

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Articles

Colorado Law Faculty Scholarship

---

2008

### The Intriguing Federalist Future of Reproductive Rights

Scott A. Moss

*University of Colorado Law School*

Douglas M. Raines

*Law Clerk, Wisconsin Supreme Court*

Follow this and additional works at: <https://scholar.law.colorado.edu/articles>



Part of the [Constitutional Law Commons](#), [Family Law Commons](#), [Law and Gender Commons](#), [Litigation Commons](#), and the [State and Local Government Law Commons](#)

---

#### Citation Information

Scott A. Moss and Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175 (2008), available at <https://scholar.law.colorado.edu/articles/305>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [lauren.seney@colorado.edu](mailto:lauren.seney@colorado.edu).

# HEINONLINE

Citation: 88 B.U. L. Rev. 175 2008

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Tue Mar 21 13:32:39 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

---

## THE INTRIGUING FEDERALIST FUTURE OF REPRODUCTIVE RIGHTS

SCOTT A. MOSS<sup>\*</sup> & DOUGLAS M. RAINES<sup>\*\*</sup>

INTRODUCTION .....	177
I. THE DECLINE OF THE FEDERAL CONSTITUTIONAL RIGHT TO ABORTION: <i>ROE</i> 'S PARTIAL REVERSAL AND LACK OF DEFENDERS ....	181
A. <i>Roe Under Fire at the Court: The Partial Reversal in Casey</i> .....	181
B. <i>Friendly Fire: Supporters of Abortion Rights Criticizing Roe</i> ....	183
II. DEFENDING <i>ROE</i> BY AMENDING <i>ROE</i> : ALTERNATIVE ARGUMENTS FOR FEDERAL CONSTITUTIONAL ABORTION RIGHTS – AND THEIR LIMITS .....	185
A. <i>Gender- and Autonomy-Based Alternatives to the Reasoning     of Roe</i> .....	185
1. Equal Protection: A Gender Equality Rationale for Abortion Rights .....	186
2. Autonomy and Self-Determination Rights: Like <i>Roe</i> but Better .....	188
B. <i>The Limited Power of Alternative Rationales for Abortion     Rights</i> .....	190
1. The Tactical Risk of Trying To Save a Precedent by Rewriting It: Watering Down the Rights It Protects .....	191
2. Obstacles to the Supreme Court's Acceptance of New Abortion Rights Rationales: The Need To Abrogate Broader Precedents.....	192
3. The Futility of Defending <i>Roe</i> with New Rationales .....	193
III. THE COMING STATE CONSTITUTIONAL LAW ABORTION CONTROVERSIES: ALTERNATIVE THEORIES OF ABORTION RIGHTS BECOME RELEVANT .....	195
A. <i>The Important yet Limited Body of State Constitutional Law     on Individual Rights</i> .....	195
B. <i>Abortion Rights Based on State Constitutions with Broader     Rights Guarantees than in the Federal Constitution</i> .....	197
1. State Constitutional Protections .....	197
a. <i>Broad "Privacy" and "Private Life" Provisions</i> .....	197

---

<sup>\*</sup> Associate Professor of Law, University of Colorado Law School (scott.moss@colorado.edu); J.D., Harvard Law School; B.A. & M.A., Stanford University. The author thanks Dawn Johnsen, Martin Katz, Alexander Tsesis, and Jennifer Hendricks for reviewing this Article.

<sup>\*\*</sup> Law Clerk to the Honorable Patience D. Roggensack, Wisconsin Supreme Court; B.A. & M.A., Marquette University Law School.

b.	<i>Rights to "Safety and Happiness" and Protection from Arbitrary Intrusion – and Using "Original Intent" Arguments to Support Abortion Rights</i> .....	200
c.	<i>"Privacy" and "Private Affairs" Protections in Constitutional Provisions Against Unreasonable Search and Seizure</i> .....	203
d.	<i>Ninth Amendment Analogues in State Constitutions</i> .....	205
2.	<i>Broader Gender Equality Rights Under State Constitutions</i> .....	205
3.	<i>Equal Protection Rights Under State Provisions Different from, but not Broader than, the Federal Constitution</i> .....	207
C.	<i>Originalism and Textualism Are Not the Barrier to State Constitutional Abortion Rights that They Are to Federal Abortion Rights</i> .....	209
1.	<i>Protecting Abortion Rights Under State Provisions Identical to the Federal Text: Relying on States' Original Intent and Rejecting Narrower Federal Decisions</i> .....	210
2.	<i>The Less Undemocratic Nature of State Constitutional Rulings</i> .....	215
3.	<i>The Legitimacy of Implied Rights: A Spectrum</i> .....	218
	<i>CONCLUSION: THE INTRIGUING FEDERALISM IMPLICATIONS OF A POST-ROE STATE CONSTITUTIONALIZATION OF ABORTION RIGHTS</i> .....	222
A.	<i>The Promise of State Constitutional Arguments for Abortion Rights</i> .....	222
B.	<i>Intriguing Stare Decisis and Federalism Implications of Shifting Abortion Rights to the States</i> .....	223

*As the decline of Roe v. Wade inspires renewed efforts to restrict federal constitutional abortion rights, the serious shortcomings of abortion rights advocates' strategies for preserving such rights will become increasingly apparent. Continued reliance on Roe is likely to fail with an increasingly unsympathetic Supreme Court. Even abortion rights supporters have begun to criticize the decision for weak reasoning, which is difficult to remedy at this late stage of federal abortion jurisprudence. Moreover, although autonomy and gender equality arguments for abortion rights would improve upon Roe's privacy rationale, such arguments would require abrogating substantial precedent and are, therefore, of limited tactical use in federal litigation.*

*This Article critically evaluates an emerging abortion rights strategy of relying on state constitutional law. Because Roe arrived early in the abortion debate, there is little state constitutional jurisprudence on abortion, little writing on state constitutional law on abortion, and no scholarship on the state court prospects of the autonomy and gender equality alternatives to Roe's privacy rationale. Unlike most articles on abortion (which neglect state law) and most articles on state law (which neglect abortion), this Article will delve into various states' constitutions in order to analyze the intersection of the two.*

*Compared to the Federal Constitution, many state constitutions are textually broader, or evidence a broader intent, to protect autonomy or gender equality and even where state and federal provisions are identical, states might still interpret theirs more broadly. Indeed, such arguments have experienced some success where a federal right declines and a broader state ruling would preserve the right – exactly the situation facing abortion rights advocates in light of Roe’s decline. Moreover, with state constitutional law typically more sparse than federal law, arguments based on autonomy or gender equality are less likely to require abrogating precedent.*

*Of course, state constitutional arguments for abortion rights face significant objections: they might provide limited protections, they will fail in states with narrow constitutions or strict constructionist courts, and in most states abortion rights would be merely implied (as opposed to expressly textual), giving rise to judicial restraint arguments that enforcing implied rights is undemocratic. Yet, even an imperfect state litigation strategy may be the best option for abortion rights advocates who need to accept that the strong Roe regime is a thing of the past. Further, judicial restraint arguments are less persuasive as to state than federal rulings because in most states, voters retain some control over their judges and constitutional text; a state-federal difference often ignored by even well-informed commentators.*

*This shift to the states would be a strong dose of federalism, but in atypical ways. First, preserving reliance on precedent is a key reason for stare decisis, yet new state jurisprudence would be preserving rights previously protected by federal law. Second, abortion rights supporters pressing new state law would illustrate the ideological indeterminacy of federalism – popularly but inaccurately viewed as a conservative idea. Third, a federal-to-state shift would be a sort of reverse federalism, with states serving not as laboratories of democracy experimenting with policy first, but rather as repair shops of democracy, replacing a declining federal regime only after reviewing the federal experience with constitutional abortion law.*

*In sum, this Article aims to predict, and to be a part of, the emerging possibility of state constitutional law on abortion, which seems increasingly likely and is highly intriguing as a matter of both litigation tactics and constitutional theory.*

#### INTRODUCTION

Where do abortion rights advocates go from here? This question is interesting not only as a matter of abortion law, but also as a practical matter of lawyering tactics and as a theoretical matter of federalism. So far, the main strategy has been to defend federal constitutional abortion rights at the margins by focusing on the permissibility of various abortion restrictions. Thus, we see litigation and debate over parental involvement requirements,<sup>1</sup> bans on certain

---

<sup>1</sup> *E.g.*, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 324-25 (2006).

dilation and extraction abortions (known to critics as “partial birth” abortions),<sup>2</sup> and restrictions of new technologies like morning-after pills<sup>3</sup> and embryonic stem cell research.<sup>4</sup> Such litigation will surely continue as the decline of *Roe v. Wade*<sup>5</sup> emboldens states to enact new abortion bans<sup>6</sup> and possibly even to renew enforcement of old bans which *Roe* has left dormant for decades.<sup>7</sup>

For abortion rights advocates, however, there are two reasons to not rely solely upon what remains of *Roe* in litigating against increasingly tighter abortion restrictions. First, such tactics will likely fail before the Roberts Court, which is less sympathetic to abortion rights arguments than any Court since *Roe*.<sup>8</sup> Second, even abortion rights supporters have criticized *Roe*’s thinly-reasoned “privacy” basis and doctor-focused (rather than woman-focused) justification. A potential solution would be to recast abortion rights in terms of autonomy or gender equality, as opposed to privacy, but that would entail abrogating substantial precedent beyond the abortion realm. Moreover, the Court is unlikely to reconceptualize abortion rights at such a late stage in federal abortion jurisprudence, especially since the Court has already seen the Justices repeatedly reexamine the extent and textual basis of such rights.<sup>9</sup>

---

<sup>2</sup> *E.g.*, *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1632 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000).

<sup>3</sup> *See, e.g.*, *Easier Access to Morning-After Pills*, N.Y. TIMES, Aug. 25, 2006, at A20.

<sup>4</sup> *See* Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION* 3, 17-18 (Jack M. Balkin ed., 2005) [hereinafter *WHAT ROE V. WADE SHOULD HAVE SAID*].

<sup>5</sup> 410 U.S. 113, 164 (1973).

<sup>6</sup> Bills are pending in numerous states – and have already been enacted in a few – to adopt contingent abortion bans which take effect upon a sufficient overruling or limiting of *Roe*. *See, e.g.*, H.B. 1466, 60th Leg. Assemb., Reg. Sess. (N.D. 2007).

<sup>7</sup> Although made unenforceable by *Roe*, many state abortion bans still remain on the books, having never been repealed or enjoined. *See, e.g.*, ALA. CODE § 13A-13-7 (2006); COLO. REV. STAT. § 18-6-102 (2004); DEL. CODE ANN. tit. 11, § 651 (2001); MASS. GEN. LAWS ch. 272, § 19 (2006).

<sup>8</sup> Most notably, Justice O’Connor, the fifth vote for certain abortion rights protections, was replaced by Justice Alito who proved to be the pivotal vote in the Court’s switch from disallowing a state ban on partial birth abortions, *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000), to upholding a federal ban, *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1632 (2007).

<sup>9</sup> As to the shifting and varied bases Justices have cited as supporting reproductive rights, *see, for example*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (relying on gender rights under the Equal Protection Clause); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (finding a right of privacy in the concept of liberty guaranteed by the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding a right of privacy in the “penumbras” of various Bill of Rights guarantees).

In light of these shortcomings, this Article provides a critical evaluation of an increasingly important approach for abortion rights advocates: litigate *state* constitutional law claims based not on atextual theories of privacy or substantive due process (as in the federal context), but instead on rights such as gender equality and personal autonomy, which are grounded more firmly in the text of various state constitutions than in the Federal Constitution. To the extent the *Roe* Court missed the boat by not providing a sounder basis for abortion rights, state courts now have an opportunity to set sail on a new, surer course by examining their own states' constitutional protections for abortion rights.

Because *Roe* arrived upon the legal scene at such an early stage in the abortion debate, there have been surprisingly few state constitutional law rulings on abortion. The few cases on record, however, are intriguing and may indicate the possibility of a broader trend coming in state constitutional law. Moreover, scholarship on state constitutional law is virtually devoid of abortion analysis<sup>10</sup> and no scholarship at all considers the ways in which state courts might adopt modern rationales, such as autonomy and gender equality, as support for abortion rights. However, with federal constitutional abortion rights now in decline, increased debate is imminent about whether state constitutions protect abortion rights more broadly than the Federal Constitution.

Part I of this Article traces the decline of *Roe*, both jurisprudentially and academically. Part II examines possible alternatives to privacy – such as autonomy and gender equality – as a basis for federal constitutional abortion rights. Part II concludes, however, that despite the greater persuasive power of such alternative rationales, they are of limited tactical use for several reasons: (1) they may actually provide less protection for abortion rights than *Roe*; (2) they would require abrogating substantial bodies of Supreme Court precedent; and (3) they have only limited ability to persuade many of those unpersuaded by *Roe* itself. Part III then delves into an analysis of state constitutional provisions and shows how they may support broader rights than the Federal Constitution. Part III also discusses how even where state constitutional text closely parallels that of the Federal Constitution, states nonetheless may – and perhaps should – deem their own constitution to protect broader rights than the Federal Constitution.

Additionally, Part III examines the viability of basing state constitutional abortion rights on gender equality and autonomy rationales. Such arguments are, of course, not without limitations and objections. First, they will fail in states with stingy constitutional rights provisions or with courts that narrowly construe the state constitution's individual rights provisions. Second, as was the case with *federal* constitutional arguments for gender- or autonomy-based *Roe* alternatives, they might provide more limited protections than *Roe* itself.

---

<sup>10</sup> *But see infra* note 119.

Third, abortion rights in most states would still be merely implied – as opposed to expressly textual – thus giving rise to judicial restraint arguments that rulings on implied rights are undemocratic. As to the first two objections, however, because state constitutional law (especially on abortion) is typically less developed than federal constitutional law, state constitutional arguments based on gender equality or autonomy are less likely to require abrogating much precedent. Further, even an imperfect strategy of state litigation may be the best available option for abortion rights advocates who must accept that the strong federal *Roe* regime of decades past is gone. As to the third objection, implied rights are not as controversial as sometimes portrayed and judicial restraint arguments are less persuasive in the context of state, as opposed to federal, rulings because voters in most states retain a degree of control over judges and constitutional text; a difference between state and federal systems commonly overlooked by even well-informed commentators.

This Article concludes by discussing how a shift from robust *Roe*-era federal abortion rights to varied state constitutional regimes would bring a strong dose of federalism to abortion jurisprudence, but in atypical ways. Abortion rights would again become a matter for state rather than federal determination, but with several implications beyond the standard federalism mantra of returning power to states. First, since a key rationale for *stare decisis* is protecting the public's reliance on precedent, a state court decision to protect abortion rights would turn *stare decisis* on its head: a change in state jurisprudence in the form of newly recognized state constitutional abortion rights would preserve, rather than modify, rights people already enjoyed under *Roe*. Second, the ideological indeterminacy of federalism – popularly viewed as a conservative doctrine – would be on stark display when abortion rights activists support state-by-state variation in individual rights. Third, a federal-to-state shift would constitute a sort of reverse federalism, with states serving not as “laboratories” of democracy,<sup>11</sup> experimenting with policy *before* the nation as a whole, but rather as “repair shops,” replacing a declining federal regime with a revised state-by-state system. In sum, the field of abortion rights offers state high courts a rare opportunity to review extensive federal experience before setting their own course of constitutional jurisprudence.

---

<sup>11</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).



