# COMPELLING GOVERNMENTAL INTEREST JURISPRUDENCE OF THE BURGER COURT: A NEW PERSPECTIVE ON *ROE v. WADE*

The United States Supreme Court has often undertaken a substantive analysis under the due process and equal protection clauses of the burdens legislation imposes on the exercise of constitutional rights, particularly those rights recognized by the Court as "fundamental."[1] The analytic process reduces to a balancing of the asserted governmental interest implicated against the constitutional right involved, in order to determine the relative strength, or "compellingness," of the governmental interest.[2] The Supreme Court employed such an analysis in *Roe v. Wade*[3] to hold that the fundamental right of personal privacy under the due process clause of the fourteenth amendment is sufficiently broad to encompass a woman's right to choose an abortion.[4] The Court concluded, however, that the exercise of this right can be limited by governmental action when the state interests in protecting maternal health, maintaining medical standards, and protecting potential life are sufficiently "compelling" to justify the governmental limitation.[5]

This Comment contends that the *Roe* Court omitted an integral step, preliminary to balancing, in the process of recognizing governmental

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[1] Judicial review of most legislation burdening individual rights has been undertaken by the Court at two levels: the rational relationship, or basis, level and the strict scrutiny level of analysis. When legislation burdens a right not deemed fundamental, the legislation need only bear a rational relationship to a permissible governmental end in order to be upheld. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955). On the other hand, if legislation burdens a right deemed fundamental, the legislation will be reviewed under a strict scrutiny standard to determine whether it is necessary to further a compelling state interest. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963). The legislation must be narrowly tailored to further only the compelling state interest at stake, and there can be no less intrusive alternative means available to further the interest. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940). Legislation almost always passes the rational basis test because the test requires only the existence of a conceivable rational relationship between the legislation and a permissible government end. Legislation rarely survives strict scrutiny because this test requires a compelling state interest and a relationship of necessity between that interest and the means chosen to further it. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 448-51 (2d ed. 1983). Equal protection and due process analyses of burdens on rights are similar in form because of their related wellsprings in fairness. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (stating that "discrimination may be so unjustifiable as to be violative of due process") (footnote omitted).

[2] *See supra* note 1.

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

[4] *Id.* at 153-54.

[5] *Id.* at 154-55. Later in the opinion, Justice Blackmun speaks of only two interests, maternal health and potential life. *Id.* at 162-63. Apparently, the Court has since viewed maintaining medical standards as implicit in protecting maternal health, for it was not again expressly mentioned in any of the Court's abortion decisions.

interests.[6] Justice Blackmun, writing for the majority in *Roe,* did not establish the constitutional legitimacy of the asserted governmental interests by associating them with some constitutional value and by establishing which purposes and powers of government, derived from specific constitutional provisions, support their assertion by government.[7] On the contrary, the Court took the view that the compellingness, or constitutional strength, of the governmental interests is a function of the resolution of issues of medical fact involving the relative safety of the abortion procedure and the potential for survival of a fetus outside the womb.[8] This view does not make the balance struck between the governmental interests and a woman's right to choose an abortion depend on their relative constitutional strengths.[9] The Court's view instead makes the balance depend upon choices it has made on the basis of medical fact as to when the governmental interests should prevail over the right to choose an abortion.[10] The Court's adoption of this view is not an appropriate framework for deciding issues of law, because the choices adopted by the Court in *Roe* are more in the nature of policy decisions normally made by the legislature than results reached through a process of judicial decisionmaking.[11]

This Comment will review and critique the Supreme Court's abortion decisions, and its analysis of governmental interests under the *Roe* trimester framework, giving particular attention to the flaws inherent in the Court's approach in *Roe.*[12] The constitutional legitimacy of the governmental interests articulated in *Roe* will then be established by examining and analyzing the relevant provisions and history of the federal and state constitutions.[13] Next, the existence and constitutional legitimacy of a governmental interest in protecting a woman's right to choose an abortion will be established.[14] Finally, this Comment will explore the ramifications of the constitutional legitimacy of these governmental interests for *Roe,* its progeny, and the compelling governmental interest jurisprudence of the Burger Court.[15]

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[6] *See infra* notes 27-39 and accompanying text.
[7] *See infra* notes 88-116, 117-48 and accompanying text.
[8] *See infra* notes 23-26 and accompanying text.
[9] *See infra* notes 35-39 and accompanying text.
[10] *See infra* notes 32-34 and accompanying text.
[11] *See infra* note 34 and accompanying text.
[12] *See infra* notes 27-39, 82-87 and accompanying text.
[13] *See infra* notes 88-148 and accompanying text.
[14] *See infra* notes 149-93 and accompanying text.
[15] *See infra* notes 194-216 and accompanying text.

## I. CRITIQUE OF THE ABORTION DECISIONS

The United States Supreme Court first addressed the issue of a woman's right to choose an abortion in *Roe v. Wade*[16] and its companion case *Doe v. Bolton.*[17] Writing for the majority in *Roe,* Justice Blackmun found that Texas statutes which made it a crime to procure or attempt an abortion when the mother's life is not in danger violated the due process clause of the fourteenth amendment.[18] The right of personal privacy, which had evolved out of other constitutional principles through a long line of Supreme Court decisions,[19] was held to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[20] This right was found not to be absolute, however, because the state, according to Justice Blackmun, has legitimate interests in protecting maternal health, maintaining medical standards, and protecting potential life.[21] The interests of protecting maternal health and potential life grow "in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' "[22] Justice Blackmun found that the interest in protecting maternal health becomes compelling at approximately the end of the first trimester, because earlier in the trimester maternal mortality rates for abortion may be less than those of normal childbirth.[23] Thereafter, a state may regulate abortion in ways reasonably related to preserving and protecting maternal health.[24] The interest in protecting potential life becomes compelling at viability, when the fetus "presumably has the capability of meaningful life outside the mother's womb."[25] The state may proscribe abortion thereafter when it is not necessary to preserve maternal health or life.[26]

Although Justice Blackmun carefully traced the history of abortion

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[16] 410 U.S. 113 (1973).

[17] 410 U.S. 179 (1973). The Court held unconstitutional those Georgia statutory provisions which required that abortions be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals, be approved by a hospital committee, be approved by two co-practitioners, and be denied to those not residents of Georgia. *Id.* at 201.

[18] 410 U.S. at 164.

[19] *See id.* at 152-53.

[20] *Id.* at 153.

[21] *Id.* at 155.

[22] *Id.* at 162-63.

[23] *Id.*

[24] *Id.* at 163.

[25] *Id.*

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

regulation from the ancients through present day[27] and set out the historical evolution of a right of personal privacy derived from constitutional principles,[28] he did not examine the text and history of the constitutions of the federal and the original thirteen state governments to determine the legitimacy of the state interests he recognized. The majority opinion merely noted that protection of maternal health has an historical basis in the nineteenth century reaction to high maternal mortality rates in abortion.[29] The Court offered no history of the interest in protecting potential life. It is no wonder, then, that Justice Rehnquist in his dissent likened the majority decision to Justice Peckham's opinion in *Lochner v. New York*,[30] complaining that "the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be 'compelling.' "[31]

The trimester approach makes the compellingness of the state interests a function of the resolution of issues of medical fact. The Court found that the interest in maternal health becomes compelling when mortality rates are higher for abortion than for normal childbirth,[32] and that the interest in potential life becomes compelling when the fetus is capable of life outside the womb.[33] The trimester approach thus does not make the balance between the woman's right of choice and the state interests depend upon their relative strengths in consti-

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[27] *See id.* at 129-47. Justice Rehnquist recognized that "[t]he Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship." *Id.* at 171 (Rehnquist, J., dissenting). However, Justice Blackmun's historical survey has been attacked: "It surely does not seem to support the Court's position, unless a record of serious historical and contemporary dispute is somehow thought to generate a constitutional mandate." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 925 n.42 (1973).

[28] 410 U.S. at 152-53.

[29] *Id.* at 148-49, 151.

[30] *Id.* at 174. Lochner v. New York, 198 U.S. 45 (1905), marked the beginning of a heyday of judicial activism (1905-1937) during which the Supreme Court waged an aggressive war on that social legislation which it saw as infringing the liberty of the individual as protected by the due process clause of the fourteenth amendment. U.S. CONST. amend. XIV, § 1. Justice Peckham, writing for the majority, held that a New York maximum hours law for bakers violated the liberty of contract protected by the due process clause, as it was not reasonably related to a legitimate state end. 198 U.S. at 57-58. He frowned on the asserted state interest in protecting public health as rendering constitutional protections "visionary", adding "[s]carcely any law but might find shelter under such assumptions." *Id.* at 60. For an attempt to distinguish substantive due process as applied in *Lochner* from that at the heart of the Court's protection of privacy and autonomy as in *Roe*, see Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293 (1986) (examining *Lochner* and substantive due process in light of contemporary constitutional scholarship and the views of Justice Brandeis).

[31] 410 U.S. at 174.

[32] *See supra* note 23 and accompanying text.

[33] *See supra* note 25 and accompanying text.

tutional terms. The balance struck in the trimester framework is the product of a predetermined set of choices the Court made between the woman's right to choose and the state interests in maternal health and potential life. These choices, made on the basis of medical fact, are more in the nature of policy decisions properly made by the legislature than results reached through a process of judicial decisionmaking.[34]

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[34] The nature of the choices to be made on a particular issue are often clear indicators of whether the choices are ones of policy for the legislature to resolve, or choices which are capable of resolution in only one rational way, because they implicate fundamental constitutional values or an area of policy the Constitution has removed from the province of the legislature. Where there is "a range of choice and judgment . . . the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice." Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). The courts should respect the choice of the legislature in such cases, unless the legislature has so clearly made a mistake "that it is not open to rational question." *Id.* The view of Professor Thayer has recently found favor again with certain constitutional scholars. *See, e.g.*, Bork, *Styles in Constitutional Theory*, 1984 SUP. CT. HIST. SOC'Y. Y.B. 53. In Thayer's own day, Justice Holmes' *Lochner* dissent expanded Thayer's notion of deference, then limited to judicial deference to Congress, into a standard for judicial deference to state legislatures as well. *See infra* note 201. This is not to say that the legislature's choice is always easily made or exclusively correct. Making choices for large groups is "incredibly" difficult, "for these are made up of individuals, each having his own scale of values" and the legislative choice therefore becomes a "vicarious substitute, to which we impute values and sacrifices that we believe to be as little alien as possible to those current at the time." L. HAND, THE BILL OF RIGHTS 38 (1958). Our government, nevertheless, operates upon a principle of separation of legislative, executive, and judicial powers. The goal of the self-restrained judicial decisionmaking advocated by Thayer and Holmes is to avoid a court's "putting itself in the same position [as the legislature] and declaring whether the legislature's substitute [for the choice of the electorate] is what the court would have coined to meet the occasion." *Id.* at 39.

Contemporary commentators on *Roe* have disagreed over the issue of whether the choices made by the Court in that decision were in fact purely policy choices in the legislature's domain. At first, Professor Tribe found that the choices made in *Roe* were not best left to the legislature because of entanglement of the issue with religious belief. He stated:

> Justice Blackmun, writing for the Court in *Roe*, had to recognize the highly charged and distinctly sectarian religious controversy that the abortion issue had predictably come to stir. That recognition, though not relied upon by the Court for its holding, strongly supports the basic allocation of roles mandated by *Roe*. For although the fact of heated political controversy alone would hardly be a source of alarm, the "first and most immediate purpose" of the establishment clause was to prevent "a union of government and religion [that] tends to destroy government and to degrade religion."

Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 22 (1973) (footnotes omitted) (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)). By 1978, however, Professor Tribe disowned this view, explaining that it failed to give sufficient weight to free political expression by religious groups, that it underestimated the presence of nonreligious moral convictions, and unrealistically assumed the Court's ruling would in some way effect the disentanglement of religion from the subject. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 928 (1978). Tribe still insisted that the religious content to the abortion issue created "legislative rigidity . . . exacerbated by the relatively lax enforcement of abortion laws against discreet and costly clinics and by the liberalization of such laws in several states prior to *Roe v. Wade*." *Id.* at 930. This legislative rigidity, combined with disdain for "majority rule over the woman's choice in matters of reproduction," *id.* at 932, led Tribe to read *Roe* as a decision "in favor of leaving the matter . . . to women rather than to

By making the choices underlying the trimester framework on the basis of medical fact rather than values expressed in, or derivable from, constitutional provisions, the Court created an analytic framework which basically functions as a mechanism for making legislative policy choices. Such an approach is flawed if constitutional values and principles are to serve as the basis for judicial decisionmaking on constitutional issues.[35] The trimester approach has several fundamental problems as applied in the abortion decisions. The identification of those state interests that are implicated by challenged legislative or administrative action is often difficult,[36] because the Court in *Roe* undertook no inquiry into the constitutional nature and extent of the state interests. Identifying the burdens on the right to choose an abortion that require a compelling state interest to justify them is often difficult, because the trimester framework is based on factual choices which take into account only the time, rather than the nature, of the burden.[37] The selection of the appropriate level of scrutiny under which to review challenged legislative or administrative action is often difficult, because the Court has not clearly identified which burdens on the

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legislative-majorities," and thus *Roe* becomes "less problematic than it might otherwise appear." *Id.* at 933.

John Hart Ely forcefully put forth the opposing argument, that the choices in *Roe* are policy choices reserved to the legislatures, and clearly sets out the problems of institutional competency which Tribe passed over. Ely insists that despite the holding in *Roe* "the Constitution has designated neither of the values in conflict as entitled to special protection." Ely, *supra* note 27, at 923 (footnote omitted). Furthermore, in Ely's opinion, the downfall of the *Roe* decision is the Court's failure "even [to] begin to resolve . . . [the abortion] dilemma so far as our governmental system is concerned by associating either side of the balance with a value inferable from the Constitution." *Id.* at 933. Without such a constitutional basis for its ruling, the Court in *Roe* had "no business getting into that business" of "second-guessing legislative balances." *Id.* at 926. Ely concluded that "[a] neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it." *Id.* at 949 (footnote omitted).

Perhaps the most eloquent, and accurate, criticism of *Roe* and its legislative nature is offered by Archibald Cox. Professor Cox has no problem grounding the right of choice in the Constitution, finding "sufficient connection in the Due Process Clause." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976). He does, however, see another serious difficulty with the decision:

> My criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences. . . . The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus.

*Id.* at 113-14.

[35] *See supra* note 34.

[36] *See infra* notes 40-53 and accompanying text.

[37] *See infra* notes 54-68 and accompanying text.

right to choose an abortion must be justified by a compelling state interest.[38] Finally, application of the chosen level of scrutiny can be difficult, because the nature of the state interests have not been defined in constitutional terms. The trimester approach differentiates among burdens only on the basis of when in the pregnancy they are imposed, and the medical facts which underlie the policy choices inherent in the trimester approach are subject to change with advances in medical technology.[39] The abortion decisions the Burger Court handed down subsequent to *Roe* are a study in judicial difficulty with the application of an essentially legislative decisionmaking process.

Difficulty in determining which interests were implicated by a state statute imposing medical and procedural restrictions on nontherapeutic abortions lay at the heart of *Planned Parenthood of Central Missouri v. Danforth*.[40] The Court invalidated provisions of a Missouri statute requiring consent by the spouse of a woman seeking an abortion, or consent by a parent of an unmarried woman under eighteen years of age seeking an abortion.[41] The majority held that since the state lacks a sufficiently compelling interest to regulate abortion at all during the first trimester it could not delegate to the husband[42] or parent[43] the power to assert the state's interest in protecting potential life.[44]

Justice White disputed the majority's characterization of the state interests in a dissent joined by Chief Justice Burger and Justice Rehnquist.[45] Justice White saw the spousal consent provision as a recognition that the husband has an interest of his own in the potential life of a fetus that should not be defeated by his wife's unilateral decision to choose an abortion.[46] He characterized the interest advanced by the parental consent requirement as the protection of unmarried minors from reaching decisions not in their own best interests.[47] The dissent concluded that the policy decisions implicit in this statute were matters best left to the state legislature.[48]

The difficulties discussed in the majority and dissenting opinions in

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[38] *See infra* notes 66-68 and accompanying text.

[39] *See infra* notes 69-81 and accompanying text.

[40] 428 U.S. 52 (1976).

[41] *Id.* at 74.

[42] *Id.* at 69.

[43] *Id.* at 74.

[44] *Id.* at 69. The state may, however, require at any stage of pregnancy that a licensed physician perform the abortion. Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam).

[45] 428 U.S. at 92-93.

[46] *Id.* at 93.

[47] *Id.* at 95.

[48] *See id.* at 93, 95.

*Danforth* result directly from the Court's failure to inquire into the constitutional nature and extent of the state interests recognized in *Roe*.[49] By declaring the interests presented in *Roe* to be the only interests legitimately assertible against a woman's right of choice,[50] the Court limited the usefulness of the trimester framework to cases in which only those interests are present. Had the Court clearly understood the limited nature of these interests in constitutional terms, it would have seen that the trimester framework was inadequate to analyze the spectrum of interests that are involved in any abortion decision.[51] In order to review the statute in *Danforth*, the Court was forced to characterize the interests actually asserted in terms of those interests it had recognized in *Roe*.[52] The *Danforth* decision therefore represents the Court's rejection of a legislative policy choice which recognized the interests of the father and the parent of a minor in the abortion decision, interests absent in *Roe*.[53] This result was predetermined by the Court's adoption of the legislative policy choices it made in creating the trimester framework which recognized only a limited range of interests assertable against the right to choose an abortion.

In *Maher v. Roe*,[54] the Court encountered difficulty in evaluating the burden a legislative enactment imposed on the right to have an abortion and in choosing the appropriate level of scrutiny under which to review that enactment. The majority, in an opinion by Justice Powell,

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[49] The state interests recognized in *Roe* were the interest in protecting maternal health, the interest in maintaining medical standards, and the interest in protecting potential life. Roe v. Wade, 410 U.S. at 154-55.

[50] *Id.* At no point did the Court say that the three interests it had recognized were among those that a state may have in the abortion context. Rather, it speaks of these three as the only interests the state has. *See id.* at 155, 162-63. Furthermore, the Court says of its own decision that it "leaves the State free to place increasing restrictions on abortions as the period of pregnancy lengthens, so long as those restrictions are tailored to the *recognized* state interests. *Id.* at 165 (emphasis added).

[51] The spectrum of interests in the abortion context, as is clear from *Danforth*, includes other considerations besides the mother's health, the fetus' potentiality of life, and medical standards. Other considerations in this spectrum include the father's relationship to the abortion decision, the ability of an underage female to make the abortion decision in her own best interests, the concern of the underage female's parents for her welfare, and the question of whether there is an expectancy of life inherent in the fetus itself. *See supra* notes 46-47 and accompanying text.

[52] The majority reached its decision on the basis of the *Roe* trimester framework and the three governmental interests it takes into account, stating that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." 428 U.S. at 69.

[53] The majority specifically declared that it was deciding questions not passed on in *Roe*: whether the trimester balancing should take into account "consent by the father of the fetus, by the spouse, or by the parents, or parent, of an unmarried minor." *Id.* The Court characterized the effect of taking these considerations into account as "a requirement . . . [that they] may be constitutionally imposed." *Id.*

[54] 432 U.S. 464 (1977).

held that the legislative policy choice to make Medicaid program payments for an indigent woman's expenses incident to childbirth but not those incident to nontherapeutic abortion did not offend equal protection principles.[55] Justice Powell made a distinction between legislation directly infringing upon a constitutionally protected activity and legislation merely encouraging some other activity in furtherance of a policy which the state legislature seeks to promote.[56] Finding that the state policy in this case fell within the latter situation, the majority subjected the regulation providing funding only for medically necessary abortions to a rational basis test.[57] Under the rational basis test, employed when a fundamental right is not itself impinged,[58] the majority found that the regulation was a rational means of implementing the strong state interest, existing throughout pregnancy,[59] in protecting potential life by encouraging normal childbirth.[60]

Dissenting, Justice Brennan attacked the distinction in the types of burden and corresponding levels of scrutiny between legislation which infringes on a right, and legislation which asserts a state interest by encouraging an alternative activity.[61] Justice Brennan reasoned that restrictions effecting less than an outright denial of a right can nonetheless infringe upon its exercise.[62] Because the regulation at issue had the effect of preventing indigent women from exercising their fundamental right to choose an abortion, Justice Brennan concluded that

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[55] *Id.* at 478. The Court decided Poelker v. Doe, 432 U.S. 519 (1977) (per curiam), on the same day as *Maher*. It found the constitutional issue presented in *Poelker* identical to that presented in *Maher*. *Id.* at 521. Accordingly, the majority held, for the same reasons set forth in *Maher*, that the city of St. Louis had not violated the Constitution in its election, "as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." *Id.*

[56] 432 U.S. at 473-75.

[57] *Id.* at 478.

[58] *Id.*

[59] *Id.*

[60] *Id.* In Beal v. Doe, 432 U.S. 438 (1977), decided on the same day as both Poelker v. Doe, 432 U.S. 519 (1977) (per curiam), and *Maher*, the majority held that Title XIX of the Social Security Act does not require a state to fund nontherapeutic abortions in order for that state to participate in the Medicaid program. 432 U.S. at 447. Justice Powell, more clearly articulating the assertion he made in *Maher* that the state has a legitimate interest in encouraging normal childbirth, *see* Maher v. Roe, 432 U.S. at 478, wrote that the state interest in protecting potential life, while not compelling until after the second trimester, was nevertheless significant throughout pregnancy. Beal v. Doe, 432 U.S. at 446.

[61] 432 U.S. at 482, 485-87. Dissenting in Beal v. Doe, 432 U.S. 438 (1977), a case decided on the same day as *Maher*, Justice Marshall deemed this a distinction pulled "from thin air" and accused the majority of using this distinction along with a "misreading of *Roe v. Wade* to generate a 'strong' state interest in 'potential life' during the first trimester" in order to ensure that the regulation passed review. *Id.* at 457-58 (Marshall, J., dissenting).

[62] 432 U.S. at 487-88.

the regulation should be examined under a strict scrutiny approach.[63] He viewed the majority's decision to allow the interest in potential life to prevail over a woman's right to choose an abortion during the first trimester as inexplicable, unless the Court was overruling the *Roe* viability standard for the compellingness of the interest in protecting potential life.[64]

The *Maher* Court was confronted with the inadequacy of the trimester approach as a framework for judicial decisionmaking. The majority clearly wished to avoid striking down a legislative policy which on its face did not expressly prohibit indigent women from exercising the right to choose an abortion.[65] The trimester approach gave the Court no assistance in articulating the nature of the burden placed upon the right of choice by encouraging childbirth, because the trimester framework is based on factual choices which take into account only the time, rather than the nature, of the burden. Because the nature of the burden determines the level of scrutiny that will be applied, and thus whether the challenged regulation will be upheld, the Court was forced to resort

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[63] *Id.* at 488-89. Justice Brennan makes clear that no matter how the majority's analysis under the equal protection clause is viewed, the regulation would be held an unconstitutional impingement under a due process analysis based on the right of privacy. *Id.* at 484. This is incorrect, however, because if the fundamental right is held not to be impinged by a regulation encouraging an alternative activity, a rational basis standard would apply under due process clause analysis as well as in equal protection clause analysis.

In his dissent in Beal v. Doe, 432 U.S. 438 (1977), Justice Marshall suggested a sliding scale of equal protection scrutiny, as he had done earlier in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting). Balancing " 'the importance of the governmental benefits denied, the character of the class [affected by the denial], and the asserted state interests,' " would, concluded Justice Marshall, result in the invalidation of the legislation in *Beal*. 432 U.S. at 458 (Marshall, J., dissenting) (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 322 (1976) (Marshall, J., dissenting)). Although such a standard may be less arbitrary than the majority's, it is nevertheless no more firmly grounded in the process of appellate review and has as much potential for misapplication.

[64] 432 U.S. at 489-90.

[65] The Court made clear its reluctance to strike down the provisions for funding childbirth. It attempted to distinguish the funding of childbirth without concomitantly funding abortion from the actual restriction of the right to choose an abortion:

> The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation place no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

432 U.S. at 474.

to drawing a tenuous distinction between direct and indirect burdens on the right to choose an abortion.[66] This somewhat weak artifice[67] allowed the Court to uphold the regulation under rational-basis scrutiny, when an analysis under strict scrutiny would demand that it fall.[68]

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[66] *Id.* at 475.

[67] *See* 432 U.S. at 485-86 (Brennan, J., dissenting); L. TRIBE, *supra* note 34, § 15-10, at 933-34 n.77. Professor Tribe aptly points out that to those who oppose *Roe* because they believe it embodies choices which ought to have been made by a legislature,

> the compromise struck by Maher v. Roe should appear utterly perverse: politics is permitted to decree that the very poor must choose between childbirth and the most hazardous backstreet abortion, while the Constitution is said to protect the right of the well-to-do to choose safe abortions even if they can easily afford additional children.

*Id.* at 934 n.77. Tribe concluded that if *Roe* was institutionally objectionable, "Maher v. Roe seems indefensible," and "if Roe v. Wade was right, then Maher v. Roe was surely wrong." *Id.*

[68] The tenuous distinction between direct and indirect burdens on the right to choose an abortion was used by the Court as the implicit basis for its decision in Harris v. McRae, 448 U.S. 297 (1980). At issue in *Harris* was the constitutionality of the Hyde Amendment, a restriction on the use of federal funds to reimburse the costs of abortions under the Medicaid program. *Id.* at 300-01. When *Harris* came before the Court, Congress had annually repassed the Hyde Amendment since 1976. *See id.* at 302. The version of the Hyde Amendment in effect at the time of *Harris*, applicable for fiscal year 1980, provided:

> [N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Pub. L. 96-123, § 109, 93 Stat. 923, 926 (1979). Justice Stewart, writing for the *Harris* majority, found that these restrictions did not violate the due process clause, because "the liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages" of the right to choose an abortion. 448 U.S. at 317-18. He also found no violation of the equal protection clause, because " '[a]n indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases.' " *Id.* at 323 (quoting Maher v. Roe, 432 U.S. 464, 470 (1977)). The Court therefore applied a rational basis test and held that the Hyde Amendment's encouragement of normal childbirth is rationally related to the "legitimate congressional interest in protecting potential life." 448 U.S. at 325.

In his dissent, Justice Brennan found a fundamental flaw in the Court's "failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions." *Id.* at 334 (Brennan, J., dissenting). Justice Marshall, in a separate dissent, decried the majority's use of a rational basis test as appropriate. *Id.* at 342 (Marshall, J., dissenting). He viewed the nature of the burden very differently than the majority. Since "the burden of the Hyde Amendment falls exclusively on financially destitute women," *id.* at 343, there exists " 'a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.' " *Id.* at 344 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)). In his dissent, Justice Stevens viewed the burden in terms of a conflict between the state interest in potential life and the state interest in maternal health. 448 U.S. at 352 (Stevens, J., dissenting). He concluded that the Hyde Amendment failed

The majority in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[69] based its ruling on a recalibration of the *Roe* Court's trimester framework, making the same kind of legislative policy choices made in *Roe*. The Court, in an opinion written by Justice Powell, invalidated several provisions of a city ordinance which purported to regulate abortion procedures in city hospitals.[70] Most notably, the majority invalidated a hospitalization requirement for abortions performed after the first trimester, even though the state interest in maternal health was held in *Roe* to become compelling after the first trimester.[71] The Court explained that the safety of second-trimester abortions had increased "dramatically" since *Roe*,[72] significantly un-

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even rational basis scrutiny, because *Roe* "squarely held that state interference is unreasonable if it attaches a greater importance to the interest in potential life than to the interest in protecting the mother's health." *Id.* at 352 n.4.

The *Harris* Court, reluctant to strike down the Hyde Amendment, therefore, based its decision upon the tenuous distinction between direct and indirect burdens first drawn in *Maher*. *See id.* at 313-17, 321-23. The Court sought to avoid the policy choice of the trimester framework because it would have led to rejection of the Hyde Amendment as lacking a compelling state interest that justified it. *See id.* at 350-52 (Stevens, J., dissenting). The three very different views of the dissenting Justices on the nature of the burden imposed by the Hyde Amendment further illustrate the difficulties the Court has encountered in trying to free itself from both the restrictive legislative policy choices inherent in the trimester approach and the factual basis of the trimester approach, which takes into account only the time when a burden is imposed, not its nature.

[69] 462 U.S. 416 (1983).

[70] *Id.* at 422 n.4. The Court invalidated provisions requiring hospitalization for all abortions performed after the first trimester; parental notification and consent for abortions performed on unmarried minors under 15 years of age; that the attending physician inform the patient of the status of her pregnancy, development of the fetus, date of possible viability, any physical and emotional complications which may result, information on birth control, adoption, and childbirth, and the particular risks associated with both her pregnancy and the abortion technique to be employed; a 24-hour period between the patient's signing of consent form and performance of the abortion; and that fetal remains must be disposed of in a " 'humane and sanitary manner.' " *Id.* at 424 n.7; *see also id.* at 422-24 nn.4-7 (quoting language of AKRON CODIFIED ORDINANCES, ch. 1870, § 1870.16 (1978)).

The Court decided Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983), on the same day as *Akron*. The *Ashcroft* majority struck down a second-trimester hospitalization requirement similar to that in *Akron*. *Id.* at 481-82. They upheld, however, a second-physician requirement and a pathology-report requirement as rationally related to the state's compelling interests in protecting life and maternal health. *Id.* at 486, 490. Justice Blackmun, in an opinion joined by Justices Brennan, Marshall, and Stevens, dissented in part. *Id.* at 494 (Blackmun, J., dissenting). He reasoned that the second-physician requirement should be found invalid, because it covered instances in which there was nothing a second physician could do to further the "compelling [state] interest in protecting potential life." *Id.* at 500. He would have found the pathology report requirement invalid as increasing the cost of an abortion with no showing that it serves any substantial health-related purpose. *Id.* at 498.

[71] 462 U.S. at 434-39. In Simopoulos v. Virginia, 462 U.S. 506 (1983), decided on the same day as *Akron*, the Court upheld, as a reasonable means of furthering the state's compelling interest in maternal health, a Virginia statute that outlawed second-trimester abortions which were not performed in licensed hospitals or outpatient clinics. *Id.* at 519.

[72] 462 U.S. at 435-36.

dercutting any health justification for requiring all second-trimester abortions to be performed in hospitals.[73] Essentially then, the Court found that advances in medicine have so reduced the risks of second-trimester abortions that the state interest in maternal health no longer becomes compelling at this point.

*Akron* suggests a reluctance on the part of the Court to apply a given level of scrutiny when the Court perceives that it would lead to a result considered improper. Once again, the trimester approach gave the Court difficulty in choosing an appropriate level of scrutiny for review of the challenged ordinance. This difficulty is created because the nature of the asserted state interests in *Akron* were not defined in constitutional terms, because the trimester approach differentiates among burdens only on the basis of when they are imposed in the pregnancy, and because the medical facts which underlie the policy choices inherent in the trimester approach are subject to change with changes in medical technology. The Court was thus forced to recalibrate the trimester framework in order to resolve this difficulty.

Justice O'Connor dissented in an opinion which attacked the trimester framework for being wedded to the state of medical technology available when state legislation is challenged.[74] The state interests in the abortion context are present, she opined, throughout the entire pregnancy.[75] She concluded that the Court should therefore not accord these interests more weight at some times in the pregnancy than at others.[76] Calling the trimester approach "clearly an unworkable

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[73] *Id.* The Court stated that because "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered," *id.* at 434, the state interest in maternal health may not be asserted in such a way, as in this provision, that unnecessarily and "significantly limit[s] a woman's ability to obtain an abortion." *Id.* at 435.

[74] *Id.* at 452, 458 (O'Connor, J., dissenting). Justice O'Connor objected that "the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes 'accepted medical practice' at any given time." *Id.* at 458. This forces the judiciary to "then pretend to act as science review boards and examine those legislative judgments," even though the courts lack "the necessary expertise or ability." *Id.*

[75] *Id.* at 459. Justice O'Connor wrote:

> The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.
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> The state interest in potential human life is likewise extant throughout pregnancy. . . . The difficulty with [the *Roe*] analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life.

*Id.* at 460-61 (emphasis in original) (footnote omitted).

[76] *Id.* at 459.

means"[77] for balancing the fundamental right to choose an abortion against the state interests "indisputably implicated,"[78] Justice O'Connor would have the Court apply heightened scrutiny only where the challenged legislation " 'unduly burdens' "[79] the right to choose an abortion. Under such a standard, judicial review of abortion legislation would be limited to a determination of whether a regulation is rationally related to a legitimate state interest where the legislation does not unduly burden a fundamental right.[80] An appropriate degree of judicial deference is demanded, Justice O'Connor suggested, in an area which involves substantive issues of legislative policy for which " 'the appropriate forum for their resolution in a democracy is the legislature.' "[81]

The trimester approach articulated in *Roe* was an attempt to quantify as a judicial decision the balance between a woman's right to choose an abortion and the state interests in maternal health, medical standards, and potential life. By quantifying the compellingness of the

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[77] *Id.* Justice O'Connor wrote:

> The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time. . . ." [citation omitted] . . . . [T]he Court's framwork forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

*Id.* at 458. For an attempt to restructure the trimester framework in light of medical fact in order to meet Justice O'Connor's criticisms, see Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639 (1986).

[78] 462 U.S. at 459.

[79] *Id.* at 453 (citation omitted). Justice O'Connor wrote that "[i]n determining whether the State imposes an 'undue burden,' we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature.' " *Id.* at 465 (quoting Maher v. Roe, 432 U.S. 464, 479-80 (1977)).

[80] 462 U.S. at 453. An undue burden has traditionally been found where the burden creates an "absolute obstacle" or "severe limitation" on a woman's right to choose an abortion. *Id.* at 464. Justice O'Connor explained that the right recognized in *Roe* was intended to protect against burdens imposed by "state action 'drastically limiting the availability and safety of the desired service,' [Maher v. Roe, 432 U.S. 464, 472 (1977)] . . . [imposing] an 'absolute obstacle' on the abortion decision, [Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70-71 n.11 (1976)] . . . or [involving] 'official interference' and 'coercive restraint' imposed on the abortion decision, [Harris v. McRae, 448 U.S. 297, 328 (1980) (White, J., concurring)]." *See* 462 U.S. at 464 (O'Connor, J., dissenting).

[81] 462 U.S. at 465 (O'Connor, J., dissenting) (quoting Missouri, K & T Ry. Co. v. May, 194 U.S. 267, 270 (1904)). Justice O'Connor went on to point out, however, that "[t]his does not mean that in determining whether a regulation imposes an 'undue burden' on the *Roe* right we defer to the judgments made by state legislatures." *Id.*

state interests on a scale of values which shift with the progress of a pregnancy, the Court sought to create standards which would yield inevitable judicial results when applied as inexorable rules of constitutional law. The Court failed, however, to realize this ambition. Its failure to establish the constitutional value of the state interests by exploring their grounding in constitutional text and tradition fundamentally flaws the trimester approach. The Court was satisfied to give value to these interests merely by relating their compellingness to factual events in pregnancy. The calibration of the balance between the right to choose an abortion and the coordinate state interests is thus based on the kind of factual policy considerations which usually characterize legislative decisions.[82] The trimester approach, therefore, operates as a national abortion statute imposed upon the states: it substitutes the policy choices made by the Court for those reached by state legislatures. As the decisions of the Burger Court in the abortion cases make manifest, the difficulties with the nature of the asserted state interests,[83] with the nature of the burden these state interests impose on the right of choice,[84] and with the selection[85] and application[86] of an appropriate level of scrutiny are the natural concomitants of judicial decisions reached through legislative policy choices.

In its unsuccessful attempts to come to terms with the wages of *Roe,* the Court has failed to strike at the ultimate source of its difficulties in employing the trimester approach.[87] None of the decisions in the abortion cases has undertaken an examination and analysis of the

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[82] *See supra* note 34.

[83] *See supra* notes 40-53 and accompanying text.

[84] *See supra* notes 54-68 and accompanying text.

[85] *See supra* notes 66-68 and accompanying text.

[86] *See supra* notes 69-81 and accompanying text.

[87] The Court has continued on the path marked out by *Roe* in its recent abortion decision, Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986). Justice Blackmun, once again writing for the majority, struck down various provisions of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. § 3201 et seq. (1983). 106 S. Ct. at 2173. These provisions concerned informed consent, printed information, degree of care required in postviability abortions, and second-physician and reporting requirements. *Id.* at 2173, 2177. The importance of this case, however, lies in the Court's reaffirmance of *Roe* over the United States Attorney General's invitation to overrule *Roe. See* 54 U.S.L.W. 3356 (Nov. 26, 1985). "Again today," wrote Justice Blackmun, "we reaffirm the general principles laid down in *Roe* and in *Akron.*" 106 S. Ct. at 2178. "Few decisions," he concluded, "are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision - with the guidance of her physician and within the limits specified in *Roe* - whether to end her pregnancy." *Id.* at 2185. Justices White and Rehnquist dissented, continuing their opposition to the basic principles set down in *Roe. Id.* at 2192 (White, J., dissenting). Chief Justice Burger, *id.* at 2190 (Burger, C.J., dissenting), and Justice O'Connor, *id.* at 2206 (O'Connor, J., dissenting), dissented separately, Chief Justice Burger continuing to express his dismay over "the distance traveled since *Roe.*" *Id.* at 2191 (Burger, C.J., dissenting).

texts and historical meanings of relevant provisions of the federal and state constitutions to determine whether the state interests are constitutionally legitimate. This Comment will undertake such an examination in Section II. The results of the legitimacy examination will be analyzed in section III to reveal the ramifications for *Roe*, its progeny, and the compelling state interest jurisprudence of the Burger Court in abortion cases.

## II. Textual and Historical Inquiry Into the Legitimacy of State Interests in Protecting Maternal Health, