strict scrutiny in finding that the challenged regulation unduly burdened a woman's fundamental right of privacy).

[160] *In re* T.W., 551 So.2d 1186 (Fla. 1989) (applying strict scrutiny in finding that the challenged regulation unduly burdened a woman's fundamental right of privacy).

[161] Some state constitutions expressly guarantee a right of privacy. *See e.g.*, ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; D. C. CONST. art. I, § 4; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; L.A. CONST. art. I, § 5; and MONT. CONST. art. II, § 10.

[162] Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982). In *Byrne*, the New Jersey Supreme Court struck down a state Medicaid funding scheme which subsidized only life-saving abortions and excluded medically necessary abortions. *Id.* at 932. The court first noted the "more expansive" liberty grant under its state charter: "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, § 1. The court concluded, "[b]y declaring the right to life, liberty, and the pursuit of safety and happiness, [the provision] protects the right of privacy, a right that was implicit in the 1844 Constitution." *Right to Choose*, 450 A.2d at 933. The court then observed that this state right to privacy had been invoked to protect adult consensual sexual conduct, the right to sterilization, and the right to terminate life support. *Id.* A common theme running through these cases was the precept that sometimes "an individual's right to control her own body and life overrides the state's general interest in preserving life." *Id.* Accordingly, the court deemed the right to privacy, and the right of "all pregnant women" to choose abortion, fundamental. *Id.* at 934. The court

noted that the choice to abort was "one of the most intimate decisions in human experience . . . that should be made by the woman in consultation with a few trusted advisors, such as her doctor, without undue government interference." *Id.* Since the funding restriction implicated a fundamental right, the court employed a strict scrutiny analysis. The court determined that the statute violated an indigent woman's "fundamental right to control her body and destiny" by withholding funds for medically necessary abortions. *Id.* at 933.

[163] Doe v. Maher, 515 A.2d 134 (Conn. 1986). In *Maher*, the Connecticut Superior Court struck down a Medicaid funding scheme which funded only abortions necessary to save the life of the mother. The court held that Connecticut's implied right of privacy included the right to preserve one's health and the right to choose an abortion. *Id.* at 150-53. To determine the source of the right, the court looked to the state constitution: "The preamble . . . reserves to the people 'the liberties, rights and privileges which they have derived from their ancestors'; and the preface clause to the declaration of rights . . . . broadly incorporates the concept of ordered liberty by stating '[t]hat the great and essential principles of liberty and free government may be recognized and established. . . .'" *Id.* In construing this expansive language, the court reasoned that the framers of the 1818 Constitution intended that "the right of privacy is implicitly guaranteed under our state charter of liberty." *Id.* The court noted that its state constitution not only constrained governmental power, but also conferred positive rights upon the people. *Id.* While some positive rights were enumerated, "others were implied . . . in the preamble of the Constitution and that of the declaration of rights; and all are guaranteed by the due process clause." *Id.* Among these implied rights were fundamental or "'natural rights,' which the people took for granted as being deeply rooted in the core of liberty." *Id.* at 150-53. The court cited one framer's conception of natural rights as "'the enjoyment and exercise of a power to do as we think proper, without any other restraint than what results from the law of nature, or what may be denominated the moral law.'" *Id.* at 149. In passing, the court noted that while natural rights analysis may be in disrepute today, it is highly useful in determining the intent of the framers. *Id.* at 149 n.32. Next, the court discerned the nature of fundamental rights. Such rights are inherently rooted in "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)). Citing the famous dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928), the court concluded that "the right to be let alone is fundamental and this right of privacy is older than the Bill of Rights." *Maher*, 515 A.2d at 150. Accordingly, the court concluded: "It is absolutely clear that the right of privacy is implicit in Connecticut's ordered liberty." *Id.* The court went on to describe the privacy right in expansive terms. It stated unequivocally that the privacy right secured a woman's exercise of procreative freedom: "If the right of privacy means anything, it is the right of the individual . . . to be free of unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* (quoting Carey v. Population Services International, 431 U.S. 678, 685 (1977)). Also, like the court in *Right to Choose*, 450 A.2d at 934, the *Maher* court stated that privacy shields the physician-patient relationship from undue governmental interference. Privacy "encompasses the doctor-patient relationship regarding the woman's health, including the physician's right to advise the woman on the abortion

privacy right in the sweeping liberty guarantees set forth in their state constitutions. Likewise, courts in Massachusetts,[164] New York,[165] and

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decision based upon her well-being." *Maher*, 515 A.2d at 150. Finally, the court deemed as fundamental "the right to make decisions which are necessary for the preservation and protection of one's health." *Id.* If not within the ambit of privacy, this right is free-standing and fundamental, for "at every stage of pregnancy, the woman's health is paramount." *Id.* at 150. Both the New Jersey and Connecticut courts found an implicit right to privacy within the expansive liberty provisions of their state charters. Both courts suggested that the privacy right was so "fundamental to the concept of ordered liberty" that it need not be enumerated expressly. See Roe v. Wade, 410 U.S. 113, 152 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[164] Moe v. Secretary of Admin., 417 N.E.2d 387 (Mass. 1981). In *Moe*, the Massachusetts Supreme Judicial Court invalidated a state Medicaid funding scheme that subsidized only abortions to save the mother's life. The funding scheme violated an implicit privacy right stemming from the state constitution's due process clause. *Id.* at 402. The court held that due process requires governmental restraint in interfering with the positive right to privacy. First, the court embraced the holding of Roe v. Wade, 410 U.S. 113 (1973): "Although we are not unaware of the criticism leveled at *Roe*, we have accepted the formulation of rights that it announced as an integral part of our jurisprudence." *Id.* at 398. The court explained that the privacy right shielding family, sexuality, and reproductive freedom is "but one aspect of a far broader grant" of personal autonomy. *Id.* This autonomy right demands that "'the sanctity of individual free choice'" and the freedom of "'bodily integrity'" be fundamental. *Id.* at 399 (quoting Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977)). To protect the right to privacy, due process requires nonintervention by the state. The court had twice defended a woman's right to choose abortion on state constitutional grounds. *Moe*, 417 N.E.2d at 398. These Massachusetts cases respect a "'private realm of family life which the state cannot enter.'" *Id.* at 398-99 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). "'We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party . . . to make the other happy. Some things must be left to private agreement.'" *Id.* at 398 (quoting Doe v. Doe, 314 N.E.2d 128 (Mass. 1974)). The Massachusetts court, noting that the due process guarantees in its state constitution provided more protection than the federal analogue, concluded that the state due process clause "'forbids the state to interpose material obstacles to the effectuation of a woman's counseled decision to terminate her pregnancy during the first trimester.'" *Id.* at 398-99 (quoting Framingham v. Southborough, 367 N.E.2d 606 (Mass. 1977)). The court further explained that governmental regulations impinging on the right to privacy must be neutral to satisfy due process. *Id.* at 400. "[O]nce [the legislature] chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference." *Id.* at 402. Accordingly, the court determined that the exclusion of medically necessary abortions from the Medicaid scheme was impermissibly discriminatory and that the woman's exercise of her right to choose abortion outweighed the state's interest in protecting fetal life. *Id.*

West Virginia[166] relied upon substantive due process guarantees in their state constitutions.

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[165] Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993), *dismissed*, 601 N.Y.S.2d 568 (N.Y. 1993). In *Hope*, a New York trial court struck down a complete ban on funded abortions through the state Prenatal Care Assistance Program for indigent women. The court held that the funding restriction was "contrary to the constitutional right to privacy guaranteed by the due process clause of the New York State Constitution." *Id.* at 976-77. New York's due process clause, providing that "no person shall be deprived of life, liberty, or property without due process of law," N.Y. CONST. art. I, § 6, had historically been construed as granting broader protection than its federal counterpart. *Hope*, 571 N.Y.S.2d at 978. The court noted that since the clause was enacted prior to the Federal Fourteenth Amendment and had distinct language, an independent construction was appropriate. *Id.* The court acknowledged that New York decriminalized abortion three years before Roe v. Wade, 410 U.S. 113 (1973), "to recognize that the state had no right to interfere with the most personal and important decision a woman can make regarding her body and her life." *Id.* at 976. Like the Massachusetts Supreme Judicial Court, the New York court stressed the importance of governmental noninterference with the right to privacy:

> In constitutional terms, the right to privacy involves freedom of choice, the broad general right to make decisions concerning one's self and to conduct one's self in accordance with those decisions free of governmental restraint or interference. . . . The essence of this freedom is the absence of governmental interference in the personal decisions concerning contraception, procreation, and abortion, to name a few that fall within the ambit of . . . privacy.

Id. at 977. The court found that the funding ban unduly interfered with the right of indigent women to choose abortion. By excluding all funding of abortion, the prenatal care program "impermissibly pressures an eligible indigent woman toward childbirth, abridging a constitutionally protected right." *Id.* at 979. The discriminatory program allowing health care only for childbirth expenses "effectively precludes an eligible woman from any real choice in the fundamental decision 'to bear or beget a child.'" *Id.* (quoting Carey v. Population Services International, 431 U.S. 678, 686 (1977)). In addition, the regulation "wrests control from the pregnant woman over her body and health." *Id.* at 980. The court ruled that the regulation was not "fairly, justly, reasonably, or rationally related to the promotion of the health, comfort, safety, and welfare of society." *Id.* at 978. Thus, the court extended the reach of the implicit privacy right to include "the right of a pregnant woman to choose an abortion where it is medically indicated." *Id.*

[166] Women's Health Ctr., Inc. v. Panepinto, 1993 WL 522706 (W. Va. Dec. 20, 1993) (striking down restrictions on public funding of abortion under substantive due process and equal protection theories advanced under the West Virginia Constitution).

b. Ohio's Constitution Affords Heightened Protection for Reproductive Freedom Under Guarantees of Liberty and Privacy

i. Textual Analysis

The U.S. Constitution mentions liberty only in the context of due process: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."[167] By contrast, the Ohio Constitution confers a sweeping grant of individual liberty: "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."[168]

Since the liberty right guaranteed under the Ohio Constitution is neither tied to nor limited by a due process clause, it may be deemed to provide greater *substantive* protection for all Ohio citizens than that afforded by the U.S. Constitution. Since it is *liberty* that forms the very foundation of reproductive freedom,[169] and since the liberty clause of the Ohio Constitution is *broader* than that of the U.S. Constitution, Ohio's liberty guarantee may be viewed as providing heightened protection for reproductive autonomy.

The New Jersey Supreme Court construed an identical provision in its state constitution as granting a fundamental privacy right.[170] The Connecticut court likewise relied upon similar language in its constitution to find that privacy is implicit in that State's ordered liberty.[171] More important, those courts found that the broad language of the liberty guarantees in their state constitutions created

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[167] U.S. CONST. amend XIV, § 1.

[168] OHIO CONST. art. I, § 1 (emphasis added).

[169] *Casey*, 112 S. Ct. 2791, 2804. *See* Rust v. Sullivan, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting).

> Roe v. Wade and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination. Those cases serve to vindicate the idea that 'liberty,' if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions.

Id.

[170] Right to Choose v. Byrne, 450 A.2d 925, 937 (1982). *See supra* note 162.

[171] Doe v. Maher, 515 A.2d 134, 148-49 (Conn. 1986). *See supra* note 163.

greater protection for reproductive freedom than that afforded by federal law. Since Ohio's liberty provision is expressed in similarly broad language, it too should be deemed to confer greater protection for reproductive freedom than that supplied by the Federal Constitution.

ii. Application to Casey*-type Provisions*

The foregoing textual analysis, coupled with the historical perspective outlined above,[172] demonstrates that the Ohio Constitution was animated by a powerful libertarian spirit, and that it contains a sweeping guarantee of liberty. Moreover, Ohio's liberty provision affords greater protection than that contained in the Federal Constitution, and its sweeping language embraces an implied right of privacy.

In fact, Ohio courts have recognized a constitutional right to privacy under the liberty guarantee in Article I, § 1, of the Ohio Constitution. An Ohio trial court enjoined a school board regulation governing dress codes and hair-length restrictions which "invad[ed] the privacy and dignity of the student . . . in the most intimate and personal way."[173] Turning to Article I, § 1, the court noted: "It seems . . . strikingly important that our founding fathers placed this section first in the Bill of Rights. It represents the embodiment of what this nation stands for. It enshrines in our Constitution our dedication to individual freedom and dignity."[174] The court then identified a broad right of individual privacy:

> In non-legal terms, Section 1 establishes the principle that every American *has the right to be let alone* and to be regulated by the government only so far as such regulation is shown to be necessary to protect others or to advance legitimate governmental purposes. This constitutional provision places a heavy responsibility

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[172] *See supra* notes 134-38 and accompanying text.

[173] Jacobs v. Benedict, 301 N.E.2d 723, 727 (Ohio C.P. 1973); *aff'd*, 316 N.E.2d 898 (Ohio Ct. App. 1973).

[174] *Id.* at 725.

> on any governmental body to justify its interference with a citizen's freedom, his right to enjoy liberty of decision and to seek happiness in his own way.[175]

Accordingly, the court concluded that the regulation was "antithetical to our American tradition of rugged individualism and wholly repugnant to the laws and Constitution of Ohio."[176]

This opinion, later affirmed,[177] offers some lessons on the interpretation of Article I, § 1. The court first looked at the text and discerned the intent of the framers by placing the provision first in the Constitution and first in the Bill of Rights.[178] The court recognized the principles of individual dignity and autonomy that animate Ohio's Constitution in declaring a fundamental right to privacy. The court formulated a standard to justify governmental interference: the intrusion must be *necessary* to advance a legitimate state purpose. This formulation, with its emphasis upon *necessity*, is closely akin to the "strict scrutiny" standard in federal constitutional jurisprudence.[179] This is the sort of independent interpretation that state courts should be encouraged to pursue when construing their own constitutions.

In the intervening years, Ohio courts have held that the protection of personal privacy covers those areas which are "'fundamental' or 'implicit in the concept of ordered liberty,' [involving] matters related to marriage, procreation, contraception, family relationships, and child-rearing and education."[180] They have noted that "the family unit, which performs the social function of child-rearing, regardless of its composition, . . . is constitutionally protected against governmental intrusion not supported by a compelling state interest."[181] Likewise, Ohio courts have held that

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[175] *Id.* at 725 (emphasis added).

[176] *Id.* at 728.

[177] *Jacobs*, 316 N.E.2d at 901.

[178] *Jacobs*, 301 N.E.2d at 725.

[179] *Compare* Graham v. Richardson, 403 U.S. 365 (1971) and Sugarman v. Dougall, 413 U.S. 634 (1973) *with* Nyquist v. Mauclet, 432 U.S. 1 (1977).

[180] Wilson v. Patton, 551 N.E.2d 625, 630 (Ohio Ct. App. 1988).

[181] Saunders v. Clark County Zoning Dep't, 421 N.E.2d 152, 155-56 (Ohio 1981).

adult, consensual sexual conduct done in private is protected,[182] and that "the choice not to procreate, as part of one's privacy, has become (subject to certain limitations) a Constitutional guarantee."[183]

These cases demonstrate that the Ohio Constitution contains an implied right of privacy affording protection for reproductive freedom. An opinion of the Ohio Attorney General has confirmed that such a privacy right exists.[184] Though never previously invoked in the context of abortion regulations, Ohio's right to privacy is sufficiently broad to protect women from the unwarranted governmental intrusion that *Casey*-type provisions represent.

2. *Equal Protection*[185]

Such restrictions also violate constitutional guarantees of equal protection because they impose burdens upon women's reproductive choices that are not imposed upon the reproductive choices of men, because they perpetuate myths and stereotypes that demean women and hinder their ability to participate fully and equally in society, and because they deprive women, but not men, of a fundamental right.

Unfettered freedom of choice regarding abortion "is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny."[186] "The implications of an unwanted child for a woman's education, employment opportunities, and associational opportunities (often including

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

[183] Bowman v. Davis, 356 N.E.2d 469, 499 (Ohio 1976).

[184] Ohio Op. Att'y Gen. No. 82-095, at n.3, 1982 Ohio AG LEXIS 14 (Nov. 15, 1982).

[185] This section of the article, though intended primarily to support *state* constitutional cliams, is applicable in part to equal protection claims under the Federal Constitution. *See infra* notes 238-60 and accompanying text.

[186] Kenneth L. Karst, *The Supreme Court, 1976 Term: Toward Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-58 (1977); *see* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 792 (Cal. 1981) (striking down abortion funding restrictions on state liberty, privacy, and equal protection grounds).

marriage opportunities) are of enormous proportion."[187]

> If a man is the involuntary source of a child—if he is forbidden, for example, to practice contraception—the violation of his personality is profound. But if a woman is forced to bear a child—not simply to provide an ovum but to carry the child to term—the invasion is incalculably greater. . . . [I]t is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary.[188]

In *Casey*, the U.S. Supreme Court acknowledged that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[189] Thus, when a statute imposes burdens upon women's reproductive choices that are not imposed upon the reproductive choices of men, that statute violates principles of equal protection:

> [I]t might be possible to discern an invidious discrimination against women, or at least a constitutionally problematic subordination of women, in the law's very indifference to the biological reality that sometimes requires them, but never requires [men], to resort to abortion procedures if they are to avoid pregnancy and childbearing.[190]

Equal protection challenges to direct restrictions on abortion have rarely been attempted. Though challenges to abortion *funding*

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[187] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 641 n.90 (1980). *See* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 793 (Cal. 1981).

[188] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1340 (2d. ed. 1988).

[189] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992) (plurality opinion).

[190] LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 244 (1985) (cited in Doe v. Maher, 515 A.2d 134, 160 (Conn. 1986) (striking down abortion funding restrictions on state constitutional liberty, privacy, and equal protection grounds)).

limitations have been pursued—unsuccessfully under the Federal Constitution,[191] but with great success under state constitutions[192]—equal protection arguments have only recently been directed at *Casey*-type provisions.[193] This article will turn first to the abortion funding cases, examining how state equal protection guarantees can be more potent than their federal counterpart in restraining governmental interference with abortion.[194] I will show that the heightened equal protection scrutiny embodied in the funding cases applies just as readily to *Casey*-type restrictions.[195] Next, I will explore how to proceed with state court judges who are not inclined to read their

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[191] Harris v. McRae, 448 U.S. 297 (1980) (holding that the government can constitutionally refuse to fund medically-necessary abortions); Maher v. Roe, 432 U.S. 464 (1977) (holding that states can constitutionally refuse to furnish Medicaid financing for non-therapeutic abortions, even while making Medicaid funding available for childbirth expenses).

[192] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 784 (Cal. 1981) (invoking the California Constitution's express right to privacy); Doe v. Maher, 515 A.2d 134 (Conn. 1986) (invoking the equal protection and liberty provisions of the Connecticut Constitution); *In re* T.W., 551 So. 2d 1186 (Fla. 1989) (invoking the Florida Constitution's express privacy guarantee); Moe v. Secretary of Admin., 417 N.E.2d 387 (Mass. 1981) (recognizing an implied right to privacy in the substantive due process guarantees in the Massachusetts Constitution); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (recognizing an implied right to privacy in the New Jersey Constitution's liberty guarantee, and invoking the state equal protection clause); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991) (invoking both the liberty and equal protection provisions of the New York Constitution), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993), *dismissed*, 601 N.Y.S.2d 568 (N.Y. 1993); Planned Parenthood Ass'n, Inc. v. Department of Human Resources, 663 P. 2d 1247 (Or. 1983) (invoking the privileges and immunities clause of the Oregon Constitution); Women's Health Ctr., Inc. v. Panepinto, 1993 WL 522706 (W. Va. Dec., 17, 1993) (invoking equal protection and substantive due process guarantees under the West Virginia Constitution). A similar lawsuit was recently filed in Florida. Doe v. State, No. CL-93-2022-AJ (Fla. Cir. Ct.) (complaint filed March 1993) (invoking the state's express guarantees of privacy and equal protection in challenging a scheme that denies state Medicaid coverage for medically necessary abortions but funds childbirth expenses). *But see* Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (rejecting state equal protection and state equal rights theories).

[193] *Voinovich*, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. Ct. May 27, 1992) (striking down a mandatory 24-hour delay and biased counseling provisions under the state equal protection clause), *id.* at 15, 28 (relying as well upon the Federal Equal Protection Clause).

[194] *See infra* notes 197-207 and accompanying text.

[195] *See infra* notes 208-37 and accompanying text.

equal protection clauses so broadly. I will demonstrate that it may be possible to invalidate *Casey*-type provisions even under a state equal protection clause that is deemed coextensive with the federal guarantee.[196]

a. In Several Jurisdictions, Courts Have Found Enhanced Protection for Reproductive Freedom in State Constitutional Guarantees of Equal Protection

Relying upon equal protection guarantees in their state[197]constitutions, courts in New Jersey,[198] West Virginia,[199] Connecticut,[200] New York,[201] and California[202] struck down laws that burdened a woman's capacity to obtain an abortion.[203] These cases,

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[196] *See infra* notes 238-60 and accompanying text.

[197] The vast majority of state constitutions contain an equal protection guarantee: ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1; ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 3; CAL. CONST. art. I, § 7; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; GA. CONST. art. I, § 2; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 2; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KAN. CONST. BILL OF RIGHTS, § 2; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MD. CONST. DECLARATION OF RIGHTS, art. 46; MASS. CONST. part 1, art. I; MICH. CONST. art. I, § 2; MO. CONST. art. I, § 2; MONT. CONST. art. II, § 4; N.H. CONST. art I, art. II; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; OHIO CONST. art. I, § 2; OR. CONST. art. I, § 20; PA. CONST. art. I, § 28; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 18; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 12; W.VA. CONST. art. III, § 1; and WYO. CONST. art. I, § 3.

[198] Right to Choose v. Byrne, 450 A.2d 925, 934-37 (N.J. 1982).

[199] Women's Health Ctr., Inc. v. Panepinto, No. 21924 (W. Va. Dec. 17, 1993).

[200] Doe v. Maher, 515 A.2d 134, 157-62 (Conn. 1986) (relying on both the state equal protection clause and the state equal rights amendment).

[201] Hope v. Perales, 571 N.Y.S.2d 972, 981-82 (Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993), *dismissed*, 601 N.Y.S.2d 568 (N.Y. 1993).

[202] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 789 (Cal. 1981) (employing an "unconstitutional conditions" analysis developed under the state constitution, the California Supreme Court held that statutory provisions which "discriminatorily deny" generally available medical benefits to poor women solely because they choose to have an abortion are invalid).

[203] *But see* Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (rejecting state equal protection and state equal rights amendment theories in a challenge to abortion funding restrictions); Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah

which form part of a larger trend in state equal protection litigation,[204] all involved restrictions on public funding of abortion.

The New York court endorsed plaintiffs' argument that "the right to choose . . . abortion is a fundamental precondition of a woman's exercise of equality under the law and [by restricting abortion] the state controls and alters the lives of women in a way that it does not control and alter the lives of men."[205] The Connecticut court concluded: "Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is *sex-oriented discrimination.*"[206]

In striking down a similar program, the California Supreme Court observed:

> [W]e cannot characterize the statutory scheme as merely providing a public benefit which the individual . . . is free to accept or refuse without any impairment of her constitutional rights. [*T*]*he state is utilizing its resources to ensure that women* who are too poor to obtain medical care on their own *will exercise their right of procreative choice only in the*

1992) (rejecting state equal protection, freedom-of-religion, and establishment-of-religion claims in a challenge to abortion access restrictions).

[204] *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) (recognizing, in dictum, that the state equal protection clause may confer a right to same-sex marriages); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (striking down the state's sodomy law on the grounds that it violated the state constitution's right to privacy and equal protection and expressly rejecting the U.S. Supreme Court's restrictive privacy and equal protection analysis in Bowers v. Hardwick, 478 U.S. 186 (1986)).

[205] Hope v. Perales, 571 N.Y.S.2d 972, 981 (Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993), *dismissed*, 601 N.Y.S.2d 568 (N.Y. 1993). The court concluded that "[w]hile the Legislature can express a preference for childbirth over abortion and allocate resources accordingly, it cannot transgress constitutional principles to achieve this result." *Id.* at 979. Thus, the court struck down the abortion funding restrictions on state equal protection grounds. *Id.* at 981-82.

[206] Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (emphasis added). Echoing this analysis, an Oregon court concluded: "It may well be that if the medical assistance program is a comprehensive one providing all medically necessary services for men but not for women if those services involve an abortion, the program denies equal privileges to women because they are women." Planned Parenthood v. Department of Human Resources, 663 P.2d 1247, 1260 (Or. Ct. App. 1983).

manner approved by the state.[207]

b. The Heightened Equal Protection Scrutiny Employed in Some States to Invalidate Abortion Funding Restrictions Applies Just as Readily to Casey*-type Provisions.*

In each of the foregoing cases, state equal protection clauses were construed to prevent the government from placing unequal burdens on the reproductive freedom of men and women. Though each case involved public funding of abortion, the rationale is equally applicable to *Casey*-type restrictions. In both contexts, the government is placing burdens on the reproductive choices of women that are not imposed on the reproductive choices of men. These four cases exemplify the diversity of approaches employed by state courts in construing their equal protection guarantees.

In *Hope v. Perales*, the New York court employed an approach that bears the closest resemblance to federal equal protection analysis.[208] It held that "[i]f a statute burdens a 'fundamental interest' or employs a 'suspect' classification, it must withstand strict scrutiny."[209] Echoing the federal standard, the court observed that in order to survive strict scrutiny, the statute must be "necessary to promote a compelling state interest and narrowly tailored to achieve that purpose."[210] But the New York court parted company with federal law in declaring access to medically prescribed abortions a "fundamental right,"[211] and, consequently, it employed

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[207] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 793 (Cal. 1981) (emphasis added).

[208] *See Hope*, 571 N.Y.S.2d at 981.

[209] *Id.* at 981.

[210] *Id.*

[211] *Id.* *Casey* leaves considerable doubt whether abortion may be regarded as a "fundamental right" under the Federal Constitution. *See* 112 S. Ct. at 2821 (plurality opinion) (adopting a new "undue burden" standard by which strict scrutiny will be applied only to those regulations that impose "a substantial obstacle to the woman's exercise of the right to choose"). "Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout

strict scrutiny to invalidate the challenged limitation on abortion funding.[212]

The New Jersey Supreme Court has recognized the same strict scrutiny standard for equal protection violations that burden suspect classes and fundamental rights.[213] The court announced, however, that mid-level scrutiny under New Jersey's equal protection clause is more exacting than that under the federal charter: "[W]here *an important personal right* is affected by governmental action, the [New Jersey Supreme] Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the Federal Constitution."[214] Standing by itself, this heightened standard would represent an encouraging prospect for gender-discrimination claims. But the New Jersey court held that freedom of choice is a *fundamental* right,[215] and therefore employed strict scrutiny in striking down the funding limitation.[216]

Thus, the New York and New Jersey decisions demonstrate that equal protection challenges to abortion regulations may be successfully pursued under state constitutions if the court can be persuaded that freedom of choice is a fundamental right. The New Jersey decision suggests, moreover, that victory may be possible without the benefit of a strict scrutiny standard. Even if the court refuses to recognize abortion as a fundamental right, its mid-level scrutiny may be sufficiently exacting to invalidate abortion regulations. Finally, these decisions need not be confined to the

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pregnancy." *Id.* at 2818. Conspicuously absent from the plurality opinion was any reference to freedom of choice as a "fundamental" right. Justice Blackmun likewise avoided any talk of "fundamental" rights, emphasizing instead the need for reconciling "the liberty of the woman and the interest of the State in promoting prenatal life . . . ." *Id.* at 2850 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[212] *Hope*, 571 N.Y.S.2d at 981-82.

[213] Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982).

[214] *Id.* at 936 (emphasis added) (quoting Taxpayers Ass'n of Weymouth Township. v. Weymouth Township., 364 A.2d 1016, 1036 (N.J. 1976)).

[215] *Byrne*, 450 A.2d at 934 (holding that the right to choose to have an abortion is a fundamental right of all pregnant women).

[216] *Id.* at 936 ("The statute affects the right of poor pregnant women to choose between alternative necessary medical services. No *compelling state interest* justifies that discrimination, and the statute denies equal protection to those exercising their constitutional right to choose a medically necessary abortion.") (emphasis added).

abortion *funding* context; their sweeping recognition that legislative obstacles to abortion impose a discriminatory burden on women is broad enough to implicate *Casey*-type restrictions as well.

The California Supreme Court employed a very different analysis in striking down a scheme of funding restrictions. Employing an "unconstitutional conditions" doctrine developed under the state's equal protection clause, the court invalidated the restrictions because they "discriminatorily den[ied]" medical benefits to poor women who were merely trying to exercise their freedom to choose an abortion.[217] This "unconstitutional conditions" doctrine, which essentially holds that a citizen cannot be penalized by the government for exercising a constitutional right,[218] will not apply as readily to *Casey*-type restrictions. The doctrine has been developed exclusively in the context of receiving public benefits conditioned "on the waiver or forfeiture of [various] constitutional rights."[219] This does not mean, however, that an equal protection claim against *Casey*-type restrictions is destined for failure under the California Constitution. It merely means that the "unconstitutional conditions" doctrine will not likely apply in such a case. Similar claims advanced in New York and New Jersey *would* be available.

Finally, the Connecticut case holds out a special promise for those states whose constitutions contain an equal rights amendment ("ERA"). The court struck down abortion funding restrictions not only under its equal protection clause,[220] but also, separately, under its ERA.[221] Like the New York and New Jersey decisions discussed above, the Connecticut court employed a strict scrutiny standard under its equal protection clause after holding that the regulation infringed upon a "fundamental right."[222] The court further observed that the women challenging this scheme had an even stronger case

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[217] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 799 (Cal. 1981).

[218] *Id.* at 796.

[219] *Id.* at 797 (applying the doctrine to an area normally reserved for equal protection analysis).

[220] Doe v. Maher, 515 A.2d 134, 158-59 (Conn. Super. Ct. 1986).

[221] *Id.* at 159-60. The court also invalidated the funding restrictions under a separate liberty/privacy analysis. *See id.* at 146-57.

[222] *Id.* at 159.

under Connecticut's ERA.[223]

In pursuing its ERA analysis, the Connecticut court observed:

> By adopting the ERA, the "people of this state and their legislators have unambiguously indicated an intent to abolish sex discrimination." . . . Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them. . . . This discrimination has had a devastating effect upon women.[224]

The court asserted that the framers of Connecticut's ERA intended that "pregnancy discrimination would come within the [amendment's] purview . . . should be subject to heightened judicial review."[225] The court concluded: "In sum, by adopting the ERA, Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex, including their reproductive capabilities."[226] The court reasoned that "[s]ince only women become pregnant," any funding scheme that effectively forecloses their access to abortion "when it is medically necessary

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[223] *Id.* at 159. Connecticut's ERA was adopted as an amendment to its equal protection clause in 1974. *Id.* at 158. Prior to that amendment, the state equal protection clause read as follows:

> No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.

Id. at 158 n.50. Section 20 was amended on Nov. 27, 1974 and again on Nov. 28, 1984. Section 20 now reads as follows:

> No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.

Id. at 158 n.51.

[224] *Id.* at 159 (citations omitted) (quoting Evening Sentinel v. NOW, 357 A.2d 498, 503 (Conn. 1975)).

[225] *Id.* at 160.

[226] *Doe*, 515 A.2d at 160; *see id.* at 158 (discussing the 1974 adoption of Connecticut's ERA and displaying the language of the state's equal protection clause as it appeared prior to and after the amendment).

and when all other medical expenses are paid by the state for both men and women is sex-oriented discrimination,"[227] and therefore violates the state ERA.[228]

This decision shows that state ERAs can be enormously helpful in challenging abortion regulations.[229] In the same way that *express* privacy provisions are often deemed more potent than *implicit* guarantees,[230] an ERA can be employed as a more potent equal protection clause. Indeed, some states have interpreted their ERAs as requiring *absolute* scrutiny, a standard even more exacting than traditional strict scrutiny.[231] In applying absolute scrutiny, the court will not consider *any* justification for gender-discrimination once it is found. The Washington Supreme Court, for example, has held that:

> The ERA, on the other hand, is a very different animal from the equal protection clause—indeed, it has no counterpart in the federal constitution. The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional "strict scrutiny." . . . The ERA mandates equality in the strongest of terms and absolutely prohibits the sacrifice of equality for *any* state interest, no matter how compelling, though separate equality may be permissible in some very limited circumstances.[232]

In addition to Connecticut and Washington, thirteen other states have

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[227] *Id.* at 159.

[228] *Id.* at 160.

[229] *But see* Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (rejecting state equal protection and state equal rights theories in a challenge to abortion funding restrictions).

[230] *See, e.g.*, American Academy of Pediatrics v. Van De Kamp, 214 Cal. App.3d 831, 840 (Cal. Ct. App. 1989) (recognizing that the express privacy guarantee contained in the California Constitution is broader than the federal right to privacy and striking down a statute requiring parental consent for minors to receive an abortion because it violated the California Constitution's express privacy guarantee).

[231] National Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1102 (Wash. 1983).

[232] *Id.* at 1102 (emphasis in original).

adopted ERAs.[233] Some, like Connecticut, simply amended their equal protection clauses to include express references to sex or gender.[234] Others, like Washington, adopted provisions based on the ill-fated federal model.[235] Two states, Utah[236] and Wyoming,[237] have equal protection clauses containing express references to sex, but the language, lying dormant since the 19th century, has never been given force or effect. Largely untapped, state ERAs can be a powerful source of protection against governmental restrictions on women's reproductive autonomy.

c. Casey*-type Restrictions Are Vulnerable to Challenge Even Under a State Equal Protection Clause Deemed Coextensive with the Federal Guarantee*

Not every state court judge will be willing to perform an expansive interpretation of the state equal protection clause. It may nevertheless be possible to invalidate *Casey*-type restrictions under a state equal protection clause deemed coextensive with the federal guarantee. Confronted with a judge who is determined to impose a lock-step construction on the state and federal equal protection

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[233] ALASKA CONST. art. I, § 3 (amended 1972); COLORADO CONST. art. II, § 29 (amended 1972); CONN. CONST. art. I, § 20 (amended 1974); HAW. CONST. art. I, § 3 (amended 1972); ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3 (amended 1974); MA. CONST. DECLARATION OF RIGHTS, Art. 46 (amended 1972); MASS. CONST. part I, art. 1 (amended 1976); MONT. CONST. art. II, § 4 (amended 1972); N.H. CONST. part I, art. 2 (amended 1974); N.M. CONST. art. II, § 18 (amended 1973); PA. CONST. art. I, § 28 (amended 1971); TEX. CONST. art. I, § 3a (amended 1972); VA. CONST. art. I, § 11 (amended 1971); WASH. CONST. art. 31, § 1 (amended 1972).

[234] CONN. CONST. art. I, § 20 (amended 1974); LA. CONST. art. I, § 3 (amended 1974); MASS. CONST. part I, art. 1 (amended 1976); MONT. CONST. art. II, § 4 (amended 1972); N.H. CONST. part I, art. 2 (amended 1974); TEX. CONST. art. I, § 3a (amended 1972); VA. CONST. art. I, § 11.

[235] ALASKA CONST. art. I, § 3 (amended 1972); COLO. CONST. art. II, § 29 (amended 1972); HAW. CONST. art. I, § 21 (amended 1972); ILL. CONST. art. I, § 18 (amended 1970); MD. CONST. DECLARATION OF RIGHTS, art. 46 (amended 1972); N.M. CONST. art. II, § 18 (amended 1973); PA. CONST. art. I, § 28 (amended 1971); WASH. CONST. art. 31, § 1 (amended 1972).

[236] UTAH CONST. art. IV, § 1 (1896).

[237] WYO. CONST. art. I, §§ 2, 3; art. VI, § 1 (1890).

clauses, it will be necessary to proceed with the sort of analysis long employed under the federal charter. Federal equal protection analysis is triggered in two different contexts—class-based discrimination[238] and deprivations of fundamental rights.[239] This article will address both prongs in turn.

i. Gender-based Discrimination

Writing separately in *Casey*, Justice Blackmun observed that abortion restrictions raise issues outside the realm of liberty and privacy; they implicate equal protection concerns as well:

> A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood— appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion [in *Casey*] recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the

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[238] *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (gender-based classification struck down).

[239] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 540-43 (1942) (applying strict scrutiny under the Equal Protection Clause to strike down compulsory sterilization law).

Constitution."[240]

In response to an equal protection claim, the court must first determine whether the regulation is in fact a gender-based classification.[241] In fending off such a claim, the government will likely argue that *Casey*-type restrictions operate alike on all persons *similarly situated*—women seeking an abortion. Because abortion is a medical procedure applicable only to pregnant women, abortion regulations make no gender-based *classification*. According to this argument, such restrictions cannot violate the Equal Protection Clause.

This argument will prove formidable, but it contains flaws that may be exploited. The best response is that the government, in identifying the range of "similarly situated" people, draws an unduly narrow map. Men and women *both* engage in sexual activity. Men and women *both* make reproductive decisions. Men and women are *both* affected by the consequences of an unplanned pregnancy. Men and women *both* have an interest in retaining their reproductive autonomy. Restrictions on the availability of abortion cripple the reproductive autonomy of women, impairing their capacity to participate fully in society and furthering their perennial subjugation. As Laurence Tribe observes: "To ignore woman's unique role in human reproduction is to allow women to lay claim to equality only insofar as they are like men."[242]

A statute restricting access to abortion constitutes a gender-based classification *per se* because it classifies on the basis of a trait which, as a matter of biology, only women possess. The direct impact of a measure restricting abortion falls on a class of people that consists exclusively of women.[243] A gender-based impact occurs in

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[240] Planned Parenthood v. Casey, 112 S.Ct. 2791, 2846-47 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[241] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-725 (1982).

[242] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-29, at 1303 (2d ed. 1988).

[243] *Cf.* Michael M. v. Sonoma County Super. Ct., 450 U.S. 464, 473 (1981) (treating a statutory rape law as a gender-based classification despite no express reference to 'men' or 'males' where only men can "accomplish sexual intercourse . . . with a female"); *accord* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 652 (1974) (Powell, J., concurring) (suggesting that a school board regulation requiring pregnant school teachers to take unpaid maternity leave could be invalidated more soundly on

a pregnancy-related case when the government's policy burdens women rather than simply fails to benefit them. Thus, in *Nashville Gas Company v. Satty*,[244] the U.S. Supreme Court concluded that plaintiffs established a disparate impact, because the employment policy substantially burdened women's reproductive freedom.[245]

Once a gender-based classification is identified, it will be deemed unconstitutional unless its proponents "carry the burden of showing an 'exceedingly persuasive justification.'"[246] In assessing the justifications offered for gender-based measures, the Court undertakes a "searching analysis"[247] of whether the restriction is, in fact, "substantially related to the statutory objective."[248] This "searching analysis" is required because gender-based measures are often not the product of reasoned analysis; rather, measures that single out one gender for special disadvantages often reflect the mechanical application of archaic sexual stereotypes.[249]

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equal protection grounds); Craig v. Boren, 429 U.S. 190, 199 (1976) (analogizing *LaFleur* to the cases establishing that gender-based classifications receive heightened scrutiny).

[244] 434 U.S. 136 (1977).

[245] A gender-based impact is established when the government "has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer." *Satty*, 434 U.S. at 142. *Contra* Geduldig v. Aiello, 417 U.S. 484, 485 (1974) (holding that distinctions based on pregnancy which determined the grant of disability payments were not gender-based). Although *Satty* involved an alleged violation of Title VII of the Civil Rights Act, the Court used the same analysis to determine whether a gender-based impact had been established as it would have in a constitutional case. *See Satty*, 434 U.S. at 138-44. Additionally, *Satty* was decided before Congress amended Title VII expressly to make clear that regulations involving pregnancy were to be considered gender-based. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1991)). Therefore the *Satty* Court decided, without the benefit of statutory interpretation, that the regulation constituted gender-based discrimination by analogizing Title VII analysis to equal protection analysis. *See* 434 U.S. at 142. The Supreme Court subsequently has conceded that, for statutory purposes, "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

[246] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

[247] *Id.* at 728.

[248] Craig v. Boren, 429 U.S. 190, 204 (1976).

[249] *Mississippi Univ. for Women*, 458 U.S. at 724-26 nn. 10-11.

Especially in the context of gender-based restrictions, courts must be wary that government officials not ascribe worthy objectives to legislation that actually reflects archaic and stereotypical conceptions of women.[250] This danger is particularly acute in the case of abortion restrictions. Such measures, shrewdly characterized as advancing the cause of "informed consent," may actually reflect a desire to confine women to a single role—that of child-bearers.[251] Such a motivation renders the legislation unconstitutional.[252] *Casey*-type provisions, by placing substantial burdens in the paths of women seeking abortion, are clearly motivated by such stereotypical and paternalistic conceptions.

ii. Deprivation of a Fundamental Right

The heightened scrutiny applicable to gender-based classifications escalates to the highest level where, as here, legislation that discriminates on the basis of gender also intrudes on bodily

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[250] *Id.* at 725.

[251] This historical preoccupation with women as child-bearers is particularly evident in Ohio. Indeed, the legislative history of an 1867 statute criminalizing abortion strongly supports this assertion:

> The report characterized abortion as a source of grave physical and moral danger to women, because abortion was a violation of nature's laws and '[a]ny interference with nature's laws results in evils innumerable.' It deplored the ignorance which led 'our otherwise amiable sisters to the commission of this crime,' and held women who resisted motherhood in the utmost contempt, condemning those who yielded to '[t]he demands of society and fashionable life' and succumbed to 'the desire of freedom from care and home duties and responsibilities.' The report concluded with a strong warning to the married women of Ohio . . . charg[ing] that wives who 'avoid[ed] the duties and responsibilities of married life' were 'living in a state of legalized prostitution,' thereby endangering the manifest destiny of the race.

Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 316-17 (1992) (quoting 1867 Ohio Senate J. App. 233, 233-35).

[252] *See Mississippi Univ. for Women*, 458 U.S. at 726 n.11. (stressing the need to invalidate legislation whose gender-based classification "was based upon traditional assumptions that 'the female [is] destined solely for the home and the rearing of the family'") (quoting Stanton v. Stanton, 421 U.S. 7, 14-15 (1975)).

integrity, procreation, health, and family.[253] Though the U.S. Supreme Court may no longer regard abortion as a fundamental right,[254] it is nevertheless possible to obtain strict scrutiny by persuading a state court to hold, as a matter of *state* constitutional law, that freedom of choice is a fundamental guarantee. In the abortion funding cases discussed above,[255] the courts in New York,[256] New Jersey,[257] California,[258] and Connecticut[259] each held that the freedom to choose abortion is a fundamental right under the state constitution. Since those holdings rest on independent state grounds, they are insulated from the U.S. Supreme Court's apparent retreat. Principles of federalism also ensure that state courts confronted with this issue in the future will not be constrained to follow the High Court's lead.[260]

3. Free Speech

"Informed consent" provisions of the sort upheld in *Casey* violate free speech guarantees because, through the mandatory delivery of state-printed materials, the government is disseminating propaganda—namely, an anti-abortion message—to a captive audience, and is forcing taxpayers and abortion clinics to fund that

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[253] *See*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (applying strict scrutiny under the Equal Protection Clause to a compulsory sterilization law); Zablocki v. Redhail, 434 U.S. 374, 381 (1978) (applying strict scrutiny under the Equal Protection Clause to a marriage restriction that discriminated against persons with outstanding child-support obligations). *Accord Casey*, 112 S. Ct. at 2846 (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part) ("In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts.").

[254] *See supra* note 211; *Casey*, 112 S. Ct. at 2821.

[255] *See supra* notes 197-207 and accompanying text.

[256] Hope v. Perales, 571 N.Y.S.2d 972, 981 (N.Y. Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993), *dismissed*, 601 N.Y.S.2d 568 (N.Y. 1993).

[257] Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982).

[258] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 790 (Cal. 1981).

[259] Doe v. Maher, 515 A.2d 134, 159 (Conn. 1986).

[260] City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

message. By compelling medical providers to communicate the state's ideology, by requiring women seeking abortions to receive materials setting forth the state's view on abortion, or by requiring the physician to communicate with his or her patient in order to explain or ameliorate the effects of state-mandated information, such provisions offend basic principles of free speech.[261]

Though the U.S. Supreme Court did not expressly rely on the First Amendment when it struck down similar regulations in the 1980s,[262] it employed an analysis that implicated free speech values.[263] Those rulings—later repudiated in *Casey*[264]—may be replicated by means of *state* free speech guarantees.

a. Exploiting Textual Differences Between State Free Speech Guarantees and the Federal First Amendment

In pursuing such a theory, it will be advantageous to show that the state free speech clause is broader than the Federal First Amendment. To this end, it would be wise to exploit *textual* differences between the state and federal provisions. In many states, the free speech guarantee is phrased very differently than the First Amendment. The federal speech clause, like every other provision in the Bill of Rights, is phrased negatively—as a restraint on governmental power: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[265]

State free speech provisions may be grouped into three categories: those that emulate the exclusively *negative* language of

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[261] *See generally* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 869 (1979) (holding a public right to know does not justify a constitutional right for governments to engage in extensive communications activities).

[262] City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 445 (1983) (liberty/privacy theory); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 762-63 (1986) (liberty/privacy theory).

[263] *See infra* notes 295-309 and accompanying text.

[264] *Casey*, 112 S. Ct. 2791 (1992).

[265] U.S. CONST. amend. I.

the Federal First Amendment,[266] those that confer speech rights in sweeping *affirmative* language,[267] and those that *combine* affirmative and negative clauses.[268]

These affirmative expressions, whether or not coupled with a negative clause, provide a striking contrast to the federal charter. Pennsylvania's provision is a good example: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that right."[269] The broad scope of this clause, and the fact that it contains virtually no limiting language, suggest that it may be *more* protective of speech than the Federal First Amendment.

b. Textual Analysis Under the Ohio Constitution

Ohio's speech guarantee contains both affirmative and negative language: "Every citizen may freely speak, write, and

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[266] 12 states, along with the District of Columbia, feature negative language of the sort employed in the First Amendment: D. C. CONST. art. I, § 1; FLA. CONST. art. I, § 4; HAW. CONST. art. I, § 4; IND. CONST. art. I, § 9; KY. CONST. art. I, § 4; MD. DECLARATION OF RIGHTS, art. 10; MASS. CONST. part I, art. 16; N.C. CONST. art. I, § 14; OR. CONST. art. I, § 8; R.I. CONST. art. I, § 21; S.C. CONST. art. I, § 2; UTAH CONST. art. I, § 15; W. VA. CONST. art. III, § 7.

[267] There are 18 states with speech clauses phrased solely in affirmative language: ALASKA CONST. art. I, § 5; ARIZ. CONST. art. I, § 6; ARK. CONST. art. II, § 6; CONN. CONST. art. I, § 4; DEL. CONST. art. I, § 5; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; KAN. CONST. art. I, § 11; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; NEB. CONST. art. I, § 5; N.H. CONST. part I, art. 22; N.D. CONST. art. I, § 4; PA. CONST. art. I, § 7; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; WASH. CONST. art. I, § 5; WYO. CONST. art. I, § 20.

[268] 20 states feature speech provisions that combine affirmative and negative clauses: ALA. CONST. art. I, § 4; CAL. CONST. art. I, § 2; COLO. CONST. art. II, § 10; GA. CONST. art. I, § 1; IOWA CONST. art. I, § 7; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MICH. CONST. art. I, § 5; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEV. CONST. art. I, § 9; N.J. CONST. art. I, part 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; TEX. CONST. art. I, § 8; VT. CONST. ch. I, art. 13; VA. CONST. art. I, § 12; WIS. CONST. art. I, § 3.

[269] PA. CONST. art. I, § 7. Virtually identical language may be found in ARK. CONST. art. II, § 6 and TENN. CONST. art. I, § 19.

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."[270] Free speech provisions of this sort may represent the best opportunity for securing broader protection than that afforded by the Federal First Amendment. By combining negative, federal-style restraints with an affirmative grant of rights, such provisions may be seen as *going beyond* the First Amendment's scope.

A close textual analysis of Ohio's provision supports this argument. Ohio's free speech guarantee contains two distinct clauses separated by a semicolon; only the second clause—"no law shall be passed to restrain or abridge the liberty of speech, or of the press"—corresponds to the federal provision. Had the Ohio drafters intended to offer no greater protection for speech and press than that provided by the First Amendment, they would have employed only the *second* clause.

But Article I, § 11 contains other language as well. It says at its very beginning (and therefore, presumably, of most importance to its drafters): "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right."[271] The second clause cannot be deemed redundant of the first clause—such a construction would conflict with long-standing principles of interpretation governing the Ohio Constitution: "In the construction of a section of the [Ohio] constitution, the whole section should be construed together, *and effect given to every part and sentence*."[272]

Thus, the scope of Ohio's free speech provision cannot be confined to the language in its second clause—and since that second clause is identical to the federal free speech guarantee, Ohio's provision is necessarily broader than its federal counterpart. Indeed, state courts interpreting free speech provisions similar to Ohio's have concluded that their constitutions confer more sweeping protection

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[270] OHIO CONST. art. I, § 11.

[271] *Id.*

[272] Froelich v. Cleveland, 124 N.E. 212, 216 (Ohio 1919) (emphasis added).

than the First Amendment.[273]

c. *Decisions Construing State Free Speech Provisions More Broadly Than the Federal First Amendment*

Whether state speech clauses exceed the First Amendment's scope is a question addressed in a line of cases involving speech activities in privately-owned shopping malls. In a 1972 shopping mall case, the U.S. Supreme Court ruled that the First Amendment serves only to restrain *governmental* restrictions on speech.[274] This issue has since been litigated under state constitutions, with results that are instructive for our purposes.

The question addressed in these cases is whether the state constitution is broad enough to govern *private* actors who suppress speech. Such an issue necessarily requires the court to decide whether the state speech clause is broader than the First Amendment. A number of these decisions have construed speech guarantees that, like Ohio's,[275] feature both negative and affirmative language. The results, not surprisingly, are mixed. California,[276] New Jersey,[277] and, most recently, Colorado[278] have deemed their speech clauses sufficiently broad to confer a limited right of access to private

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[273] *See* Bock v. Westminster Mall Co., 819 P.2d 55, 56 (Colo. 1991) (holding that, unlike the U.S. Constitution, the Colorado Constitution protects an individual's right to distribute political pamphlets within the public spaces of a privately-owned mall); Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 342 (Cal. 1979) (holding that soliciting signatures at a shopping center is an activity protected by the California Constitution); State v. Schmid, 423 A.2d 615, 626 (N.J. 1980) (holding that the New Jersey Constitution afforded greater protection to rights of expression than the U.S. Constitution).

[274] Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972).

[275] The Ohio Supreme Court recently rejected the notion that the state constitution's free speech guarantee affords any right of access to the common areas of privately-owned malls for speech activites. Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59 (Ohio 1994).

[276] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979).

[277] State v. Schmid, 423 A.2d 615, 632-33 (N.J. 1980) (campus of private university), *aff'd*, 447 U.S. 74, 88 (1980).

[278] Bock v. Westminster Mall Co., 819 P.2d 55, 61 (Colo. 1991) (shopping mall).

property for speech activity.[279] Seven other states have demurred,[280]—though, in the process, one acknowledged that the state

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[279] *Cf.* Right to Life Advocates v. Aaron Women's Clinic, 737 S.W.2d 564, 567-68 (Tex. Ct. App. 1987), *cert. denied*, 488 U.S. 824 (1988) (although the court did not allow expressive activity in this case, the court adopted the New Jersey test established in *Schmid*, 423 A.2d at 632-22, and stated that an abortion clinic is different than a shopping mall and implied that it would allow free speech in a shopping mall).

[280] The Michigan Supreme Court has held that there is no constitutional right to free speech in a privately owned shopping mall. Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985). The *Woodland* court cited debates of the Michigan Constitutional Convention in which the delegates debated and rejected a provision that would have broadened the free speech clause. *Id.* at 345-46. Thus the delegates expressly intended that Michigan's free speech guarantee would extend only to state action. *Id.* New York's highest court has held that its constitution affords no protection for someone who wants to distribute leaflets in a private shopping mall. SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1218 (N.Y. 1985). Of special significance to the court was the fact that New York's constitution was adopted at a relatively early date (1822); this distinguished it from the New Jersey provision construed in *Schmid*, which was drafted in 1844. *Id.* at 1214-15. Historical records showed, moreover, that the New York provision was based on the Federal Bill of Rights. *Id.* at 1213. The Wisconsin Supreme Court held that the positive-negative language in the state free speech clause is not ambiguous, and that it serves to restrain only the government. Jacobs v. Major, 407 N.W.2d 832, 836-37 (Wis. 1987). The court traced the Wisconsin provision to those of New York and Connecticut, which have been interpreted by their courts as affording no speech rights in shopping malls. *Id.* at 842. The court found it significant, moreover, that Wisconsin does not have an initiative provision. *Id.* at 843-44. Finally, the court observed that the speech activity at issue occurred in Madison (site of the state capitol and the University of Wisconsin) thus, the court reasoned, there were plenty of traditional public forums available to the petitioner. *Id.* at 844. While conceding that a state constitution may afford more expansive protections than the U.S. Constitution, the Pennsylvania Supreme Court held that the history of its constitution required the conclusion that its bill of rights applies only to state action. Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1334-35 (Pa. 1986). The state supreme courts in Georgia and Iowa found no protection in their constitutions for speech in privately owned shopping malls. Neither court, however, performed an extensive analysis of its constitutional text or heritage. The Georgia court merely echoed the reasoning in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (construing the Federal Constitution). Citizens for Ethical Govt., Inc. v. Gwinnett Place Ass'n, 392 S.E.2d 8, 9-10 (Ga. 1990). The Iowa court offered a very limited analysis, holding simply that the state constitution does not allow free speech on private property. State v. Lacey, 465 N.W.2d 537, 539-40 (Iowa 1991). Such claims were most recently rejected in Ohio, where the state supreme court, ignoring the textual differences between the state free speech clause and the Federal First Amendment, treated the case essentially as a dispute over property rights, devoid of any larger free speech implications. Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 60-62 (Ohio

speech guarantee might be broader than the First Amendment.[281] Mixed results have likewise occurred in cases where the state speech clause is phrased solely in affirmative language.[282]

The California, New Jersey, and Colorado decisions provide an encouraging sign that state supreme courts may be willing to view state speech guarantees as substantially broader than the First Amendment. The analysis performed in these cases provides useful instruction to those who would invoke a state speech clause in challenging *Casey*-type "informed consent" provisions.

The New Jersey Supreme Court performed both a textual and a historical analysis. It began with a close comparison between its speech clause and the Federal First Amendment. "A basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly is found in part in the

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1994).

[281] Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.2d 1331, 1333-34 (Pa. 1986).

[282] Of the states with free speech clauses phrased only in affirmative language, four have ruled on this issue. The Supreme Judicial Court of Massachusetts held that there is a right to collect signatures in a shopping mall for election petitions. Batchelder v. Allied Stores Int'l, Inc., 448 N.E.2d 590 (Mass. 1983). Though the court relied on the Massachusetts free election provision, it stressed that the provision is written as a positive right. *Id.* at 593. Therefore, it is not directed solely at state action. *Id.* The court also noted that malls function "in many parts of th[e] State much as the 'downtown' area of a municipality did in earlier years." *Id.* at 595. This quasi-public aspect of malls prompted the court to recognize them as latter-day public forums. *Id.* The Washington Supreme Court has held that the fundamental nature of its constitution is to protect individuals from the abuse of state power. Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989). Thus, it held that there is no right to free speech in a private mall. *Id.* at 1292. The Connecticut Supreme Court likewise held that its constitution provides no right to free speech in a shopping mall. Cologne v. Westfarms Assoc., 469 A.2d 120 (Conn. 1984). The Court relied, however, on the fact that its constitution was adopted in 1818 (near the time of New York's), and that according to contemporaneous historical accounts, it was the popular sentiment then that bills of rights should protect against infringement of liberties by the *government*; and, finally, that there is nothing in Connecticut's history to suggest that this provision was intended to reach private suppression of speech. *Id.* at 1207-08 (emphasis added). An Arizona appeals court held that while the state constitution may provide more protection than its federal counterpart, it does not provide the right to free speech in a private mall. Fiesta Mall Venture v. Mecham Recall Committee, 767 P.2d 719, 723 (Ariz. Ct. App. 1988) (analyzing the history of its free speech provision, and finding nothing to indicate that it was intended to restrain private conduct).

language employed. Our Constitution *affirmatively* recognizes these freedoms. . . ."[283] The court construed this affirmative language as conferring a direct grant of speech rights to the people.[284] Accordingly, New Jersey's speech clause is "more sweeping in scope than the language of the First Amendment,"[285] because the affirmative clause performs a *different function* than the negative, federal-style clause with which it is combined: "[O]ur State Constitution not only affirmatively guarantees to individuals the rights of speech and assembly, but *also* expressly prohibits government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging 'the liberty of speech.'"[286] Thus, by combining an affirmative grant of speech rights with negative restraints on governmental power, New Jersey's speech clause is broader than the First Amendment—broad enough to reach *private* suppression of speech.[287]

The New Jersey court followed its textual analysis with a brief examination of local history and tradition: "Since it is our State Constitution which we are here expounding, it is also fitting that we look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property."[288] Based on its textual and historical analysis, the court recognized a limited right of access to private property for speech activities, and announced a three-part balancing test for determining when such access must be

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[283] State v. Schmid, 423 A.2d 615, 626 (N.J. 1980) (emphasis added).

[284] *Id.* at 627 ("Hence, the explicit affirmation of these fundamental rights in our Constitution can be seen as a *guarantee* of those rights and not as a restriction upon them.") (emphasis added).

[285] *Id.* at 626.

[286] *Id.* at 628 (emphasis added).

[287] *Schmid*, 423 A.2d at 628.

> [T]he rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well. . . . The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under [our speech and assembly provisions]. . . .

Id.

[288] *Id.* at 629-30.

granted.[289]

The Supreme Courts of California[290] and Colorado[291] likewise performed a textual analysis, each holding that affirmative language in the state constitution's speech guarantee creates a broader sweep than the First Amendment.[292] The Colorado Supreme Court also looked to history, noting that its free speech guarantee had long been construed more broadly than the First Amendment,[293] and that the Colorado courts had developed a "tolerance standard" in deciding speech cases that imposed "more stringent scrutiny" than federal jurisprudence.[294]

These cases demonstrate the vitality of free speech protection

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[289] The court set forth its new standard as follows:

> Accordingly, we now hold that under the State Constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

Id. at 630.

[290] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346, (Cal. 1979) (holding that California's speech clause is "'more definitive and inclusive than the First Amendment'. . . .") (quoting Wilson v. Superior Court, 532 P.2d 116, 120 (Cal. 1975)).

[291] Bock v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991) (identifying the "affirmative declaration" contained in the second clause of Colorado's speech guarantee as "necessarily enhanc[ing] the already preferred position of speech under the [Federal] First Amendment . . ."); The court held that "the second clause of [Colorado's speech provision] is an *affirmative* acknowledgement of the liberty of speech, and therefore of *greater scope* than that guaranteed by the First Amendment. . . ." *Id.* at 59 (emphasis added).

[292] *See Pruneyard*, 592 P.2d at 347 n.5 (granting a limited right of access to shopping malls, expanding the public forum doctrine under their state constitution and recognizing that the common areas of modern malls are latter-day public forums); *see also Bock*, 819 P.2d at 62.

[293] *Bock*, 819 P.2d at 59-60.

[294] *Id.* at 60.

under state constitutions. The expansive interpretation of state speech guarantees that developed in this line of cases may be readily applied in other contexts, including the government-compelled speech imposed under *Casey*-type "informed consent" provisions.

d. State Constitutional Guarantees of Free Speech Can Replicate Now Repudiated U.S. Supreme Court Decisions That Struck Down Government Efforts to Use "Informed Consent" Regulations to Compel Anti-abortion Speech

Governmental efforts to compel anti-abortion speech under the guise of "informed consent" regulations may be challenged under state free speech provisions. In pursuing such a challenge, the rudiments of a theory may be gleaned from two cases, *City of Akron v. Akron Center for Reproductive Health*[295] and *Thornburgh v. American College of Obstetricians and Gynecologists*,[296] in which the U.S. Supreme Court struck down "informed consent" provisions that required doctors to convey various anti-abortion messages to their patients.[297] Though the Court did not expressly rely on the First Amendment in arriving at these rulings,[298] it employed an analysis that implicated free speech values.[299] These decisions—later repudiated in *Casey*[300]—may be replicated by means of *state* free speech guarantees.

In both *Akron* and *Thornburgh*, the Court raised special concerns about the government forcing doctors to communicate an

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[295] 462 U.S. 416 (1983).

[296] 476 U.S. 747 (1986).

[297] *Akron*, 462 U.S. at 445; *Thornburgh*, 476 U.S. at 764.

[298] In both cases, the Court was presented with the usual liberty/privacy theory. *Akron*, 462 U.S. at 443-45; *Thornburgh*, 476 U.S. at 758-59.

[299] *Akron*, 462 U.S. at 445; *Thornburgh*, 476 U.S. at 762-63. Prior to *Akron* and *Thornburgh*, lower federal courts had employed a similar free speech analysis in striking down "right to know" provisions governing abortion. *See* Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1021-22 (1st Cir. 1981); Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980); Women's Medical Ctr. v. Roberts, 530 F. Supp. 1136, 1153-54 (D.R.I. 1982).

[300] 112 S. Ct. at 2823 (overruling *Akron* and *Thornburgh*). The Court expressly rejected a First Amendment theory advanced by petitioners. *Id.* at 2824.

anti-abortion message. The *Akron* Court observed that "much of the information is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[301] By "intru[ding] upon the discretion of the pregnant woman's physician,"[302] the government was "placing the physician in . . . an 'undesired and uncomfortable straitjacket.'"[303]

This concern with government-compelled speech was voiced even more emphatically in *Thornburgh*. Referring to a requirement that doctors give their patients state-printed brochures containing pictures of fetal development, the Court wrote: "The printed materials . . . seem to us to be nothing less than 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."[304] The Court recognized that the government was effectively forcing doctors to communicate—and, inevitably, to *validate*—its anti-abortion message: "Forcing the physician . . . to present the materials . . . to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon . . . the materials. . . ."[305]

This analysis provides the kernel of a free speech theory that, though unavailable under the First Amendment,[306] might well be advanced under state constitutions. The essence of this theory is government-compelled speech: forcing individuals to convey the government's anti-abortion ideology, whether or not they agree with it.[307] As we have seen,[308] affirmative language in state free speech guarantees may be construed as a positive grant of speech rights.

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[301] 462 U.S. at 444.

[302] *Id.* at 445.

[303] *Id.* (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976)).

[304] 476 U.S. at 762.

[305] *Id.* at 763.

[306] *Casey* expressly rejected a First Amendment claim directed at "informed consent" requirements virtually identical to those struck down in *Thornburgh*. 112 S. Ct. at 2824.

[307] *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the State of New Hampshire could not require plaintiffs, who were followers of the Jehovah's Witnesses faith, to display the state motto—"Live Free or Die"—on their license plates). The government cannot, consistent with the First Amendment, "require an individual to participate in the dissemination of an ideological message." *Id.* at 713.

[308] *See supra* notes 274-87 and accompanying text.

State provisions that feature such affirmative phrasing do not merely restrain governmental suppression of speech; they also "impose upon the . . . government an affirmative obligation to *protect* fundamental individual rights."[309] Thus, the freedom of speech conveyed by such a provision guarantees not only protection *from* the government, but protection *by* the government. This freedom of speech necessarily entails the freedom *not* to be made the unwilling mouthpiece of the state.

E. Employing State Constitutional Provisions with No Federal Counterpart—the "Freedom of Conscience" Guarantee

Many state constitutions contain "freedom of conscience" guarantees.[310] Such provisions may represent an invaluable tool in challenging *Casey*-type regulations. By compelling medical providers to convey to their patients a state-mandated message disapproving of abortion; by establishing a state orthodoxy regarding abortion, and, through the imposition of procedural obstacles, punishing women who seek abortion; or, by invading the doctor-patient dialogue with a governmental message disapproving of abortion, *Casey*-type restrictions arguably violate the right to freedom of conscience.[311]

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[309] State v. Schmid, 423 A.2d 615, 627 (N.J. 1980) (emphasis added).

[310] ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, § 24; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; DEL. CONST. art. I, § 1; GA. CONST. art. I, § 3; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, §§ 2, 3; KAN. CONST. BILL OF RIGHTS, § 7; KY. CONST. BILL OF RIGHTS, §§ 1, 5; ME. CONST. art. I, § 3; MASS. CONST. part I, art. II; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MO. CONST. art. I, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. part I, art. 4, 5; N.J. CONST. art. I, § 3; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OR. CONST. art. I, §§ 2, 3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, §§ 1, 4; VT. CONST. ch. I, art. 3; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; WIS. CONST. art. I, § 18; and WYO. CONST. art. I, § 18.

[311] *See Casey*, 112 S.Ct. at 2822-25 (upholding "informed consent" provision and 24-hour waiting period to review anti-abortion literature).

1. Textual Analysis

Ohio's "freedom of conscience" guarantee has no identical counterpart in the U.S. Constitution, and is directly applicable to the issue of reproductive freedom. The provision is set forth in the midst of other guarantees protecting religious and moral independence. Article I, § 7 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. . . .*[312]

The Federal Constitution has no identical counterpart; its only analogous provisions are the Establishment and Free Exercise Clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[313] These federal provisions are expressly tied to "religion." The Ohio Constitution, however, extends *beyond* the traditional sphere of religion to embrace the more sweeping concept of "conscience." Freedom of conscience necessarily includes moral and philosophical views that lay far beyond the confines of established religion.[314]

A textual comparison reveals, therefore, that Ohio's freedom of conscience provision exceeds the scope of the federal religion clauses. This reading is consistent with Ohio's long-standing tradition of constitutional interpretation, which requires that effect be given to every part and sentence of a constitutional provision.[315]

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[312] OHIO CONST. art. I, § 7 (1851) (emphasis added).

[313] U.S. CONST. amend. I (1791).

[314] "Conscience is that moral sense in man which dictates to him right and wrong." Harden v. State, 216 S.W.2d 708 (Tenn. 1948). In *Casey*, Justice Stevens specifically described a woman's decision whether or not to have an abortion as a matter of "conscience." 112 S. Ct. at 2842 (Stevens, J., concurring in part and dissenting in part).

[315] Froelich v. Cleveland, 99 Ohio St. 376 (1919) (emphasis added).

Indeed, the Minnesota Supreme Court, construing a right of conscience provision virtually identical to Ohio's,[316] has ruled that the Minnesota provision "is broader and more emphatic than the religion clauses of the [Federal Constitution]."[317] More recently, a Minnesota appeals court held that this conscience clause is broad enough to protect individual views on *abortion*.[318]

2. *Whether Construed Broadly or Narrowly, Ohio's Freedom of Conscience Provision Reaches—and Invalidates—Provisions of the Sort Upheld in* Casey

a. Broad Construction

Construed broadly, Ohio's freedom of conscience provision easily reaches, and invalidates, *Casey*. If it means anything, the right of conscience must prevent the government from interfering in decisions that involve deeply held moral and philosophical views. Its application is all the more critical when the decision will have a profound impact on the direction of a person's life. For women, the prospect of an abortion poses precisely such a decision. By invading the doctor-patient dialogue with a governmental message disapproving of abortion, such regulations violate the right to freedom of conscience guaranteed by the Ohio Constitution.

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[316] *See* Minn. Const. art. I, § 16 ("The right of every man to worship God according to the dictates of his own conscience shall never be infringed; . . . nor shall any control of or interference with the rights of conscience be permitted.").

[317] State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (holding that a state statute requiring Amish citizens to display a slow-moving-vehicle emblem on their horse-drawn carriages violated the state's freedom-of-conscience guarantee). *Accord* State *ex rel.* Cooper v. French, 460 N.W.2d 2, 9 (Minn. 1990) (right of conscience precludes imposing civil penalties upon landlord who refused, on moral grounds, to rent apartment to unmarried couple).

[318] Rasmussen v. Glass, 498 N.W.2d 508, 516 (Minn. App. 1993) (holding that the owner of a delicatessen could not be prosecuted under a public accommodations ordinance for refusing, on grounds of moral conscience, to deliver food to an abortion clinic). Since this refusal to set foot inside the clinic was based upon his profound opposition to the services performed there, the owner's actions, were a direct expression of his right of conscience, and therefore could not be punished consistent with the state constitution. *Id.*

b. Narrow Construction

Even if construed narrowly—confined, for example, to governmental interference with religious beliefs[319]—Ohio's conscience provision invalidates a statute like that addressed in *Casey*. The issue of abortion is necessarily intertwined with religious and moral perspectives.[320] Indeed, it is undeniable that "the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate."[321] Those who oppose freedom of choice consistently base their position on the *religious* principle that life begins at conception.[322] But other religions, notably Judaism, teach that life does not begin until live birth, and give precedence "to the well-being of the woman and her existing family."[323] Thus, a woman's freedom of conscience is ultimately the freedom to act in accordance with her own religious and moral beliefs. And a state-mandated message disapproving of abortion, coupled with governmental efforts to burden or penalize women who seek abortion, is nothing less than an effort by the government to force women to adhere to a particular *religious* viewpoint—in direct violation of Ohio's freedom of

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[319] Confining Ohio's conscience provision solely to "religious" beliefs will not necessarily narrow its application in any significant way. *See* Robert L. Rabin, *When is a Religious Belief Religious:* United States v. Seeger *and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 232-33 (1966). Religious freedom cases often interpret the concept of religion broadly to include humanistic inquiries—"an exploration of the nature of man, his diverse activities and interests, his quest for unity with something more than merely himself." *Id.* at 245.

[320] *See, e.g.*, Webster v. Reproductive Health Services, 492 U.S. 490, 565-72 (1989) (Stevens, J., concurring in part and dissenting in part).

[321] *Id.* at 571.

[322] *Id.* at 566 n.9.

[323] Janice C. Biskin, *The Hyde Amendment: An Infringement Upon the Free Exercise Clause?*, 33 RUTGERS L. REV. 1054, 1064 n.69 (1981). *See*, McRae v. Califano, 491 F.Supp. 630, 692-702 (E.D.N.Y. 1980) (containing a comprehensive overview of the testimony of various theologians regarding religious doctrine pertaining to the abortion decision). The conservative and reformed teachings of Jewish Law emphasize the "primacy of the duty to protect existing life and health, coupled with a belief that life does not begin until live birth. . . . [A]bortion is mandated if there is a danger to the mother's health. Biskin, *supra*, at 1064 n.69. In *McRae*, one rabbi testified: "The decision to have an abortion is as much a part of the exercise of the Jewish Religion as the observance of ritual." *Id.*

conscience guarantee.[324]

V. Conclusion

State constitutions represent the last, best hope for restoring the level of reproductive autonomy that formerly existed under the Federal Constitution.[325] Judicial reaction to state constitutional theories will vary from state to state. In some jurisdictions, the status quo will weigh heavily against any florescence of state constitutional jurisprudence. But necessity is the mother of invention and, in the wake of *Casey*, state constitutions represent the most promising tool at hand.

More important, even the most skeptical jurist must admit that principles of federalism preclude any notion that state constitutions lack independent force. Each charter has its own unique text and its own unique history; this much cannot be ignored. Nor can the burgeoning development of state constitutions in many jurisdictions be ignored.[326] Finally, some judges may be pleasantly surprised to learn that constitutional interpretation is not the sole province of the U.S. Supreme Court—that, for them, it need not be a spectator sport. More precisely, state court judges need to be reminded that they have the power and the duty to perform an *independent* interpretation of their state charters.

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[324] *But see* Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992) (rejecting state equal protection, freedom-of-religion, and establishment-of-religion claims in a challenge to abortion access restrictions).

[325] Though many put their faith in the Federal Freedom of Choice Act, S.25, d Cong., 1st Sess. (1993), which is currently wending its way through Congress, serious questions persist as to whether the federal legislature has the power under Article I, Section 8 of the Constitution, to enact such a law. The only conceivable source of this power is the Federal Commerce Clause and, despite its nearly boundless elasticity, reliance on this clause may not withstand judicial scrutiny. *See generally* Ira C. Lupu, *Statutes Revolving In Constitutional Law Orbits*, VA. L. REV. 1, 37 (1993) (discussing the validity of substantive statutory schemes, such as the Freedom of Choice Act, that attempt to legislate constitutional norms). *See, e.g.*, New York v. United States, 112 S.Ct. 2408 (1992) (striking down portions of a federal statute that effectively coerced, rather than encouraged, state legislatures to adopt a particular regulatory scheme concerning low-level radioactive waste).

[326] *See supra* notes 42-72 and accompanying text.

These factors—federalism, the unique text and history of state constitutions, the burgeoning renaissance in many states, and the historic role of state courts in construing their own constitutions—may inspire a willingness, even among the most doubtful jurists, to take a second look at their own state charters.

Just as the erosion of Fourth Amendment rights prompted this renaissance in the first place,[327] so may the erosion of reproductive rights trigger an upsurge in state constitutional claims. It is my hope that this article will provide a road map for those who would invoke their state charters in the fight for reproductive freedom.

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[327] *See supra* notes 25-29 and accompanying text.