I. THE DECLINE OF THE FEDERAL CONSTITUTIONAL RIGHT TO ABORTION:  
*ROE'S PARTIAL REVERSAL AND LACK OF DEFENDERS*

A. *Roe Under Fire at the Court: The Partial Reversal in Casey*

For a decision featuring a six Justice majority,<sup>12</sup> *Roe* fell into disfavor surprisingly quickly. Much of the shift traces to turnover on the Court, as most Justices appointed since *Roe* have been critical of the decision. Of the eight appointed in the thirty years after *Roe*,<sup>13</sup> five were *Roe* critics (to varying degrees) who replaced *Roe* majority members.<sup>14</sup> The other three new Justices did not truly counter this anti-*Roe* trend since only one was a *Roe* supporter replacing a *Roe* dissenter<sup>15</sup> while the other two were *Roe* supporters replacing *Roe* majority members.<sup>16</sup> The upshot of this Court turnover has been the partial, but not formal, overruling of *Roe*.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>17</sup> the Court claimed to reaffirm the essential holding of *Roe*,<sup>18</sup> a statement that is true only if one defines the essential holding of *Roe* quite narrowly. Rejecting the *Roe* rule of virtually unrestricted first trimester abortion, *Casey* struck down a

---

<sup>12</sup> Justice Blackmun delivered the opinion of the Court, in which Justices Douglas, Brennan, Stewart, Marshall, and Powell joined. See *Roe*, 410 U.S. at 115.

<sup>13</sup> This Article does not discuss the jurisprudence of Chief Justice Roberts and Justice Alito which is still too sparse to allow for a meaningful discussion of any body of relevant decisions.

<sup>14</sup> Justices Stewart, Burger, Powell, Brennan, and Marshall were replaced, respectively, by Justices O'Connor, Scalia, Kennedy, Souter, and Thomas. See THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE app. at 453 (Christopher Tomlins ed., 2005). The views of the three 1980s appointees were on display in *Webster v. Reproductive Health Services*, which upheld a ban on most abortions after twenty weeks of gestation. 492 U.S. 490, 520 (1989) (opinion of Rehnquist, C.J., Kennedy & White, JJ.). Justice Kennedy joined a joint opinion with two *Roe* dissenters (Rehnquist, C.J., & White, J.), which criticized "the rigid *Roe* framework." *Id.* at 518. Justice Scalia called for *Roe* to be "overrule[d] . . . explicitly." *Id.* at 532 (Scalia, J., concurring in part and concurring in the judgment). And Justice O'Connor said a future case should "reexamine *Roe* . . . carefully." *Id.* at 526 (O'Connor, J., concurring in part and concurring in the judgment). *Webster* is significant because it was "the first [case] to abandon *Roe's* trimester framework, which had been reaffirmed [three years earlier]" and because it ultimately held "that the state's interest is compelling even before viability . . . , a direct rejection of *Roe*." David C. Blickenstaff, Comment, *Defining the Boundaries of Personal Privacy: Is There a Paternal Interest in Compelling Therapeutic Fetal Surgery?*, 88 NW. U. L. REV. 1157, 1165 (1994).

<sup>15</sup> Justice White was replaced by Justice Ginsburg in 1993. See THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE, *supra* note 14, app. at 453.

<sup>16</sup> Justices Douglas and Blackmun were replaced, respectively, by Justices Stevens and Breyer. See *id.*

<sup>17</sup> 505 U.S. 833 (1992).

<sup>18</sup> *Id.* at 845-46.

spousal notice requirement for married women<sup>19</sup> but upheld a parental consent requirement for minors<sup>20</sup> and a mandatory one day waiting period following detailed informed consent disclosures to all women seeking abortions.<sup>21</sup> Upholding the waiting period and informed consent requirements necessitated the reversal of two precedents which had disallowed exactly such restrictions.<sup>22</sup>

Although the Court claimed otherwise, "substantial features of *Roe* were jettisoned" by the *Casey* opinion,<sup>23</sup> which upheld provisions that would have been unconstitutional under prior law.<sup>24</sup> For instance, the plurality expressly rejected *Roe*'s trimester framework which it criticized for unnecessary rigidity.<sup>25</sup> To allow restrictions that *Roe* and other precedents would not, *Casey* reversed the presumption against such laws. Whereas *Roe* declared abortion a fundamental right, making abortion restrictions presumptively invalid,

[*Casey*] backed away from affording women the highest level of constitutional protection for the abortion choice. . . . *Casey* rejected the strict scrutiny standard of review mandated by *Roe*, adopting instead the more permissive "undue burden" standard. Under this new standard, the right to choose abortion is no longer a fundamental right and thus, women seeking abortions are no longer entitled to the strong protections afforded other fundamental rights . . . .<sup>26</sup>

As interpreted by *Casey*, the Constitution protects women only against total prohibitions on their right to choose to have a safe abortion<sup>27</sup> and, accordingly, *Casey* gave a woman only "some freedom"<sup>28</sup> to terminate her pregnancy so

---

<sup>19</sup> *Id.* at 895.

<sup>20</sup> *Id.* at 899 (opinion of O'Connor, Kennedy & Souter, JJ.).

<sup>21</sup> *Id.* at 881-87 (opinion of O'Connor, Kennedy & Souter, JJ.).

<sup>22</sup> *Id.* at 882 (overruling *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983) and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) to the extent they "find a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probably gestational age' of the fetus").

<sup>23</sup> Jack M. Balkin, *Preface to WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 4, at ix, xii.

<sup>24</sup> Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1987 (2002).

<sup>25</sup> *Casey*, 505 U.S. at 872-73 (opinion of O'Connor, Kennedy & Souter, JJ.).

<sup>26</sup> Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1154 (1993) (footnote omitted).

<sup>27</sup> Whitman, *supra* note 24, at 1985.

<sup>28</sup> *Casey*, 505 U.S. at 869 (opinion of O'Connor, Kennedy & Souter, JJ.).

long as she does so before the fetus becomes viable.<sup>29</sup> Indeed, the key reason the *Casey* Court deemed the spousal notification provision to pose an undue burden was that it created a risk of spousal coercion – both physical and psychological – against having an abortion.<sup>30</sup>

Given the extent to which *Casey* diminished abortion rights, “the survival of *Roe* was more spin than substance,”<sup>31</sup> evidenced by a proliferation of abortion restrictions<sup>32</sup> and a decline in the number of abortions which have occurred in *Casey*’s wake.<sup>33</sup> Indeed, a much-quoted passage in Chief Justice Rehnquist’s dissent lamented that “[t]he joint opinion retains the outer shell of *Roe v. Wade*, but beats a wholesale retreat from the substance of that case.”<sup>34</sup> “While it is predictable for a dissent to criticize the plurality, commentators across the ideological spectrum essentially agree[] as to the undignified fate of *Roe*”<sup>35</sup> with many abortion rights supporters mirroring Chief Justice Rehnquist’s diagnosis of *Casey*’s effect on *Roe*.<sup>36</sup> Thus, although the *Casey* plurality denied overruling *Roe*, there is little doubt that, at a minimum, it substantially diminished the rights *Roe* had announced.

#### B. *Friendly Fire: Supporters of Abortion Rights Criticizing Roe*

Although it may not be surprising that serious analysts on both sides agree that *Casey* vitiated *Roe*, it may be surprising that *Roe* has long drawn criticism – and efforts at revision – from *supporters* of abortion rights. Indeed, a surprising amount of the scholarly criticism of *Roe* has been “friendly fire”:

---

<sup>29</sup> Whitman, *supra* note 24, at 1988.

<sup>30</sup> See *Casey*, 505 U.S. at 893-94 (opinion of O’Connor, Kennedy & Souter, JJ.).

<sup>31</sup> Scott A. Moss, *Where There’s At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 333 (2005) (comparing the inconsistency of the employment at will doctrine with instances in constitutional law where the Court professed adherence to strict precedents while simultaneously eviscerating them).

<sup>32</sup> See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 708, 722-23, 733 (Univ. of Cal. Press 1998) (1994); Balkin, *supra* note 4, at 5.

<sup>33</sup> See Balkin, *supra* note 4, at 5.

<sup>34</sup> *Casey*, 505 U.S. at 944 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part) (citation omitted).

<sup>35</sup> Moss, *supra* note 31, at 334.

<sup>36</sup> See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 41 n.44 (2000) (observing that *Casey* “quietly overruled various lesser-known cases while loudly pledging allegiance to precedent in general, and the more prominent case of *Roe* in particular”); Balkin, *supra* note 4, at 16 (claiming that *Casey* significantly limited *Roe*); Blickenstaff, *supra* note 14, at 1166 (“The recent history of abortion law shows that women no longer enjoy the kind of rights the Court recognized in *Roe*.”); Whitman, *supra* note 24, at 1985 (viewing *Casey* as “a significant betrayal of the hopes raised by *Roe*”).

attacks by those who agree that the Constitution should be interpreted as protecting abortion rights.

This friendly fire on *Roe* falls into two categories. First, *Roe* draws criticism for being too broad and sweeping a constitutional ruling, having “struck down the abortion laws of almost all the states, including reform statutes” which allowed exceptions to previously categorical abortion bans.<sup>37</sup> Typifying this view is Cass Sunstein who, although agreeing that the Constitution protects abortion rights, has expressed reservations about the breadth of *Roe*’s unqualified ban on abortion restrictions:

The [*Roe*] Court would have done far better to proceed slowly and incrementally . . . . [It] might have ruled that abortions could not be prohibited in cases of rape or incest, or that the law at issue in *Roe* was invalid even if some abortion restrictions might be acceptable. Such narrow grounds would have allowed democratic processes to proceed with a degree of independence – and perhaps to find their own creative solutions . . . .<sup>38</sup>

Ruth Bader Ginsburg has similarly written that *Roe*’s “sweep and detail” went too far in the change it ordered, resulting in the “mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures.”<sup>39</sup> Jack Balkin has also opined that “the Court should have been more reluctant to offer hard and fast rules,” and instead developed the law over a course of decisions to produce a “fairer, more flexible, and more democratically acceptable set of legal doctrines.”<sup>40</sup>

Second, Justice Blackmun’s majority opinion in *Roe* draws criticism from abortion rights supporters for being simply unpersuasive. As Balkin and Ginsburg have argued, *Roe* was “altogether too cursory . . . to justify and defend the abortion right.”<sup>41</sup> Andrew Koppelman has similarly written that the *Roe* Court failed to “ground its decision, that abortion is a fundamental right, in the text of the Constitution.”<sup>42</sup> Similarly, John Hart Ely, a pro-choice<sup>43</sup> opponent of the *Roe* abortion rights holding but a defender of other judicial decisions protecting unenumerated constitutional rights, famously wrote in 1973 that “[*Roe*] is *not* constitutional law and gives almost no sense of an

---

<sup>37</sup> Balkin, *supra* note 4, at 11.

<sup>38</sup> CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 180-81 (1996).

<sup>39</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985).

<sup>40</sup> Balkin, *supra* note 4, at 23.

<sup>41</sup> *Id.* at 22; *see also* Ginsburg, *supra* note 39, at 376.

<sup>42</sup> Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 480 (1990).

<sup>43</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926-27 (1973).

obligation to try to be.”<sup>44</sup> Even those who believe that such a right has grounding elsewhere in the Constitution nevertheless admit that, “[a]s a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible.”<sup>45</sup>

*Roe*’s weakness is one of the worst-kept secrets of the liberal legal establishment. Supporters of abortion rights may not go as far as *Roe* critic Michael McConnell’s controversial assertion that *Roe* is an “embarrassment to those who take constitutional law seriously,”<sup>46</sup> but they do view *Roe* as disturbingly weakly reasoned for such a critical source of individual rights.

## II. DEFENDING *ROE* BY AMENDING *ROE*: ALTERNATIVE ARGUMENTS FOR FEDERAL CONSTITUTIONAL ABORTION RIGHTS – AND THEIR LIMITS

### A. *Gender- and Autonomy-Based Alternatives to the Reasoning of Roe*

As *Roe* declines, supporters of constitutional abortion rights have begun to “search for an alternative constitutional provision on which to ground the right to abortion, alternative to the privacy-based approach in *Roe*.”<sup>47</sup> Whether because they recognized the weaknesses of *Roe* or because they saw tactical advantage in new arguments, those defending the basic *Roe* idea – abortion as a fundamental right – increasingly asserted rationales different from those of *Roe* itself.

The extent to which abortion rights supporters are abandoning *Roe* for better arguments is perhaps clearest in Jack Balkin’s bold and controversial book, *What Roe v. Wade Should Have Said*,<sup>48</sup> in which eleven scholars wrote mock judicial opinions for *Roe*. Eight supported constitutional limits on abortion bans, but in a striking consensus none of the opinions adopted Justice Blackmun’s original trimester framework.<sup>49</sup> Each used only materials available in 1973 – thereby limiting the available arguments – but several adopted alternative arguments made in other Justices’ opinions<sup>50</sup> or in the original *Roe* amicus briefs.<sup>51</sup>

---

<sup>44</sup> *Id.* at 947.

<sup>45</sup> Edward Lazarus, *The Lingering Problems with Roe v. Wade, and Why the Recent Senate Hearings on Michael McConnell’s Nomination Only Underlined Them*, FINDLAW, Oct. 3, 2002, <http://writ.news.findlaw.com/lazarus/20021003.html>.

<sup>46</sup> Michael W. McConnell, *Roe v. Wade at 25: Still Illegitimate*, WALL ST. J., Jan. 22, 1998, at A18.

<sup>47</sup> Cynthia Grant Bowman et al., *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 50 (2006) (detailing the emergence of race and gender diversity in the publications of the *Northwestern University Law Review*).

<sup>48</sup> See generally WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 4.

<sup>49</sup> Balkin, *supra* note 4, at 18.

<sup>50</sup> See *id.* at 20.

<sup>51</sup> See *id.* at 19.

There are two major *Roe* alternative theories: (1) *gender equality* under the Equal Protection Clause<sup>52</sup> and (2) *autonomy rights* grounded in various constitutional provisions, a bit like the *Roe* right to privacy, but better-theorized and more focused on the magnitude of interference with personal autonomy.<sup>53</sup> Critically, federal and state jurisprudence is likely to diverge along these two tracks. Whereas federal constitutional arguments have shifted somewhat from autonomy (the original right of privacy in *Roe*) to gender equality,<sup>54</sup> state constitutional jurisprudence is likely to focus more on autonomy.<sup>55</sup>

### 1. Equal Protection: A Gender Equality Rationale for Abortion Rights

At first blush, it may seem surprising that *Roe* was not written as a women's rights decision. Indeed, in the years preceding *Roe*, "plaintiffs and amici made sex equality arguments in several cases challenging abortion statutes."<sup>56</sup> Ultimately, however, even "feminists seemed primarily to talk about abortion in the discourse of privacy," rather than women's rights, for two tactical reasons. First, in 1972 Congress passed the Equal Rights Amendment ("ERA") – seeking to constitutionalize gender equality rights – and "feminists . . . [wanted] to protect the ERA from the abortion controversy."<sup>57</sup> Second, a privacy focus would enable the abortion rights issue to be litigated under *Griswold v. Connecticut*,<sup>58</sup> which had established a privacy right for the use of contraceptives.<sup>59</sup>

This latter rationale was particularly important since the Court had recognized scattered rights of reproductive and family privacy for decades before *Roe*,<sup>60</sup> but had only very recently begun to apply the protections of the ERA to gender discrimination.<sup>61</sup> Indeed, it wasn't until 1971 that the Court first found any form of gender discrimination unconstitutional,<sup>62</sup> and even

<sup>52</sup> See discussion *infra* Part II.A.1.

<sup>53</sup> See discussion *infra* Part II.A.2.

<sup>54</sup> See discussion *infra* Part II.A.1.

<sup>55</sup> See discussion *infra* Part III.B.1.

<sup>56</sup> Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1991 n.145 (2003).

<sup>57</sup> *Id.*; accord Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1369 (2006).

<sup>58</sup> 381 U.S. 479 (1965); see also Siegel, *supra* note 57, at 1369.

<sup>59</sup> *Griswold*, 381 U.S. at 485.

<sup>60</sup> See *id.* at 482-85 (collecting cases from as far back as 1886 which protect rights against mandatory sterilization, rights to choose private schools, rights to learn foreign languages, and many other rights of privacy and repose).

<sup>61</sup> See Ginsburg, *supra* note 39, at 377.

<sup>62</sup> See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

then, such finding came in a halting ruling which declined to apply heightened scrutiny to gender.<sup>63</sup> Moreover, this decision came only *after* the parties filed their initial briefs in *Roe*.<sup>64</sup> Thus, while in retrospect it is easy to question why gender issues are missing from the *Roe* decision, given the state of the law at the time, *Roe* could not easily have been decided on a still-inchoate constitutional theory of women's rights.<sup>65</sup>

Shortly after *Roe*, equal-protection based gender rights<sup>66</sup> became well-established,<sup>67</sup> rendering *Roe*'s neglect of gender a source of great criticism.<sup>68</sup> By the 1990s, even Justice Blackmun, whose *Roe* opinion "reads like a case about doctors' rights rather than women's rights,"<sup>69</sup> was citing leading feminist views:<sup>70</sup>

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. . . . [The] assumption – that women can simply be forced to accept the "natural"

<sup>63</sup> *Id.* (applying rational basis analysis).

<sup>64</sup> *Reed* was decided on November 22, 1971. *See id.* at 71. The Appellant's brief in *Roe* was filed on August, 18, 1971. *See* Brief for Appellants at cover, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). The Appellee's brief in *Roe* was filed on October 19, 1971. *See* Brief for Appellee at cover, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

<sup>65</sup> *See* Balkin, *supra* note 4, at 23 ("Given the legal and moral difficulty of the issues and the inevitable need to make compromises, it was perhaps too much to expect that the Court would get it right the first time . . .").

<sup>66</sup> Equality rights are protected against *federal* intrusion by the Fifth Amendment Due Process Clause, not the Fourteenth Amendment Equal Protection Clause, which reaches only *states*. *See* *Frontiero v. Richardson*, 411 U.S. 677, 680 n.5, 690-91 (1973) (plurality opinion). However, these protections are coextensive, and the case law and constitutional scholarship speak primarily of equal-protection rights. Accordingly, this Article will refer to equal-protection rights, rather than to due-process rights, regardless of whether federal or state action is at issue.

<sup>67</sup> *See, e.g.*, Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 610 (2005).

<sup>68</sup> *See, e.g.*, Ginsburg, *supra* note 39, at 382; Kenneth L. Karst, *The Supreme Court 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-58 (1977).

<sup>69</sup> Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 FORDHAM L. REV. 549, 564 (2004); *see also* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1626 (1987) ("Justice Blackmun, having been general counsel for the Mayo clinic, was more concerned with the 'rights' of doctors than of women.").

<sup>70</sup> *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 n.4 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308-24 (1991); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 350-80 (1992)).

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.<sup>71</sup>

More recent feminist critiques have agreed with Justice Blackmun’s implicit admission in *Casey* that his original *Roe* opinion focused too little on how abortion restrictions limit women’s rights to equality in their work, family, and civic roles. For example, of the eight scholars in Balkin’s book who wrote in support of abortion rights, four of them relied in whole or in part on gender equality theories instead of (or in addition to) theories of autonomy or privacy.<sup>72</sup>

## 2. Autonomy and Self-Determination Rights: Like *Roe* but Better

Autonomy-based theories of abortion rights seem similar to *Roe*’s privacy basis – which *Griswold* defined as a right to control personal matters without government interference.<sup>73</sup> However, because “[t]he Constitution does not explicitly mention any right of privacy,”<sup>74</sup> the Court has fumbled through wildly inconsistent explanations for the source of such a right. For instance, in *Roe* the Court offered a haphazard array of alternative arguments – approvingly citing not only *Griswold*’s penumbras argument, but also the District Court’s Ninth Amendment argument – before ultimately settling on an entirely different Fourteenth Amendment Due Process Clause rationale.<sup>75</sup> The lack of explanation for this foundational shift in the right of privacy from the Bill of Rights to the Fourteenth Amendment is startling considering such a major change to a very controversial right which the Court had so recently explained entirely differently.

---

<sup>71</sup> *Casey*, 505 U.S. at 928.

<sup>72</sup> See Akhil Reed Amar, *Concurring in Roe, Dissenting in Doe, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 4, at 152, 168 (“I hope that this dialogue may benefit from public attention to those aspects of the Constitution that genuinely do bear on the abortion question, especially the women’s equality norms of the Fourteenth and Nineteenth Amendments.”); Jack M. Balkin, *Judgment of the Court, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 4, at 31, 42 (“Criminal prohibitions on abortion . . . violate fundamental notions of equality between men and women.”); Reva B. Siegel, *Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 4, at 63, 63 (“The [abortion] statutes reflect and enforce traditional assumptions about the sexes, and can no longer be reconciled with the understanding that women are equal citizens with men.”); Robin West, *Concurring in the Judgment, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 4, at 121, 135 (“The [abortion] regulation . . . must proceed in a way that respects pregnant women’s rights to equal protection of the laws.”).

<sup>73</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

<sup>74</sup> *Roe v. Wade*, 410 U.S. 113, 152 (1973).

<sup>75</sup> *Id.* at 152-53.



Thus, *Roe* critics who offer autonomy-based alternative arguments are, to some extent, returning the abortion right to its privacy roots in *Griswold*, though based in different constitutional provisions than those cited in *Griswold* and *Roe*. There are several prominent efforts of this sort. First, Kenneth Karst, picking up on how *Griswold* described marriage as an association,<sup>76</sup> has proposed freedom of intimate association as an organizing principle for reproductive privacy and related cases,<sup>77</sup> stating that “[c]oerced intimate association in the shape of forced childbearing or parenthood is no less serious an invasion . . . than is forced marriage or forced sexual intimacy.”<sup>78</sup>

Second, Andrew Koppelman has pressed a more novel Thirteenth Amendment argument that women compelled to carry and bear children are subjected to involuntary servitude.<sup>79</sup> Laurence Tribe has advanced essentially the same point stating that a “woman forced by law to submit to . . . carrying, delivering, and nurturing a child she does not wish to have is entitled to believe that more than a play on words links her forced labor with the concept of involuntary servitude.”<sup>80</sup> This argument is not just the fanciful theorizing of scholars detached from real-world adjudication.<sup>81</sup> For instance, though not explicitly citing the Thirteenth Amendment, Justice Blackmun himself laid out exactly this sort of argument in his *Casey* concurrence stating that “[b]y 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.”<sup>82</sup>

Third, Jed Rubenfeld has advanced a mixed Thirteenth and Fourteenth Amendment argument, as well as an alternative Ninth Amendment argument. Rubenfeld’s premise is that there exists a freedom to choose one’s occupation which extends to abortion rights.<sup>83</sup> In support of his mixed argument, he begins by citing the Thirteenth Amendment’s bar on states compelling people to fulfill employment contracts: “If a state cannot force a man to till a field, it

---

<sup>76</sup> See *Griswold*, 381 U.S. at 486.

<sup>77</sup> Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625-26 (1980).

<sup>78</sup> *Id.* at 641 (footnote omitted).

<sup>79</sup> Koppelman, *supra* note 42, at 484 (claiming that this argument provides a response to the objection that the fetus is a person since, even if that is the case, “the fetus’ right to continued aid from the woman does not automatically follow”).

<sup>80</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1354 (2d ed. 1988).

<sup>81</sup> Not that there is anything wrong with that.

<sup>82</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>83</sup> See Jed Rubenfeld, *Concurring in the Judgment Except as to Doe*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 4, at 109, 111.

cannot force a woman to mother a child.”<sup>84</sup> He then goes on to argue that the right of privacy is not unwritten, but rather is one of the privileges or immunities of citizenship protected by the Fourteenth Amendment<sup>85</sup> – which also includes the right to choose one’s calling in life.<sup>86</sup> In the alternative, Rubinfeld argues that the Ninth Amendment, which states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,”<sup>87</sup> means exactly “what its words seem plainly to suggest: that the enumerated constitutional rights are not exhaustive.”<sup>88</sup> Therefore, even if his argument that the right of privacy has a textual basis in the Privileges or Immunities Clause of the Fourteenth Amendment fails, he argues that the Ninth Amendment would still provide a clear and sufficient answer to those rejecting all unenumerated rights.<sup>89</sup> If Rubinfeld’s argument based on a *mélange* of Amendments parallels Justice Douglas’s *Griswold* majority opinion,<sup>90</sup> then his Ninth Amendment alternative parallels Justice Goldberg’s *Griswold* concurrence which viewed the Ninth Amendment as strengthening the argument that contraception bans infringed upon Fourteenth Amendment liberty.<sup>91</sup>

In sum, whereas gender arguments for abortion rights require a wholesale relocation and transformation of the *privacy* right to abortion into a *women’s* right to abortion, autonomy arguments entail less radical change. Autonomy arguments are – to paraphrase the title of Balkin’s book – what *Griswold* should have said.<sup>92</sup> Proponents of such arguments essentially agree with *Griswold* that reproductive rights are best viewed as the freedom to make decisions about private matters – they merely seek to offer better constitutional grounding, or simply better arguments, for such rights.

#### B. *The Limited Power of Alternative Rationales for Abortion Rights*

This Part does not aspire to resolve decades of debate on the merits of *Roe*, gender- or autonomy-based alternatives to *Roe*, or anti-*Roe* positions based on originalism, textualism, or strict constructionism. Rather, this Part will set that broader debate aside and focus instead on a series of related tactical problems with gender- and autonomy-focused litigation strategies. In particular, some of

---

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 119.

<sup>86</sup> *See id.* at 111.

<sup>87</sup> U.S. CONST. amend. IX.

<sup>88</sup> Rubinfeld, *supra* note 83, at 119.

<sup>89</sup> *See id.*

<sup>90</sup> *See* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>91</sup> *See id.* at 493 (Goldberg, J., concurring). The Ninth Amendment was also the basis for the district court’s opinion in *Roe*. *See* *Roe v. Wade*, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970).

<sup>92</sup> *See* *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 4.

these strategies protect abortion rights more weakly than *Roe* did,<sup>93</sup> many depart too sharply from federal constitutional jurisprudence to have much likelihood of success,<sup>94</sup> and all may be unpersuasive to the key audience: those unpersuaded by *Roe*.<sup>95</sup>

1. The Tactical Risk of Trying To Save a Precedent by Rewriting It: Watering Down the Rights It Protects

To accept an entirely different basis for a constitutional right to abortion, the Court would have to rewrite *Roe* even more substantially than it did in *Casey*. As a matter of legal strategy, rewriting *Roe* entails risks for abortion rights advocates in that recasting the federal constitutional right to abortion as one of gender equality or autonomy could ultimately result in a weaker, more limited abortion right than the one established in *Roe*.

Switching the abortion rights focus to gender equality would open the door to a key counterargument: because women have come to play an increasingly equal role in voting and policymaking, recently enacted abortion restrictions no longer constitute male domination of women.<sup>96</sup> Because nineteenth century abortion restrictions were enacted by male policymakers elected by male voters, they can be seen as discrimination by an empowered majority against a disenfranchised group.<sup>97</sup> Modern abortion laws, however, are the work of men and women alike. In this vein, Akhil Amar has suggested that the Court in 1973, faced with two states' abortion bans,<sup>98</sup> should have struck down the ban written in the 1850s but upheld the ban enacted in 1968.<sup>99</sup> Although Amar's view can be countered by noting that far more male than female legislators are pro-life,<sup>100</sup> his point nevertheless remains that legislatures are continually

---

<sup>93</sup> See discussion *infra* Part II.B.1.

<sup>94</sup> See discussion *infra* Part II.B.2.

<sup>95</sup> See discussion *infra* Part II.B.3.

<sup>96</sup> See Amar, *supra* note 72, at 152.

<sup>97</sup> See *id.* at 165.

<sup>98</sup> In *Doe v. Bolton*, the Court considered the constitutionality of criminal abortion statutes enacted in Georgia in 1968. *Doe v. Bolton*, 410 U.S. 179, 181 (1973). In *Roe v. Wade*, the Court considered the constitutionality of criminal abortion statutes enacted in Texas in 1854 and modified in 1857. *Roe v. Wade*, 410 U.S. 113, 119 (1973).

<sup>99</sup> Amar, *supra* note 72, at 152. Although Amar's explicit reasoning for rejecting the appellant's claims in *Doe* was that, being a recently enacted statute, the Georgia courts should have to interpret it before the U.S. Supreme Court ruled on its constitutionality, *id.*, he nevertheless goes on to consider many "hard questions" that would surface when assessing the legitimacy of modern abortion regulations passed in more gender-balanced legislatures and supported by a constituency including women holding the power to vote. See *id.* at 167-68.

<sup>100</sup> For example, voting records tabulated by Planned Parenthood in 2006 show that ten of the fourteen then-serving female United States Senators with established voting records had substantially *pro-choice* records while slightly more than half of the then-serving male

becoming more gender-balanced<sup>101</sup> and are empowered by electorates with as many women as men.

Similarly, switching to an autonomy rationale might open the door to arguments that autonomy is not truly infringed by certain limited restrictions on abortion, such as the waiting period and informed consent restrictions upheld in *Casey*.<sup>102</sup> The same goes for parental consent requirements which may be viewed not as restricting autonomy generally, but instead as simply shifting the autonomous decision from minor to parent. An autonomy-based rationale may be an imperfect alternative to *Roe* because it might only protect against restrictions substantial enough to completely deny women their autonomy. However, this Article is premised on the observation that *Roe* is declining. Assuming abortion-rights advocates accept this premise, they may still find such watered-down rights appealing.

## 2. Obstacles to the Supreme Court's Acceptance of New Abortion Rights Rationales: The Need To Abrogate Broader Precedents

Another problem with attempting to house abortion rights in other constitutional provisions is that such a move would require major departures from precedent. For example, the women's rights argument is not that restricting abortion intentionally discriminates against women, but that such laws negatively impact women. One of the more established equal-protection precedents, however, is that the Clause bans only *purposeful* discrimination.<sup>103</sup> Laws with merely a *disparate impact*, or even a "dramatic and foreseeable" impact, on a particular group are permissible.<sup>104</sup> Accordingly, a plaintiff "must show that the challenged policy was not only adopted *in spite of* its disparate impact on women (or racial minorities), but *because of* that impact."<sup>105</sup> Thus, fitting abortion rights into the Equal Protection Clause would require a substantial revision of basic equal-protection jurisprudence, a revision that would have implications well beyond abortion rights.

---

United States Senators with established voting records had substantially *pro-life* records. See Project Vote Smart, Planned Parenthood Rating, [http://www.vote-smart.org/issue\\_rating\\_detail.php?r\\_id=3424](http://www.vote-smart.org/issue_rating_detail.php?r_id=3424) (last visited Jan. 11, 2008).

<sup>101</sup> For example, until 1993 there were never more than three female United States Senators serving at the same time. As of August 1, 2007, however, there are sixteen. See U.S. Senate, Women in the Senate, [http://www.senate.gov/artandhistory/history/common/briefing/women\\_senators.htm](http://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm) (last visited Jan. 11, 2008).

<sup>102</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887 (1973) (opinion of O'Connor, Kennedy & Souter, JJ.).

<sup>103</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>104</sup> See Marjorie Heins, *Massachusetts Civil Rights Law*, 76 MASS. L. REV. 77, 90 n.352 (1991); see also Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 305-06 (2007).

<sup>105</sup> William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2138 (2002).

There is even less case law support for a First Amendment association right to abortion or a Thirteenth Amendment involuntary servitude right to abortion. In fact, assertions of a Thirteenth Amendment right to abortion struck one court as frivolous enough to justify an award of attorney's fees to the defendant.<sup>106</sup>

### 3. The Futility of Defending *Roe* with New Rationales

A third shortcoming of autonomy and gender arguments for abortion is that they are unlikely to persuade those who are unpersuaded by *Roe* itself. First, these arguments interpret constitutional text broadly and beyond its originally intended application. As to the text, no constitutional provisions literally protect a broad autonomy right; nor were any provisions clearly intended by their authors to protect such a right. As to historical evidence, the clear target of the Equal Protection Clause was race, not gender.<sup>107</sup> Of course, one could reject a narrow interpretation based on original intent and instead favor a broader view of history. In this vein, Jack Balkin argues that constitutional provisions should be interpreted "based on the *original meaning* of the constitutional text as opposed to its *original expected application*" by those who wrote it.<sup>108</sup> Certainly, for the Constitution's "great clauses" that lay out brief, broad commandments, expansive ahistorical readings may be proper. The Supreme Court has even articulated this idea in a leading case<sup>109</sup> which drew now-noteworthy agreement from then-law student and current Chief Justice John Roberts.<sup>110</sup> Although debating the idea of a "living

---

<sup>106</sup> See *Jane L. v. Bangerter*, 828 F. Supp. 1544, 1554-55 (D. Utah 1993).

<sup>107</sup> *Loving v. Virginia*, 388 U.S. 1, 10 (1967); see also Norman J. Fry, Note, *Lamprecht v. FCC: A Looking-Glass into the Future of Affirmative Action?*, 61 GEO. WASH. L. REV. 1895, 1927 (1993) ("[T]here is little doubt that [the Fourteenth Amendment's] framers did not intend to extend any federal protection with respect to classifications based on gender.").

<sup>108</sup> Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. (forthcoming 2007) (manuscript at 2, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=925558](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925558)).

<sup>109</sup> See *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 32 (1977).

<sup>110</sup> See *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 86 (1978). In this manifesto against strict construction, Roberts defended a broad, ahistoric interpretation of the Contract Clause:

Constitutional protections, however, should not depend merely on a strict construction that may allow "technicalities of form to dictate consequences of substance." . . . "[W]here constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details." . . . Furthermore, the Framers could hardly have been expected to identify . . . with "admirable precision" . . . problems . . . far in the future. "The great clauses of the Constitution are to be considered in the light of our whole experience, and not merely as they would be interpreted by its Framers in the conditions and with the outlook of their time."

*Id.* at 91-92 (footnotes omitted).

Constitution”<sup>111</sup> or the role of original meaning<sup>112</sup> is well beyond this Article’s scope, one important point warrants observation: because textually broad, ahistorical interpretations are premised on ambiguity that leaves room for discretion, they will “not persuade anyone who was not already persuaded that the Constitution contained a right to abortion.”<sup>113</sup>

Second, while gender- and autonomy-based rationales seek to improve upon *Roe*, they offer significantly similar theories based on similar constitutional provisions. While some who were unpersuaded by *Roe* might be persuaded by different rationales, new autonomy-based theories are really not all that different from the old privacy rationales.<sup>114</sup> Ultimately, the tactical argument for autonomy rationales is that *Roe* might be at less risk if it had utilized the same basic theories but had been better written. Individual views of constitutional abortion rights tend to be so fixed and passionately held, however, that it is hard to see how modest tinkering with *Roe* – relocating the same privacy right elsewhere in the Constitution and offering better legal arguments for it – could change the minds of those who had rejected the right to abortion under *Roe* in the first place.

Moreover, the above two problems support a broader observation: a Court intent on overturning *Roe*, or simply abrogating it further, is unlikely to accept a competing theory for the same right. Justices who defend an existing scheme of constitutional or statutory rights typically do so by invoking stare decisis, even if they believe a different constitutional provision would provide a sounder basis – as evidenced by the Court’s recurring tactic of not reversing now-disfavored, anti-civil rights precedents from the nineteenth century, but instead evading them by relying on less obvious constitutional provisions.<sup>115</sup>

---

<sup>111</sup> See, e.g., Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985, 1001-04 (2002) (book review).

<sup>112</sup> See generally Balkin, *supra* note 108.

<sup>113</sup> John O. McGinnis, *Decentralizing Constitutional Provisions Versus Judicial Oligarchy: A Reply to Professor Koppelman*, 20 CONST. COMMENT. 39, 56 (2003). McGinnis was criticizing Andrew Koppelman’s Thirteenth Amendment theory that laws against abortion violate the Thirteenth Amendment, but his point applies to any ahistorical, textually broad, autonomy-based theory of abortion rights.

<sup>114</sup> See discussion *supra* Part II.A.2.

<sup>115</sup> For example, where the late 1800s Court rejected the idea that the Fourteenth Amendment’s Privileges or Immunities Clause bound states to the Bill of Rights, the 1900s Court held to the contrary not by reversing those precedents, but by finding states bound by the Fourteenth Amendment’s Due Process Clause – a far weaker place to locate this incorporation doctrine. See Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 466 (2001) (“[M]ost legal historians today believe that the Privileges or Immunities Clause was the intended vehicle for protecting individual rights against state action.”). Similarly, where the late 1800s Court rejected federal civil rights legislation as beyond Congress’s civil rights powers, the 1960s Court authorized similar legislation not by reversing those precedents, but

Furthermore, the Justices who would reject *Roe* incline toward originalism, textualism, or strict constructionism as a method of constitutional interpretation,<sup>116</sup> making them particularly unlikely to accept the notion of grounding abortion rights in broad readings of the First, Thirteenth, or Fourteenth Amendments. Thus, as a matter of federal constitutional law, it is hard to see how alternative bases for abortion rights could forestall any demise of *Roe*. Justices who would diminish or reverse *Roe* will not be persuaded by those arguments, and Justices who defend constitutional abortion rights would prefer to cite *stare decisis* rather than new constitutional theories divorced from *Roe* itself.

### III. THE COMING STATE CONSTITUTIONAL LAW ABORTION CONTROVERSIES: ALTERNATIVE THEORIES OF ABORTION RIGHTS BECOME RELEVANT

#### A. *The Important yet Limited Body of State Constitutional Law on Individual Rights*

As the Burger Court retreated from the Warren Court's broad pronouncements on individual rights, Justice William Brennan, in two landmark law review articles, noted the potential of state constitutional law to protect rights that the federal courts would no longer as aggressively protect.<sup>117</sup> "[T]he Court's contraction of federal rights and remedies on grounds of federalism," Justice Brennan wrote, "should be interpreted as a plain invitation to state courts to step into the breach."<sup>118</sup> Since then, numerous scholars have picked up this gauntlet, arguing for broader state than federal constitutional

---

by interpreting Congress's Commerce Clause power broadly. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 279 (1964) (Douglas, J., concurring).

<sup>116</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting) (rejecting a broad construction of the Constitution); *Saenz v. Roe*, 526 U.S. 489, 521-22 (1999) (Thomas, J., dissenting) (looking to history to ascertain the original meaning of the Privileges or Immunities Clause); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann ed., 1997).

<sup>117</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) [hereinafter Brennan, *Protection of Individual Rights*] (arguing that in light of recent Supreme Court civil liberties decisions, litigants should rest their claims on state constitutional rights as opposed to relying on the Federal Constitution); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548-49 (1986) [hereinafter Brennan, *Guardians of Individual Rights*] (supporting the recent trend of state courts interpreting provisions in state constitutions as more protective of individual rights than the analogous federal provisions). Justice Brennan's articles are noteworthy in their own right, but are additionally remarkable because he wrote them while sitting as a Justice.

<sup>118</sup> Brennan, *Guardians of Individual Rights*, *supra* note 117, at 548.

rights – sometimes as to their particular state,<sup>119</sup> sometimes (as in this Article) more generally.<sup>120</sup>

The results of Justice Brennan's state law gambit have been underwhelming. States have only occasionally followed his suggestion and held that their individual state constitutions protect certain rights that the Federal Constitution does not – or at least does not protect to the same extent.<sup>121</sup> Instead, most state court rulings are contrary declarations that state constitutional provisions should be given the same meaning as corresponding federal provisions.<sup>122</sup> Such rulings have defeated assertions that a defendant is entitled to more expansive state constitutional rights against unreasonable searches and seizures,<sup>123</sup> self-incrimination,<sup>124</sup> and double jeopardy.<sup>125</sup> Even state courts open to the possibility of different interpretations of similar state and federal constitutional provisions often announce that they exercise "great restraint" in departing from a federal constitutional interpretation or that they should engage in such departures only for compelling reasons.<sup>126</sup>

Thus, although expansive interpretation of state constitutional rights has been an intriguing idea, it has not been Justice Brennan's hoped-for panacea for the federal judiciary becoming increasingly conservative (or just less liberal, depending on one's viewpoint). In a sense, state constitutional rights

<sup>119</sup> See, e.g., John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?*, 51 LA. L. REV. 685, 686 (1991); Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 295 (2005).

<sup>120</sup> See, e.g., Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathub?*, 64 WASH. L. REV. 19, 30 (1989); Nan D. Hunter, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics*, 92 GEO. L.J. 941, 943 (2004) (book review); Paula A. Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 511 (1992).

<sup>121</sup> See *infra* Parts III.B-C.

<sup>122</sup> See, e.g., *State v. Davis*, 304 N.W.2d 432, 434 (Iowa 1981); *Gamble v. State*, 567 A.2d 95, 97 n.2 (Md. 1989); *McCrary v. State*, 342 So. 2d 897, 900 (Miss. 1977) (en banc); *Edwards v. State*, 815 P.2d 670, 672 (Okla. Crim. App. 1991); *Commonwealth v. Bostic*, 456 A.2d 1320, 1322 n.4 (Pa. 1983); *State v. Guy*, 492 N.W.2d 311, 313 (Wis. 1992).

<sup>123</sup> See, e.g., *Davis*, 304 N.W.2d at 434; *State v. Buzzell*, 617 A.2d 1016, 1018 (Me. 1992); *Gamble*, 567 A.2d at 97; *State v. Spurgeon*, 820 P.2d 960, 962 (Wash. Ct. App. 1991); *Guy*, 492 N.W.2d at 313.

<sup>124</sup> See, e.g., *McCrary*, 342 So. 2d at 900.

<sup>125</sup> See, e.g., *Edwards*, 815 P.2d at 672.

<sup>126</sup> See, e.g., *Buzzell*, 617 A.2d at 1018 n.4.; *Kivela v. Dep't. of Treasury*, 536 N.W.2d 498, 499 (Mich. 1995); *People v. Brewer*, 662 N.Y.S.2d 172, 175-76 (N.Y. Sup. Ct. 1997); *Spurgeon*, 820 P.2d at 961.



arguments to date have usually been little more than a tease. Courts support such endeavors just often enough for advocates of individual rights to get their hopes up, file lawsuits, and then usually see those hopes dashed.

Although there is currently a dearth of state constitutional rulings on abortion rights, at least some such precedent currently exists in a minority of states and, thus, it would not be futile for abortion rights advocates to press similar arguments in other states. Indeed, there are sound arguments – based on state constitutional text, original intent, and federalism principles – that support states’ recognition of abortion rights under their own constitutions.

B. *Abortion Rights Based on State Constitutions with Broader Rights Guarantees than in the Federal Constitution*

Abortion is an area with intriguing potential for broader state than federal constitutional law because various state constitutional rights provisions support the two leading *Roe* alternative theories discussed above: autonomy and gender equality.<sup>127</sup> First, some state constitutions, unlike the Federal Constitution, expressly protect privacy, autonomy, self-determination, or otherwise bar laws restricting personal decisions.<sup>128</sup> In a few such states, these provisions have even been held to bar certain restrictions on access to abortion.<sup>129</sup> Second, the Federal Constitution protects gender equality rights only as part of a more general Equal Protection Clause written with the purpose of promoting racial equality.<sup>130</sup> In contrast, many state constitutions expressly protect gender equality<sup>131</sup> and some state courts have already held that such provisions guarantee broader gender equality rights than the Federal Constitution.<sup>132</sup> Third, some states have expansively construed their constitutions’ equal protection clauses to protect abortion rights, even *without* language broader than the Federal Equal Protection Clause.<sup>133</sup>

1. State Constitutional Protections

a. *Broad “Privacy” and “Private Life” Provisions*

The constitutions of four states – Alaska, California, Hawaii, and Montana – contain an express right to privacy<sup>134</sup> while a fifth – Florida – has a similar

---

<sup>127</sup> See discussion *supra* Part II.A.1-2.

<sup>128</sup> See discussion *infra* Part III.B.1.

<sup>129</sup> See discussion *infra* Part III.B.1.a.

<sup>130</sup> See *supra* note 107 and accompanying text.

<sup>131</sup> See, e.g., LA. CONST. art. I, § 12; TEX. CONST. art. I, § 3a.

<sup>132</sup> See discussion *infra* Part III.B.2.

<sup>133</sup> See discussion *infra* Part III.B.3.

<sup>134</sup> See ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; HAW. CONST. art. I, § 6; MONT. CONST. art. II, § 10.

“right to be let alone and free from governmental intrusion into . . . private life.”<sup>135</sup> Four of these five states’ supreme courts have already held that these provisions protect reproductive rights.<sup>136</sup>

In one of the broadest of such rulings, the Supreme Court of Montana invalidated a statute requiring pre-viability abortions to be performed by physicians because “where the right of individual privacy is implicated, Montana’s Constitution affords significantly broader protection than does the federal constitution.”<sup>137</sup> The court also rejected *Casey*’s undue burden test in favor of the *Roe* strict scrutiny analysis for pre-viability abortion restrictions.<sup>138</sup> Finally, the court expounded upon the scope of the privacy right in the Montana Constitution:

[The privacy right] of the Montana Constitution broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference. . . . [It] protects a woman’s right of procreative autonomy . . . to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice.<sup>139</sup>

The Supreme Court of Alaska has issued similarly broad rulings, striking down a statute authorizing a public hospital to refuse to perform abortions<sup>140</sup> and a regulation limiting state medical assistance for abortion to cases of life endangerment, rape, or incest as unconstitutional under the state constitution.<sup>141</sup>

Other states with constitutional privacy provisions have also protected abortion rights in cases addressing public funding of abortions, but to varied extents. For instance, the Supreme Court of Florida has held that the Florida Constitution protects against governmental interference with abortion rights.<sup>142</sup> Florida’s right-to-be-let-alone provision, the court explained, “embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.”<sup>143</sup> This provision protects abortion rights not only as a textual matter of privacy, but also as a matter of specific original intent:

---

<sup>135</sup> FLA. CONST. art. I, § 23.

<sup>136</sup> Hawaii is the only one of the five to have not so held, but its legislature may have mooted the issue by enacting a state statute protecting abortion rights. See HAW. REV. STAT. ANN. § 453-16(c) (Supp. 2006).

<sup>137</sup> See *Armstrong v. State*, 989 P.2d 364, 375 (Mont. 1999).

<sup>138</sup> *Id.* at 373-74.

<sup>139</sup> *Id.* at 370.

<sup>140</sup> See *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 971-72 (Alaska 1997).

<sup>141</sup> See *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001).

<sup>142</sup> See *In re T.W.*, 551 So. 2d 1186, 1190-96 (Fla. 1989).

<sup>143</sup> *Id.* at 1192.

[T]he privacy provision was added to the Florida Constitution by amendment in 1980, well after the United States Supreme Court decision in *Roe v. Wade*. It can therefore be presumed that the public was aware that the right to an abortion was included under the federal constitutional right of privacy and would therefore certainly be covered by the Florida privacy amendment.<sup>144</sup>

California's state constitutional right of privacy – which, like Florida's, was adopted after *Roe*<sup>145</sup> – has also been held to protect abortion rights. In particular, the Supreme Court of California invalidated a statute prohibiting state funding of abortion on the ground that the state constitutional right of privacy precludes the state from funding births while withholding funds for abortions.<sup>146</sup> Contrast, however, *Renee B. v. Florida Agency for Health Care Administration*<sup>147</sup> in which the Florida Supreme Court declined to extend the Florida Constitution's privacy right quite so far in the state funding context:

The right of privacy in the Florida Constitution protects a woman's right to choose an abortion. . . . [It] does not create an entitlement to the financial resources to avail herself of this choice. Poverty may make it difficult for some women to obtain abortions. Nevertheless, the State has imposed no restriction on access to abortions that was not already present.<sup>148</sup>

The examples of Florida and California – just two states, but two that contain over seventeen percent of the nation's population<sup>149</sup> – illustrate two very important points. On the one hand, express state constitutional privacy rights are powerful tools that enable state courts to find broader abortion rights than exist under federal law alone. On the other hand, as the disagreement between Florida and California about state funding shows, an express privacy right does not end all legal battles regarding abortion. Even when a robust abortion right is well-established (as it was just after *Roe*), advocates on both sides will still litigate the frontiers of permissible limits on abortion access.

---

<sup>144</sup> *Id.* at 1197 (Ehrlich, C.J., concurring) (citation omitted).

<sup>145</sup> Article I, Section 1 of the California Constitution, which contains the privacy right, was added on November 5, 1975 – more than two years after *Roe* was decided. See CAL. CONST. art. I, § 1.

<sup>146</sup> See *Comm. to Defend Reproductive Rights v. Meyers*, 625 P.2d 779, 781 (Cal. 1981).

<sup>147</sup> 790 So. 2d 1036, 1039-41 (Fla. 2001).

<sup>148</sup> *Id.* at 1041. The court declined to consider whether the rules at issue might violate state equal protection rights but did not foreclose the possibility of such a claim in the future. *Id.* at 1041-42.

<sup>149</sup> See U.S. Census Bureau, Geographic Comparison Table, <http://factfinder.census.gov> (follow “Population Finder” hyperlink; then follow “alphabetic” hyperlink) (last visited Jan. 11, 2008).

b. *Rights to "Safety and Happiness" and Protection from Arbitrary Intrusion – and Using "Original Intent" Arguments to Support Abortion Rights*

One relatively common state constitutional provision declares all people "free and independent" with inalienable rights to pursue "safety and happiness."<sup>150</sup> Under such provisions, the supreme courts of New Jersey and West Virginia have struck down laws curtailing the use of public funds for abortions.<sup>151</sup> Other state courts have struck down laws restricting access to abortions based on similar state constitutional guarantees of autonomy.<sup>152</sup> Both the language and original intent of such state constitutional provisions equip courts to find that these provisions protect abortion rights.

Nontextual bases for interpretation, like original intent, are more important for rights of safety and happiness than for rights of privacy because privacy has, for several decades, been a term of art for referencing reproductive rights. In this context, original intent arguments lead to an interesting twist: whereas original intent arguments are usually seen as undercutting abortion rights arguments under the *Federal Constitution*,<sup>153</sup> they often support such arguments under *state* constitutions – at least in the many states in which there was a clear intent to provide broad state constitutional rights. Each state has a unique history surrounding the ratification of its state constitutional provisions, and in many states that history supports interpreting state constitutional provisions differently from the narrower federal provisions. As one commentator has observed, "the indeterminant nature of state constitutional history . . . encourages courts to interpret state constitutions according to local constitutional heritage."<sup>154</sup>

Kentucky's *Commonwealth v. Wasson*<sup>155</sup> provides an example of how a state court can call upon the historical context of its constitution's ratification in order to justify adopting a broader interpretation of a state constitutional provision than of any similar provision in the Federal Constitution. In *Wasson*, the disputed statute prohibited same-sex, "deviate sexual intercourse,"<sup>156</sup> rather

---

<sup>150</sup> N.J. CONST. art. I, ¶ 1; *see also* ARK. CONST. art. II, § 2; COLO. CONST. art. II, § 3; N.M. CONST. art. II, § 4; W. VA. CONST. art. III, § 1.

<sup>151</sup> *See* *Right to Choose v. Byrne*, 450 A.2d 925, 928 (N.J. 1982); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993).

<sup>152</sup> *See, e.g.,* *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 4 (Tenn. 2000).

<sup>153</sup> *But see* Balkin, *supra* note 108 (asserting that arguments that "laws criminalizing abortion violate the Fourteenth Amendment's principle of equal citizenship and its prohibition against class legislation" are "not novel or fanciful but have deep roots in the original meaning of the Fourteenth Amendment").

<sup>154</sup> Schwaiger, *supra* note 119, at 295.

<sup>155</sup> 842 S.W.2d 487, 491-92 (Ky. 1992).

<sup>156</sup> *Id.* at 488 (citing KY. REV. STAT. ANN. § 510.100 (LexisNexis 1999)).

than abortion, but the court's invalidation of such a law has obvious relevance to abortion restrictions. In reaching its holding, the Supreme Court of Kentucky asserted its "responsibility to interpret and apply [the] state constitution independently,"<sup>157</sup> because of both the state-federal textual differences as well as the historical context of the current state constitution's adoption.<sup>158</sup>

First, in regards to the text, the Kentucky Constitution's broader-than-federal provisions – including rights of safety and happiness and against arbitrary power<sup>159</sup> – established not only broader textual rights, but also spawned a history of the Kentucky state courts' recognition of broad personal autonomy rights long before the federal courts' recognition of such rights.<sup>160</sup> Going back even further in time, the original intent of the state constitution's framers also provides evidence of greater concern with protecting autonomy rights than was expressed by the federal framers. For instance, the record of the Kentucky Constitutional Convention debates reveals that the delegates sought to "express protection of individual liberties significantly greater than the selective list of rights addressed by the Federal Bill of Rights."<sup>161</sup> This text-history combination provided by the Kentucky Constitution supplied the basis for the *Wasson* court's conclusion that "immorality in private which does 'not operate to the detriment of others,' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution."<sup>162</sup>

On similar logic, various states have interpreted constitutional rights of "safety and happiness" or against "arbitrary power" as encompassing abortion rights. In *Right to Choose v. Byrne*, for example, the Supreme Court of New Jersey found that its state constitutional right to life, liberty, and "the pursuit of safety and happiness" includes a privacy right.<sup>163</sup> Further, such right was held to encompass a woman's "right to control her own body and life" which supersedes the State's interest in preserving fetal life.<sup>164</sup> Accordingly, the court held that the statute at issue – which allowed abortion funding when a woman's *life* was endangered, but did not when merely her *health* was at risk – "impinge[d] upon the fundamental right of a woman to control her body and

---

<sup>157</sup> *Id.* at 492.

<sup>158</sup> *See id.* The Kentucky Constitution of 1891 – the state constitution in force at the time of *Wasson* – was the fourth constitution to be ratified in Kentucky and was, "in every sense of the word, a new constitution." *Stone v. Pryor*, 45 S.W. 1053, 1054 (Ky. 1898).

<sup>159</sup> KY. CONST. §§ 1, 2.

<sup>160</sup> *Wasson*, 842 S.W.2d at 493.

<sup>161</sup> *Id.* at 494.

<sup>162</sup> *Id.* at 496 (quoting *Commonwealth v. Smith*, 173 S.W. 340, 343 (Ky. 1915)).

<sup>163</sup> *Right to Choose v. Byrne*, 450 A.2d 925, 933 (1982).

<sup>164</sup> *Id.*

destiny. That right encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child.”<sup>165</sup>

Paralleling this New Jersey case, the West Virginia Supreme Court relied in part on its own constitution’s happiness and safety provision to invalidate an analogous abortion funding regulation in *Women’s Health Center of West Virginia, Inc. v. Panepinto*.<sup>166</sup> The relevant West Virginia constitutional provision declares all persons “equally free and independent” with the right of “pursuing and obtaining happiness and safety.”<sup>167</sup> The court also noted other relevant state constitutional language including a declaration that the “[g]overnment is instituted for the common benefit” of the people.<sup>168</sup> Because the West Virginia Constitution provides guarantees which are not present in the Federal Constitution, *Panepinto* deemed it appropriate to “interpret those guarantees independent from federal precedent,”<sup>169</sup> and held that denying funding for certain abortions violated these state constitutional provisions:

Given that the term safety, by definition, conveys protection from harm, it stands to reason that the denial of funding for abortions that are determined to be medically necessary both can and most likely will affect the health and safety of indigent women in this state.<sup>170</sup>

“Given West Virginia’s enhanced constitutional protections,” the abortion statute “constitute[d] undue government interference with the . . . right to terminate a pregnancy.”<sup>171</sup>

As a final example, in *Planned Parenthood of Middle Tennessee v. Sundquist*,<sup>172</sup> the Supreme Court of Tennessee struck down abortion funding restrictions similar to those in *Byrne* and *Panepinto*, but with the aid of a different state constitutional provision.<sup>173</sup> There, the court held that a fundamental right to autonomy derives from a combination of state constitutional provisions<sup>174</sup> – including one protecting the right to resist “arbitrary [governmental] power and oppression”<sup>175</sup> – and that such right was broad enough to encompass abortion rights.<sup>176</sup> The court went on to state that

---

<sup>165</sup> *Id.* at 934.

<sup>166</sup> 446 S.E.2d 658, 661 (W. Va. 1993).

<sup>167</sup> W. VA. CONST. art. III, § 1.

<sup>168</sup> *Id.* § 3.

<sup>169</sup> *Panepinto*, 446 S.E.2d at 664.

<sup>170</sup> *Id.* at 665.

<sup>171</sup> *Id.* at 667.

<sup>172</sup> 38 S.W.3d 1 (Tenn. 2000).

<sup>173</sup> *See id.* at 4.

<sup>174</sup> *See id.* at 5 n.3.

<sup>175</sup> TENN. CONST. art. I, § 2. The constitutions of Alabama and Mississippi, for example, contain similar provisions. *See* ALA. CONST. art. I, § 2; MISS. CONST. art. III, § 5.

<sup>176</sup> *Sundquist*, 38 S.W.3d at 11.

the “more particularly stated” and “more descriptive” protections of the Tennessee Constitution differed from the Federal Constitution in “marked respects,” such that the state constitution must be interpreted as granting broader protections than the Federal Constitution.<sup>177</sup> Thereafter, the court rejected *Casey*’s undue burden test in favor of strict scrutiny and ultimately found the statute at issue invalid under that more rigorous test.<sup>178</sup>

State courts’ abilities to interpret their constitutions as protecting privacy and autonomy rights derive both from the text and from the history of those charters. State constitutions often contain provisions either absent from the Federal Constitution or more expansively written than those in the Federal Constitution. Further, each state constitution was enacted under unique historical conditions that sometimes evidence a particular concern with establishing broad privacy or autonomy rights.

c. *“Privacy” and “Private Affairs” Protections in Constitutional Provisions Against Unreasonable Search and Seizure*

There are additional state constitutions which grant privacy or private affairs rights. However, these states’ privacy provisions exist not as freestanding, general rights of privacy, but rather in provisions limiting searches and seizures.<sup>179</sup> Such provisions are ambiguous as to whether privacy protection extends beyond the search and seizure context. The answer remains unsettled law as the states have adopted divergent views as to whether such provisions guarantee broad privacy rights that might include protections for private reproductive decisions such as having an abortion or using contraception.

As the Supreme Court of South Carolina has noted, “South Carolina and the other states with a right to privacy provision imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context.”<sup>180</sup> For instance, the supreme courts of South Carolina and Louisiana have both held that their respective state constitutions’ privacy provisions prevent forced medication of death row inmates in preparation for execution.<sup>181</sup> The supreme courts of Louisiana and Arizona have also held that

---

<sup>177</sup> *Id.* at 12-13. The court went on to remark that, even when the Tennessee Constitution lies in “practical synonymity” with the Federal Constitution, the state court is not required to interpret the state charter “as coextensive to” the federal charter. *Id.* at 14. For more on interpreting parallel state/federal provisions, see *infra* Part III.C.1.

<sup>178</sup> *See id.* at 17.

<sup>179</sup> *See, e.g.*, ARIZ. CONST. art. II, § 8; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

<sup>180</sup> *State v. Forrester*, 541 S.E.2d 837, 841 (S.C. 2001).

<sup>181</sup> *See State v. Perry*, 610 So. 2d 746, 755 (La. 1992); *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993).

such provisions protect a broader, more general right to obtain or reject medical treatment.<sup>182</sup>

Such provisions, however, only go so far. For example, although Arizona's privacy provision goes beyond the search and seizure context to protect the right to obtain or reject medical treatment, it does not protect a right to public funding for abortion.<sup>183</sup> Of course, even clearly abortion-protective state constitutional privacy rights may not provide much of a right to public funding,<sup>184</sup> and so this limit on Arizona's privacy right does not mean it is useless in protecting abortion rights.

In contrast to the three states discussed above, Illinois and Washington have declined to interpret their respective state constitutions' search and seizure privacy provision as granting a more general right of privacy than that found in the Federal Constitution.<sup>185</sup> For instance, although in limited circumstances the Supreme Court of Illinois's construction of its state constitutional privacy provision<sup>186</sup> departs from that of its federal counterpart,<sup>187</sup> the court recently reaffirmed its policy of interpreting that provision "to mean, in general, what the same phrase means in the federal constitution."<sup>188</sup>

Thus, the results have been mixed for abortion rights arguments based on privacy provisions embedded in search and seizure provisions. Some state courts have seen fit to grant significant abortion rights protections based on such provisions, but the limited search and seizure textual context gives support to contrary, narrower interpretations that deny any coverage of abortion rights.

---

<sup>182</sup> See *Rasmussen v. Fleming*, 741 P.2d 674, 682 (Ariz. 1987) (en banc); *Hondroulis v. Schumacher*, 553 So. 2d 398, 415 (La. 1989). *But cf.* *Standhardt v. Superior Court*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) (refusing to extend Arizona's right to privacy to encompass same-sex marriage); *State v. Brennan*, 772 So. 2d 64, 72 (La. 2000) (rejecting an attempt to expand Louisiana's privacy right to protect commercial distribution of sexual devices). Nonetheless, *Brennan* observed "that '[o]ur state constitution's declaration of the right to privacy contains an affirmative establishment of a *right of privacy* . . . ' and that this 'is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by . . . the federal constitution.'" *Brennan*, 772 So. 2d at 71 (quoting *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982)).

<sup>183</sup> See *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 31-32 (Ariz. 2002).

<sup>184</sup> See discussion *supra* Part III.B.1.a.

<sup>185</sup> See, e.g., *People v. Caballes*, 851 N.E.2d 26, 45 (Ill. 2006); *Bedford v. Sugarman*, 772 P.2d 486, 489 n.5 (Wash. 1989) (en banc); *In re Custody of RRB*, 31 P.3d 1212, 1222 (Wash. Ct. App. 2001).

<sup>186</sup> ILL. CONST. art. I, § 6.

<sup>187</sup> See, e.g., *People v. Krueger*, 675 N.E.2d 604, 611-12 (Ill. 1996); *People v. Ocampo*, No. 2-06-0556, 2007 WL 3253509, at \*4 n.1 (Ill. App. Ct. Oct. 30, 2007).

<sup>188</sup> *People v. Caballes*, 851 N.E.2d 26, 45 (Ill. 2006).



d. *Ninth Amendment Analogues in State Constitutions*

Finally, just as federal courts have rarely relied on the Ninth Amendment<sup>189</sup> in their holdings,<sup>190</sup> there is very little state court precedent relying on state constitutional provisions equivalent to the Ninth Amendment.<sup>191</sup> Despite this lack of case law, powerful original intent arguments have been made for broadly construing the Ninth Amendment as “a meaningful check on federal power and a significant guarantee of individual liberty.”<sup>192</sup> If nothing else, a state constitutional provision paralleling the Ninth Amendment could fairly be viewed – as it was by Justice Goldberg in *Griswold*<sup>193</sup> – as an interpretive guide supporting broad constructions of other constitutional provisions to protect reproductive privacy.

2. Broader Gender Equality Rights Under State Constitutions

While rights to gender equality are now well-established under the Federal Equal Protection Clause,<sup>194</sup> it remains potentially significant for state-federal comparisons that the Federal Constitution does not expressly, or by the specific intentions of its authors, reach gender issues. Moreover, although the Equal Protection Clause protects gender equality, it does so to a lesser degree than it protects racial equality<sup>195</sup> – which was the clear aim of the Fourteenth Amendment.<sup>196</sup> The failure of the proposed gender-focused Equal Rights Amendment to the Federal Constitution is also noteworthy for purposes of comparison.<sup>197</sup>

In contrast, fourteen state constitutions contain equal rights provisions expressly prohibiting gender-based discrimination.<sup>198</sup> Thus, it is reasonable to

---

<sup>189</sup> U.S. CONST. amend. IX.

<sup>190</sup> See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006) (“Although the Ninth Amendment appears on its face to protect unenumerated individual rights of the same sort as those that were enumerated in the Bill of Rights, courts and scholars have long deprived it of any relevance to constitutional adjudication.”).

<sup>191</sup> See, e.g., ALA. CONST. art. I, § 36; ARIZ. CONST. art. II, § 33; ARK. CONST. art. II, § 29; N.M. CONST. art. II, § 23; UTAH CONST. art. I, § 25; WYO. CONST. art. I, § 36.

<sup>192</sup> Barnett, *supra* note 190, at 1; see also *supra* notes 88-91 and accompanying text.

<sup>193</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring).

<sup>194</sup> See *supra* notes 66-67 and accompanying text.

<sup>195</sup> See *United States v. Virginia*, 518 U.S. 515, 532-33 & n.6 (1996) (noting that the “most stringent judicial scrutiny” has been reserved for classifications based on “race or national origin,” but applying an “exceedingly persuasive” justification standard on laws or official policies that deny women an equal opportunity).

<sup>196</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873).

<sup>197</sup> See Post & Siegel, *supra* note 56, at 1995-97.

<sup>198</sup> ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3; MASS. CONST. pt. I,

view these state constitutions as providing broader gender equality rights than the Federal Constitution and, indeed, several of these states' courts have responded favorably to gender-based abortion rights arguments. Relying – at least in part – on gender equality rights under their respective state constitutions, courts in Connecticut,<sup>199</sup> Massachusetts,<sup>200</sup> New Jersey,<sup>201</sup> West Virginia,<sup>202</sup> and, briefly, New York,<sup>203</sup> have invalidated laws restricting public funding of abortion. Among these states, however, only Connecticut and Massachusetts have relied squarely on *gender* equality analysis.<sup>204</sup> The New Jersey and West Virginia courts employed *economic* equality arguments for requiring abortion funding,<sup>205</sup> and the relevant New York case has a complex procedural history, leaving the law unsettled.<sup>206</sup>

A gender-focused equal rights amendment may prove to be even more potent than an equal protection clause mentioning sex or gender among a list of protected classes. The Supreme Court of Washington, for example, has concluded that the Washington Constitution's Equal Rights Amendment<sup>207</sup> requires application of absolute scrutiny,<sup>208</sup> "a standard even more exacting than traditional strict scrutiny."<sup>209</sup> Under absolute scrutiny, no state interest – no matter how compelling – may justify a law that denies equality based on gender.<sup>210</sup>

The Superior Court of Connecticut has also relied, in part, on the Connecticut Constitution's Equal Rights Amendment<sup>211</sup> to strike down a law

art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt. 1, art. 2; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1.

<sup>199</sup> See *Doe v. Maher*, 515 A.2d 134, 157-62 (Conn. Super. Ct. 1986).

<sup>200</sup> See *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 390 (Mass. 1981).

<sup>201</sup> See *Right to Choose v. Byrne*, 450 A.2d 925, 934-37 (N.J. 1982).

<sup>202</sup> See *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 661 (W. Va. 1993).

<sup>203</sup> See *Hope v. Perales*, 571 N.Y.S.2d 972, 981 (N.Y. Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (N.Y. App. Div. 1993), *rev'd*, 634 N.E.2d 183 (N.Y. 1994).

<sup>204</sup> See *Maher*, 515 A.2d at 162; *Moe*, 417 N.E.2d at 402.

<sup>205</sup> For a discussion of New Jersey's and West Virginia's analyses, see *infra* Part III.B.3.

<sup>206</sup> For a discussion of *Hope v. Perales*, the relevant New York case, see *infra* Part III.C.1.

<sup>207</sup> WASH. CONST. art. XXXI, § 1.

<sup>208</sup> See *Nat'l Elec. Contractors Ass'n v. Pierce County*, 667 P.2d 1092, 1102 (Wash. 1983) (en banc) ("The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.'" (citing *Darrin v. Gould*, 540 P.2d 882, 889-90 (Wash. 1975) (en banc))).

<sup>209</sup> Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1, 55 (1993).

<sup>210</sup> See *Nat'l Elec. Contractors Ass'n*, 667 P.2d at 1102.

<sup>211</sup> CONN. CONST. art. I, § 20.

which provided state funding for abortions only when the mother's life would be endangered by carrying her pregnancy to term.<sup>212</sup> The court observed that by enacting an equal rights amendment, Connecticut "unambiguously indicated an intent to abolish sex discrimination."<sup>213</sup> Accordingly, the court held that it could not equate Connecticut's Equal Rights Amendment with the Federal Equal Protection Clause because such an interpretation "would negate its meaning given that [Connecticut] adopted an [equal rights amendment] while the federal government failed to do so."<sup>214</sup>

As the Washington and Connecticut courts demonstrate, state equal rights amendments might serve as a powerful source of protection against state restrictions on women's abortion rights. As the Superior Court of Connecticut stated, when a state adopts an equal rights amendment that the federal government failed to adopt,<sup>215</sup> the state court should give meaning to that difference by declaring broader state gender equality rights than federal gender equality rights. Therefore, even if abortion rights arguments based on gender equality fail as a matter of *federal* constitutional law, such arguments might still succeed as a matter of *state* constitutional law.

### 3. Equal Protection Rights Under State Provisions Different from, but not Broader than, the Federal Constitution

In Indiana, New Jersey, West Virginia, and possibly Oregon, state courts have protected the right to an abortion – as a matter of state constitutional equal protection – from statutes which prohibit Medicaid funding for certain abortions on the ground that such statutes create a disparity in abortion access between rich and poor.<sup>216</sup> These rulings established a broader state constitutional abortion right than that provided by the Federal Constitution,

---

<sup>212</sup> See *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

<sup>213</sup> *Id.* (quoting *Evening Sentinel v. Nat'l Org. for Women*, 357 A.2d 498, 503 (Conn. 1975)).

<sup>214</sup> *Id.* at 160-61. The court further elaborated that "[a]lthough the argument for absolute scrutiny is impressive, the court need not decide whether it is required by the Connecticut [Equal Rights Amendment] since the regulation cannot survive strict scrutiny and, indeed, not even an intermediate review." *Id.* at 161.

<sup>215</sup> See *id.*

<sup>216</sup> See *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 257-58 (Ind. 2003); *Right to Choose v. Byrne*, 450 A.2d 925, 934-37 (N.J. 1982); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 661 (W. Va. 1993). The Oregon Court of Appeals issued a similar ruling under an equality provision of the Oregon Constitution, *Planned Parenthood Ass'n v. Dep't of Human Res.*, 663 P.2d 1247, 1261 (Or. Ct. App. 1983), but the Supreme Court of Oregon upheld the decision on *statutory* grounds only, *Planned Parenthood Ass'n v. Dep't of Human Res.*, 687 P.2d 785, 787 (Or. 1984) (in banc) ("The Court follows the principle that constitutional issues should not be decided when there is an adequate statutory basis for a decision.").

under which the United States Supreme Court has rejected similar equal protection claims.<sup>217</sup>

In so ruling, these state courts relied on state constitutional provisions which were different from, but not facially broader than, the Federal Equal Protection Clause.<sup>218</sup> Interestingly, however, those courts interpreted their respective state constitutional provisions as broad mandates of equality and held that once a state chooses to subsidize the costs associated with the exercise of constitutional rights, it must do so in a nondiscriminatory fashion.<sup>219</sup> Accordingly, the States acted in a discriminatory manner by allowing state-funding for an abortion when a mother's life was at risk, but not when only her health was endangered.<sup>220</sup> The Indiana Supreme Court explained its ruling as follows:

[T]he Indiana Constitution does not require Medicaid to pay for all abortions that are medically necessary.

. . . [But] so long as the Indiana Medicaid program pays for abortions to preserve the lives of pregnant women and where rape or incest cause pregnancy, it must also pay for abortions in cases of pregnancies that create for pregnant women serious risk of substantial and irreversible impairment of a major bodily function.<sup>221</sup>

The examples of these states show that even when a state constitutional provision is not facially *broader* than its federal counterpart, sufficiently *different* language may still allow for a broader interpretation. Moreover, such arguments may be most likely to succeed when pressed against state statutes that limit abortion access based on economic status.

---

<sup>217</sup> See *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980).

<sup>218</sup> See *Humphreys*, 796 N.E.2d at 258-59 (relying on IND. CONST. art. 1, § 23); *Panepinto*, 446 S.E.2d at 663 (relying on N.J. CONST. art. I, ¶ 1); *Byrne*, 450 A.2d at 931 (relying on W. VA. CONST. art. III, § 3). Compare IND. CONST. art. 1, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."), N.J. CONST. art. I, ¶ 1 ("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."), and W. VA. CONST. art. III, § 3 ("Government is instituted for the common benefit, protection and security of the people, nation or community."), with U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>219</sup> See *Panepinto*, 446 S.E.2d at 666; *Byrne*, 450 A.2d at 935.

<sup>220</sup> See *Panepinto*, 446 S.E.2d at 666; *Byrne*, 450 A.2d at 935.

<sup>221</sup> *Humphreys*, 796 N.E.2d at 248-49.

C. *Originalism and Textualism Are not the Barrier to State Constitutional Abortion Rights that They Are to Federal Abortion Rights*

In federal constitutional case law and commentary, originalism and textualism usually provide the theoretical underpinnings of arguments against abortion rights. No abortion, reproductive, or privacy right expressly appears in the text, and there is no evidence that the framers of the Constitution expressed any intention to formulate rules about abortion laws. To be sure, some have pressed originalist arguments *for* abortion rights based, for example, on a broad definition of the original meaning of “equal protection.”<sup>222</sup> Nevertheless, at least thus far in the constitutional debate, such arguments are a minority view, seeking to reclaim originalism for causes to which originalism has typically been seen as hostile.

As to state constitutions, however, originalism and textualism often *support* abortion rights for several reasons. First, as discussed in Part II.B above, there are strong textual and historical reasons for states to interpret a state privacy, autonomy, or gender rights provision more broadly than its federal counterpart. Second, original intent can provide support for interpreting state constitutional rights provisions more broadly than even *identically worded* federal constitutional rights provisions.<sup>223</sup>

Third, state constitutional rulings are less susceptible to criticisms of being undemocratic than are federal rulings.<sup>224</sup> Critics generally decry rulings which grant broad constitutional rights as undemocratic on the ground that the judges who issue such rulings are usurping power from more politically accountable branches and displacing democratic outcomes with essentially unamendable constitutional rules.<sup>225</sup> Although such criticisms arise from theoretical discussions of *federal* judicial rulings, they have been levied against *state* constitutional rulings as well. State constitutional rulings, however, are less susceptible to such criticism than are federal rulings. Whereas federal judges are appointed, most state judges are elected, and an elected judge’s ruling is less likely to be viewed as a usurpation of democratic processes. Further, because many state constitutions are easier to amend than the Federal Constitution, the democratic process is more capable of checking a state constitutional ruling. Even highly qualified commentators have overlooked these relevant differences between state and federal judiciaries.

Fourth, the fact that abortion rights are often implied, rather than express, constitutional rights should not be inherently troubling – a point that applies to federal and state constitutional interpretation alike.<sup>226</sup> Although the implied nature of constitutional abortion rights is often seen as a weakness, a closer

---

<sup>222</sup> See, e.g., Balkin, *supra* note 108, *passim*.

<sup>223</sup> See discussion *infra* Part III.C.1.

<sup>224</sup> See discussion *infra* Part III.C.2.

<sup>225</sup> See *infra* notes 275-279 and accompanying text.

<sup>226</sup> See discussion *infra* Part III.C.3.

look at the federal case law shows that implied rights are not really as controversial as they seem as a matter of original intent. Even committed originalists like Justice Scalia accept implied rights that comport logically with the broader constitutional scheme.<sup>227</sup>

1. Protecting Abortion Rights Under State Provisions Identical to the Federal Text: Relying on States' Original Intent and Rejecting Narrower Federal Decisions

The United States Supreme Court has recognized state courts' authority to interpret their own constitutions as providing greater protection than the Federal Constitution, even when the provisions of both have identical wording.<sup>228</sup> This authority comes from the fact that a state has a "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."<sup>229</sup> Indeed, Justice Brennan observed with approval that "more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased."<sup>230</sup> While such rulings yield "a divergence of meaning between words which are the same in both federal and state 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 . . ."<sup>231</sup> As Justice Brennan commented, state constitutions "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."<sup>232</sup> Accordingly, federal rulings "must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed."<sup>233</sup>

Nevertheless, there is little history of state courts recognizing broader state *reproductive rights* under identical state and federal constitutional provisions, despite courts having declared broader state rights in other privacy-related

---

<sup>227</sup> See SCALIA, *supra* note 116, at 37.

<sup>228</sup> See, e.g., *Oregon v. Kennedy*, 456 U.S. 667, 680-81 (1982) (Brennan, J., concurring); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

<sup>229</sup> *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980).

<sup>230</sup> Brennan, *Protection of Individual Rights*, *supra* note 117, at 495; see also Brennan, *Guardians of Individual Rights*, *supra* note 117, at 548-49 ("As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law.").

<sup>231</sup> Brennan, *Protection of Individual Rights*, *supra* note 117, at 500 (quoting *State v. Kaluna*, 520 P.2d 51, 58 n.6 (Haw. 1974)).

<sup>232</sup> *Id.* at 491.

<sup>233</sup> *Id.*

areas such as search and seizure restrictions.<sup>234</sup> The dearth of state abortion jurisprudence, however, may simply reflect how early in the abortion wars *Roe* arrived on the scene to establish broad federal abortion rights. Just as *Roe* preempted state legislative battles on abortion,<sup>235</sup> it may have preempted development of state constitutional abortion jurisprudence too. Thus, the decline of *Roe* may invite – and perhaps even require – state courts to confront the decision whether to recognize broad abortion rights under their state constitutions.

Perhaps the only case to recognize broader state than federal abortion rights in the absence of any meaningful textual difference between the corresponding state and federal constitutional provisions is *Women of the State of Minnesota v. Gomez*.<sup>236</sup> There, the Supreme Court of Minnesota relied upon the state constitutional right of privacy<sup>237</sup> to invalidate several state statutes “that restrict[ed] the use of public funds for abortion-related medical services to three limited circumstances while permitting the use of such funds for comprehensive childbirth-related medical services.”<sup>238</sup> The United States Supreme Court had previously rejected an analogous federal constitutional argument in upholding similar funding restrictions in *Harris v. McRae*.<sup>239</sup> Nevertheless, the Supreme Court of Minnesota declared that it “may interpret the Minnesota Constitution to offer greater protection of individual rights than the U.S. Supreme Court has afforded under the federal constitution.”<sup>240</sup> Accordingly, the court deemed it appropriate to declare broader abortion rights under the state constitution and held “to the extent that *McRae* stands for the proposition that a legislative funding ban on abortion does not infringe on a woman’s right to choose abortion, we depart from *McRae*.”<sup>241</sup>

*Hope v. Perales* may be the only other state case to (almost) recognize broader state than federal abortion rights in the absence of a relevant textual difference between state and federal constitutional provisions.<sup>242</sup> There, the statute at issue denied abortion funding for low income (but not indigent)

---

<sup>234</sup> See, e.g., *Reeves v. State*, 599 P.2d 727, 734 (Alaska 1979); *State v. Johnson*, 346 A.2d 66, 67 (N.J. 1975).

<sup>235</sup> See *supra* notes 37-40 and accompanying text.

<sup>236</sup> 542 N.W.2d 17 (Minn. 1995).

<sup>237</sup> The Supreme Court of Minnesota found the right of privacy “rooted in Article I, Sections 1, 2 and 10 [of the Minnesota Constitution].” *Id.* at 26 n.10. Accordingly, like the Federal Constitution, the Minnesota Constitution gave rise to a merely implied, penumbral right of privacy. *Id.* at 26.

<sup>238</sup> *Id.* at 19.

<sup>239</sup> 448 U.S. 297, 318 (1980).

<sup>240</sup> *Gomez*, 542 N.W.2d at 30.

<sup>241</sup> *Id.* at 29-30.

<sup>242</sup> *Hope v. Perales*, 571 N.Y.S.2d 972, 981-82 (N.Y. Sup. Ct. 1991), *aff’d*, 595 N.Y.S.2d 948 (N.Y. App. Div. 1993), *rev’d*, 634 N.E.2d 183 (N.Y. 1994).

women, and since the statute plainly satisfied federal constitutional standards, only the New York Constitution was in issue.<sup>243</sup> Although the state constitution's due process and equal protection provisions were no broader than those in the federal text,<sup>244</sup> both the trial and appellate courts found the statute "intrude[d] on the fundamental right of an eligible woman for whom an abortion is medically prescribed,"<sup>245</sup> and thus violated both substantive due process liberties<sup>246</sup> and economics-based equal protection.<sup>247</sup>

The New York Court of Appeals subsequently reversed, but did so without reaching the issue of state-versus-federal constitutional interpretation.<sup>248</sup> Because the plaintiffs were not indigent – just relatively lower-income<sup>249</sup> – and because there was "no evidence that eligible women are coerced, pressured, steered or induced by [the statute] to carry pregnancies to term,"<sup>250</sup> the court found that the statute's denial of abortion funds did not "in any sense burden a fundamental right."<sup>251</sup> Despite reversing the lower court judgment, the New York Court of Appeals left open the argument for broader state constitutional abortion rights stating, in dicta, that "the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is *at least* as extensive as the Federal constitutional right."<sup>252</sup> Thus, despite the plaintiffs' loss, *Hope* showed that a number of New York judges support broader abortion rights under the state constitution.

As federal abortion rights decline, the argument that existing state constitutional abortion rights should not automatically decline every time the Supreme Court narrows its interpretation of the Federal Constitution will only become stronger. Indeed, in other areas of constitutional law, the New York Court of Appeals has been a prime example of a state high court (1) finding broader state rights absent a textual difference between the state and federal

---

<sup>243</sup> See *Hope v. Perales*, 634 N.E.2d 183, 186 (N.Y. 1994).

<sup>244</sup> Compare N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law."), and N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof."), with U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>245</sup> See *Hope*, 571 N.Y.S.2d at 981.

<sup>246</sup> *Id.* at 980.

<sup>247</sup> *Id.* at 982.

<sup>248</sup> *Hope*, 634 N.E.2d at 187.

<sup>249</sup> *Id.* at 188. The statute restricted funding only for women with income above 185% of the poverty line. *Id.* at 185.

<sup>250</sup> *Id.* at 187.

<sup>251</sup> *Id.* at 188.

<sup>252</sup> *Id.* at 186 (emphasis added) (citation omitted).



provisions and (2) declining to narrow state rights in accordance with a narrowing of parallel federal rights. For example, in the leading case of *People v. P.J. Video, Inc.*,<sup>253</sup> the court expressly declined to follow, as a matter of state constitutional law, a United States Supreme Court decision narrowing a federal constitutional right.<sup>254</sup> The case featured a back-and-forth of state and federal constitutional decisions on search warrants. First, the New York Court of Appeals suppressed evidence on the ground that it was obtained in violation of the Fourth Amendment as well as the essentially identical<sup>255</sup> state constitutional provision.<sup>256</sup> On appeal, the United States Supreme Court rejected the state court's Fourth Amendment interpretation and reversed, deeming the evidence admissible.<sup>257</sup> On remand, the New York Court of Appeals then held that although the evidence satisfied federal law, it failed to comport with the analogous state constitutional requirements.<sup>258</sup>

[T]he Supreme Court of the United States found the evidence satisfied the requirements of the Fourth Amendment to the Federal Constitution and . . . remanded the case to us so that we could decide whether article I, § 12 of the State Constitution imposes a more exacting standard for the issuance of search warrants authorizing the seizure of allegedly obscene material than does the Federal Constitution. We hold that it does and we therefore affirm the order of the County Court suppressing the [evidence].<sup>259</sup>

The Supreme Court of Wisconsin provides another example of a state high court declining to narrow state constitutional rights in the face of narrowing parallel federal rights. In 2005 alone, the court issued three decisions declaring broader rights under Wisconsin constitutional provisions – due process, right to counsel, and equal protection, respectively – than under essentially identical

---

<sup>253</sup> 501 N.E.2d 556 (N.Y. 1986).

<sup>254</sup> *See id.* at 558.

<sup>255</sup> Compare N.Y. CONST. art. 1, § 12 (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”), with U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>256</sup> *See People v. P.J. Video, Inc.*, 483 N.E.2d 1120, 1123-25 (N.Y. 1985), *rev'd*, 475 U.S. 868 (1986).

<sup>257</sup> *See New York v. P.J. Video, Inc.*, 475 U.S. 868, 874-76 (1986).

<sup>258</sup> *See P.J. Video, Inc.*, 501 N.E.2d at 558.

<sup>259</sup> *Id.* (footnote omitted) (citation omitted).

federal constitutional provisions.<sup>260</sup> Further, like *P.J. Video*, one of those rulings was a direct response to a United States Supreme Court decision narrowly construing federal constitutional rights in the same case.<sup>261</sup>

The first of these cases was *State v. Dubose*,<sup>262</sup> in which the court held, under the state Due Process Clause, that “showups” (showing a crime victim just the suspect, rather than a lineup of people) are “inherently suggestive and will not be admissible unless . . . necessary” (e.g., if exigency precludes alternatives).<sup>263</sup> This holding is contrary to federal jurisprudence which requires only evaluation of the identification process’s suggestiveness and the resulting identification’s reliability in order to be admissible.<sup>264</sup> The second was *State v. Knapp*,<sup>265</sup> in which the court expanded the state constitutional exclusionary rule to require suppression of physical evidence obtained following a police failure to provide Miranda warnings.<sup>266</sup> In a sequence similar to that in *P.J. Video*, the United States Supreme Court rejected this position under the Federal Constitution during the pendency of the *Knapp* state litigation.<sup>267</sup> The third was *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*,<sup>268</sup> in which the court interpreted the state’s Equal Protection Clause as disallowing a cap on noneconomic damages in medical malpractice cases<sup>269</sup> – a holding far out of sync with federal jurisprudence which “refuse[s] seriously to consider . . . equal protection challenges to economic regulation.”<sup>270</sup>

These cases interpreting state constitutional rights more broadly than their federal counterparts are, however, the exceptions. There are many more examples of state courts rejecting efforts to establish broader state than federal

---

<sup>260</sup> See *infra* notes 262-270 and accompanying text.

<sup>261</sup> See *State v. Knapp*, 700 N.W.2d 899, 901 (Wis. 2005).

<sup>262</sup> 699 N.W.2d 582 (Wis. 2005).

<sup>263</sup> *Id.* at 584-85.

<sup>264</sup> See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972).

<sup>265</sup> 700 N.W.2d 899 (Wis. 2005).

<sup>266</sup> See *id.* at 918 (commenting that “[t]his is not the first time [the court has] explicitly departed from federal constitutional jurisprudence to extend greater rights to Wisconsin citizens”).

<sup>267</sup> See *United States v. Patane*, 542 U.S. 630 (2004).

<sup>268</sup> 701 N.W.2d 440 (Wis. 2005).

<sup>269</sup> See *id.* at 491.

<sup>270</sup> Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 222 (1991); see also William Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87, 90 (1990).

constitutional rights.<sup>271</sup> In New York, *P.J. Video* has been frequently distinguished in subsequent cases involving similar constitutional provisions:

We have observed that because the search and seizure language of the Fourth Amendment and of article I, § 12 is identical, they generally confer similar rights. Nevertheless, this Court has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved.

....

... None of the reasons for extending protections of our Constitution beyond those given by the Federal Constitution exist here.<sup>272</sup>

In states with constitutional rights provisions that closely track the Federal Constitution, the prospect of broader state constitutional reproductive rights in a post-*Roe* world is uncertain. Still, although arguments for expanding state rights beyond identically phrased federal analogues have a limited track record of success, the several successes have come when state courts choose to preserve under state law an existing right which the United States Supreme Court is narrowing – exactly the situation following *Roe*'s decline.

## 2. The Less Undemocratic Nature of *State* Constitutional Rulings

One common argument for narrow theories of originalism and textualism is that broader theories of federal constitutional rights are undemocratic in the sense that they authorize unelected judges to overturn democratically enacted laws via difficult-to-amend constitutional rulings. In decrying the finding of federal constitutional rights beyond what the text literally states and the framers originally intended, Justice Scalia has argued, in typically colorful invective, that “this most illiberal Court . . . has embarked on a course of inscribing one after another of the current preferences of the society (and in

---

<sup>271</sup> See, e.g., *State v. Davis*, 304 N.W.2d 432, 434 (Iowa 1981) (holding that express waiver of the rights to remain silent and to counsel is not required by the state constitution); *State v. Buzzell*, 617 A.2d 1016, 1018-19 (Me. 1992) (holding that electronic recording of custodial interrogation is not required by the state constitution); *Gamble v. State*, 567 A.2d 95, 100 (Md. 1989) (declining to interpret the state constitutional search and seizure provision more expansively than the federal provision); *Webster v. State*, 474 A.2d 1305, 1321 (Md. 1984) (refusing to recognize a state constitutional right to counsel); *McCroory v. State*, 342 So. 2d 897, 900 (Miss. 1977) (en banc) (interpreting the state self-incrimination clause in accord with the federal clause); *Edwards v. State*, 815 P.2d 670, 672 (Okla. Crim. App. 1991) (affording a state double jeopardy provision similar meaning as its federal analogue); *State v. Spurgeon*, 820 P.2d 960, 963 (Wash. Ct. App. 1991) (stating that failure to tape record an interrogation did not violate the state constitution).

<sup>272</sup> *People v. Robinson*, 767 N.E.2d 638, 642-43 (N.Y. 2001) (citations omitted); see also *Grinberg v. Safir*, 694 N.Y.S.2d 316, 327 (N.Y. Sup. Ct. 1999) (“New York’s Excessive Fines clause requires the same analysis as the federal, and provides no greater protection.”).

some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law."<sup>273</sup>

This "three un's" argument – that essentially *unamendable* rulings by *unelected* judges are *undemocratic* – has been applied to criticize state constitutional rulings as well. A striking example arose from the above-discussed line of rulings issued by the Supreme Court of Wisconsin, in which the court construed several state constitutional rights provisions more broadly than the federal courts had interpreted identical federal provisions.<sup>274</sup> In particular, these rulings drew heavy criticism from Judge Diane Sykes, a sitting Seventh Circuit judge and former Wisconsin Supreme Court justice.<sup>275</sup> Judge Sykes attacked such broad constitutional rulings as undemocratic for several reasons: (1) "legislative correction [of the ruling] is impossible and the constitution is difficult to amend,"<sup>276</sup> (2) the state court is "plainly disinclined to defer to the judgment of those elected to represent the people,"<sup>277</sup> and (3) such rulings are refusals to "defer[] to the political process."<sup>278</sup> Others have lodged similar complaints.<sup>279</sup>

Even coming from an analyst as qualified as Judge Sykes, however, such criticism ignores critical state-federal distinctions that make broad state constitutional rights rulings less undemocratic than broad federal constitutional rights rulings. To begin, there is notably more democracy in most state judiciaries than in the federal judiciary as the vast majority of state appellate judges (including those in Wisconsin) are subject to popular election.<sup>280</sup> Even at the highest levels – state supreme court elections – "[j]udges who are running for election take the time to ride with law enforcement officers, make rounds with social workers and doctors, visit schools and factories, and lunch with the fork-and-knife clubs and bar associations."<sup>281</sup> Based on this reality of

<sup>273</sup> *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

<sup>274</sup> See *supra* notes 261-270 and accompanying text.

<sup>275</sup> Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 738 (2006).

<sup>276</sup> *Id.* at 737.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> See, e.g., Michael S. Kenitz, Comment, *Wisconsin's Caps on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (and Should Stand) on "Tort Reform,"* 89 MARQ. L. REV. 601, 623-24 (2006) (criticizing the Wisconsin Supreme Court's disallowance of a cap on noneconomic damages in medical malpractice cases in *Ferdon ex rel. Petrucci v. Wisconsin Patients Compensation Fund*, 701 N.W.2d 440, 491 (Wis. 2005)).

<sup>280</sup> See Shirley S. Abrahamson, Speech, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001) ("Nearly 87% of state trial judges and nearly 82% of state appellate judges stand for election of some type.").

<sup>281</sup> *Id.* at 977.

state judiciaries, “[e]lecting judges is citizen participation. Elections legitimize the judicial authority.”<sup>282</sup>

Admittedly, viewing elections as authorization for judicial action may be somewhat of an overstatement, for how many voters really know about, much less vote based on, even major state judicial decisions? But the same limit on democratic accountability exists for, say, gubernatorial elections: how often do voters really know about, or vote based on, even major state regulations? Thus, there are similar limits on democratic accountability for governors, state judges, and state legislators. But, that is no argument that all three branches of government are undemocratic. At the very least, the argument that broad constitutional rulings interfere with the political process and with those elected to represent the people<sup>283</sup> is far weaker at the state level than at the federal level because state judges themselves are elected to represent the people as part of the political process.

Another reason state rulings are less undemocratic is that many state constitutions are far more readily amendable by the democratic process than is the Federal Constitution. This undercuts Judge Sykes’s argument that, following state constitutional rulings, “legislative correction is impossible and the constitution is difficult to amend.”<sup>284</sup> In fact, almost a third of all state constitutions can be amended by a majority of the popular vote<sup>285</sup> and such procedures are in wide use. For example, “[a]ll significant amendments to the Colorado Constitution since the 1930s have originated as ballot initiatives. California, Oregon, and several other states have similar histories.”<sup>286</sup> Moreover, such “[c]onstitutional initiatives are often responses to state judicial rulings.”<sup>287</sup> Even in states requiring legislative, rather than voter, approval, state constitutional amendments are much more common than at the federal level. For example, while the Federal Constitution has been amended only seventeen times since the Bill of Rights, there were thirteen state constitutional amendments in 2004 alone (a rate of about one constitutional amendment per state every 3.8 years) and more than half of those began in state legislatures

---

<sup>282</sup> *Id.* at 980.

<sup>283</sup> See Sykes, *supra* note 275, at 737.

<sup>284</sup> *Id.* at 736-37.

<sup>285</sup> See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1546 (1990) (stating that sixteen states permit constitutional amendment by a majority of the popular vote); Rebekah K. Browder, Comment, *Internet Voting with Initiatives and Referendums: Stumbling Towards Direct Democracy*, 29 SEATTLE U. L. REV. 485, 509 (2006).

<sup>286</sup> Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 983 (2001) (footnote omitted).

<sup>287</sup> Eule, *supra* note 285, at 1547.

rather than through ballot initiatives.<sup>288</sup> That state constitutions are amended much more frequently makes those states' constitutional rulings much less a democratic override than a comparable federal ruling.

Of course, there remains a powerful argument against excessive judicial exercise of the power to invalidate other branches' decisions in that "the legislature is in a better position than the courts to gather, weigh, and reconcile . . . competing polic[ies]."<sup>289</sup> This argument, however, is equally powerful against state and federal rulings alike. Moreover, this principle may or may not be dispositive in a particular case and is subject to counterarguments. For example, when individual rights are determined by legal procedural rules – such as a "judicial bypass" for parental/spousal notification requirements – a court is "in a much better position than the Legislature to decide what new rules would be most effective."<sup>290</sup>

The point here is not that all arguments against broad federal rulings are wholly irrelevant to state rulings. Rather, it is that most state judiciaries are more accountable to the electorate and more subject to democratic reversal than the federal judiciary. Key arguments against broad constitutional rights rulings, therefore, are far less applicable to state rulings than commonly recognized. Accordingly, state court recognition of broader abortion rights would not be nearly the usurpation of democratic processes that is commonly portrayed.

### 3. The Legitimacy of Implied Rights: A Spectrum

As indicated in the above analysis, most state constitutional abortion rights are implied, rather than express. The very notion of implied rights is, of course, controversial. Textualists and most originalists, though differing as to certain specifics, tend to oppose most implied rights. The argument is that to the extent constitutional provisions possess a generally knowable and limited range of meaning, "no interpretation that goes beyond that range is permissible,"<sup>291</sup> and courts recognizing rights not grounded in the text are improperly "creat[ing] rights that the Constitution does not contain."<sup>292</sup>

---

<sup>288</sup> See J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 572 (2006).

<sup>289</sup> *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 739 (Wis. 1997); accord *Kenitz*, *supra* note 279.

<sup>290</sup> Joseph A. Ranney, *Practicing Law in 20th Century Wisconsin: Continuity and Change in Everyday Legal Life, Part 2*, WIS. LAW., July 1997, at 20, 22 (referencing an argument made by Wisconsin Supreme Court Chief Justice John Winslow in regards to the procedural reform movement in Wisconsin).

<sup>291</sup> SCALIA, *supra* note 116, at 24; see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 167 (1990) ("The philosophy of original understanding does not produce a rigid Constitution or a mechanical jurisprudence. Instead,

However, even originalists concede that, due to the necessary brevity of its text,<sup>293</sup> “the Constitution tells us . . . to give words and phrases an expansive rather than narrow interpretation – though not an interpretation that the language will not bear.”<sup>294</sup> Such expansive interpretation makes it proper for courts to find non-textual rights that are strongly implied by a constitutional provision. For example, the First Amendment protects freedom of speech and of the press, as well as the right to assemble and to petition the government. A “reasonable construction,”<sup>295</sup> however, could extend these protections beyond speaking, press printing, assembling, and petitioning to other modes of communication including flag burning,<sup>296</sup> filmmaking,<sup>297</sup> and wearing clothing bearing a profane message of protest.<sup>298</sup> Thus, even to a committed originalist like Justice Scalia, the Constitution may disallow a federal law even when “there is no constitutional text speaking to th[e] precise question.”<sup>299</sup> “It is not at all unusual for [the Court’s] resolution of a significant constitutional question to rest upon reasonable implications”<sup>300</sup> found “in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of th[e] Court.”<sup>301</sup>

These examples illustrate that there is often a discernable original intent, and a strong basis in the text, suggesting that constitutional rights provisions be construed broadly. This is why, contrary to a popular misconception, originalists do support a number of broad interpretations of constitutional provisions – such as Justice Scalia’s broad interpretations of rights against pretrial detention,<sup>302</sup> rights against police stops,<sup>303</sup> rights to expressive conduct,<sup>304</sup> states’ rights to freedom from federal compulsion,<sup>305</sup> and states’

---

it controls the process of growth in constitutional doctrine in ways that preserve the document’s relevance and integrity.”).

<sup>292</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting).

<sup>293</sup> *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>294</sup> SCALIA, *supra* note 116, at 37.

<sup>295</sup> *Id.* at 38.

<sup>296</sup> *See, e.g., United States v. Eighman*, 496 U.S. 310, 312 (1990); *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

<sup>297</sup> *See, e.g., Jenkins v. Georgia*, 418 U.S. 153, 155 (1974).

<sup>298</sup> *See, e.g., Cohen v. California*, 403 U.S. 15, 26 (1971).

<sup>299</sup> *Printz v. United States*, 521 U.S. 898, 905 (1997).

<sup>300</sup> *Id.* at 923-24 n.13.

<sup>301</sup> *Id.* at 905.

<sup>302</sup> *See County of Riverside v. McLaughlin*, 500 U.S. 44, 66 n.2 (1991) (Scalia, J., dissenting).

<sup>303</sup> *See Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

<sup>304</sup> *See Texas v. Johnson*, 491 U.S. 397, 399 (1989).

<sup>305</sup> *See Printz*, 521 U.S. at 905.

rights against federal litigation.<sup>306</sup> Going further, some originalists see an original intent to provide constitutional protection for unenumerated rights based on broad, general constitutional provisions like the Ninth Amendment<sup>307</sup> as “a meaningful check on federal power and a significant guarantee of individual liberty.”<sup>308</sup>

Thus, except for those textualists and originalists adopting the narrowest views of constitutional text and intent, there is no bright line of legitimacy between rights *clearly listed* in text and rights *impliedly supported* by it. In short, the presence or absence of textual support for a right is not a binary yes or no condition, but instead lies along a spectrum. The spectrum of textual support for implied rights (categories two, three, and four below) can be seen in the opinions of Justices not typically viewed as those most likely to recognize implied rights:

---

<sup>306</sup> Martin A. Schwartz & George C. Pratt, *Section 1983 Litigation*, 14 *TOURO L. REV.* 299, 312 (1998) (highlighting the Court’s “broad interpretation of the Eleventh Amendment protecting states’ rights” in opinions joined by Justices Scalia and Thomas).

<sup>307</sup> U.S. CONST. amend. IX.

<sup>308</sup> Barnett, *supra* note 192, at 1.



<u>Level of Textual Support</u>	<u>Example</u>
1. A right <b>clearly delineated</b> by the text	The 1798 Sedition Act ban on falsely criticizing government unconstitutionally abridged freedom of the press <sup>309</sup>
2. A right <b>strongly implied</b> by the text, based on a clear similarity of the right asserted and one clearly delineated in the text	Justice Scalia's view that the First Amendment protections of speech, press, and assembly imply a right to other expressive conduct <sup>310</sup>
3. A right <b>fairly implied</b> not by any particular text but by the constitution's structure or intent	Justice Scalia's view that original intent supports atextual states' rights to freedom from federal compulsion <sup>311</sup>
4. A right <b>not specifically listed</b> in text and absent from original intent but that evolved to be part of the meaning of a broad constitutional rights provision	Justice Kennedy's view that the Constitution protects gay rights because "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom" <sup>312</sup>

The above discussion and chart do not purport to fully analyze the various methods of constitutional interpretation – an issue well beyond the scope of this Article and one which has been much-debated over many years.<sup>313</sup> Rather, the above seeks only to illustrate that implied constitutional rights are less controversial than they might at first seem. They exist along a spectrum, and the vast majority of those who criticize certain implied rights still accept others in some form.

---

<sup>309</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

<sup>310</sup> See SCALIA, *supra* note 116, at 38.

<sup>311</sup> See *Printz v. United States*, 521 U.S. 898, 905 (1997).

<sup>312</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>313</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); SCALIA, *supra* note 116, *passim*; Randy E. Barnett, *Scalia's Infidelity: A Critique Of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

That implied rights exist along a spectrum is particularly important with respect to a serious comparative analysis of rights under state constitutions. Privacy and autonomy provisions, for example, most strongly imply abortion rights – an implication often strongly supported by original intent, as in category two above. Other state constitutions imply abortion rights less explicitly, for example, by not using the word “privacy” – essentially a synonym for reproductive rights after *Griswold* and *Roe* – or by placing the reference to privacy in a search and seizure provision which leaves its intent unclear.<sup>314</sup> Yet such constitutions may still protect abortion rights as a matter of fair implication from a variety of autonomy- or equality-protective provisions, or as a matter of original intent – as in category three above. Finally, just as the United States Supreme Court has protected reproductive and sexual privacy rights under largely “evolving meaning” theories – category four above – state supreme courts may reach similar conclusions under their own state constitutions, regardless of whether the United States Supreme Court departs from its prior interpretations of that sort.

CONCLUSION: THE INTRIGUING FEDERALISM IMPLICATIONS OF A POST-*ROE*  
STATE CONSTITUTIONALIZATION OF ABORTION RIGHTS

A. *The Promise of State Constitutional Arguments for Abortion Rights*

This Article shows how, due to *Roe*'s decline, abortion rights advocates, after spending decades urging the Supreme Court to make abortion a matter of federal constitutional law, suddenly have reason to press state sovereignty arguments. This Article analyzes those arguments, finding that although most arguments for broader state than federal constitutional rights fail, arguments for broader state than federal abortion rights seem promising for a number of reasons. The text and original intent of many state constitutions support, to varying degrees and in varying ways, arguments that the state constitution should protect broader abortion rights than the Federal Constitution. Specifically, the sort of gender- and autonomy-based arguments proposed as alternatives to *Roe*'s reasoning may find support in those state constitutions which contain broader gender equality and autonomy rights than does the Federal Constitution. Further, some state courts have been particularly receptive to arguments for broader state rights as a way to preserve suddenly declining federal rights – exactly the situation facing *Roe*.

Certainly, arguments for broad state constitutional rights face many of the same objections which *Roe* has drawn. For instance, in most states, state constitutional abortion rights would be merely implied, rather than express, and judicial declarations of broad implied constitutional rights may be considered an undemocratic usurpation of democratic governance. These

---

<sup>314</sup> See *supra* Part III.B.1.c.

arguments, however, hold less water than is commonly recognized – especially when aimed at rulings made under a state constitution. First, a close look at the case law shows that virtually all analysts accept some degree of implied rights. Moreover, with most state judges elected, and most state constitutions far more amendable than the Federal Constitution, arguments that constitutional rulings are undemocratic carry far less weight as to many state constitutions than as to the Federal Constitution.

One pragmatic note of skepticism bears mention: the states most likely to enact abortion restrictions might seem, because of their conservative leanings, the ones whose supreme courts are least likely to accept abortion rights arguments. Yet the judicial branch often diverges ideologically from the other branches of government. At the federal level, the late 1960s and early 1970s Supreme Court was notoriously out of sync with the Nixon administration,<sup>315</sup> and the Court's 1995-2000 federalism rulings came at the expense of Clinton administration priorities such as gun control<sup>316</sup> and women's rights laws.<sup>317</sup> At the state level, examples include the all-Democrat Florida Supreme Court's conflict with Republican Governor Jeb Bush and Secretary of State Kathleen Harris in the 2000 election,<sup>318</sup> as well as the Massachusetts Supreme Judicial Court's mandate of gay marriage over the opposition of Governor Mitt Romney and the Massachusetts legislature.<sup>319</sup> Thus, even where a state's governor and legislature pass laws restricting abortion rights, that state's courts may yet be willing and able to fulfill their traditional role as a check on the excesses of the other branches.

#### B. *Intriguing Stare Decisis and Federalism Implications of Shifting Abortion Rights to the States*

This Article's prediction that arguments for abortion rights under state constitutions will prevail in a number of states has interesting implications for stare decisis and federalism. As to stare decisis, while state protection of declining federal rights could be seen as a state *rejecting* stare decisis (i.e., abstaining from the usual state practice of following federal precedent), it alternatively could be seen as *adhering* to the premises of stare decisis. One rationale for stare decisis is the importance of protecting reliance upon

---

<sup>315</sup> See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

<sup>316</sup> See *Printz v. United States*, 521 U.S. 898, 905 (1997); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

<sup>317</sup> See *United States v. Morrison*, 529 U.S. 598, 601-02 (2000).

<sup>318</sup> Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1293-94 (2001).

<sup>319</sup> See Goutam U. Jois, Note, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L. L. REV. 509, 512-13 (2006).

established rights.<sup>320</sup> Federal decisions undercutting *Roe* harm such reliance and a state court might decide to use the state's constitution to protect women's reliance on abortion rights, which have been robust for "[a]n entire generation [that] has come of age free to assume . . . liberty in defining the capacity of women to act in society, and to make reproductive decisions."<sup>321</sup> Replacing a declining federal constitutional right with a state constitutional right may make legal doctrine less predictable for the legal establishment, but more predictable for laypeople who need know only whether they have a certain right, not which constitutional text (state or federal) provides the source of the right. In short, state protection of declining federal rights makes doctrine less *formally* consistent (to lawyers) but more *realistically* consistent (to the citizenry), and more in conformity with a key purpose of *stare decisis*: protecting citizens' reliance on rights they have come to enjoy.

As to federalism, in pressing state constitutional arguments, abortion rights advocates would be urging states to reject a federal standard and instead interpret their constitutions differently from the Federal Constitution. This move toward urging state variation shows how federalism can be ideologically indeterminate, sometimes supporting one side and sometimes supporting the other on a given social issue.<sup>322</sup> In particular, federalism can be friend or foe to progressive movements, as illustrated by how late nineteenth-century feminists succeeded at reforming *state* laws while, at the same time, drew only harsh backlash from the *federal* courts.<sup>323</sup>

Notably, this federal-to-state shift would be an anomalous sort of "reverse federalism." The traditional model of federalism is that states serve as laboratories, where they experiment with different laws and policies so that failures are small- rather than large-scale, and successes may be adopted elsewhere.<sup>324</sup> Other civil rights protections evolved in just this manner; for example, numerous state anti-discrimination laws preceded the Federal Civil Rights Act of 1964.<sup>325</sup> In contrast, in the abortion context, federal law preempted state law. Although this may be appropriate as a normative matter,

---

<sup>320</sup> See, e.g., Rafael Gely & Leonard Bierman, *Labor Law Access Rules and Stare Decisis: Developing a Planned Parenthood-Based Model of Reform*, 20 BERKELEY J. EMP. & LAB. L. 138, 171 (1999); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 25 n.87 (1983); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 772 (2004).

<sup>321</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

<sup>322</sup> See Paul D. Moreno, "So Long as Our System Shall Exist": *Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 742 (2005).

<sup>323</sup> See Siegel, *supra* note 72, at 67.

<sup>324</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>325</sup> For example, in 1951 New York enacted a discrimination law paralleling and preceding the 1964 Federal Civil Rights Act. See *Holland v. Edwards*, 119 N.E.2d 581, 582 (N.Y. 1954).

it leaves the country in the reverse of the usual state of affairs, with the *federal* experiment of *Roe* now petering out. Essentially, rather than state experimentation providing guidance to later federal law, we have the reverse situation in which federal law emerged and then began a gradual decline, leaving states not to experiment with, but rather to perfect the earlier federal experiment.

States have a rare opportunity to learn from a disjointed federal experience and to set their own course. Many state supreme courts may find comfort in understanding that such a pioneering endeavor would be supported by the text and history of their constitutions, and that recognizing implied rights under state law is not the usurpation of democratic processes that it might be at the federal level. Accordingly, state courts are well-equipped, and would be well-justified, to respond to the decline of federal constitutional abortion rights by recognizing such rights under their own state constitutions.

*BOSTON UNIVERSITY LAW REVIEW*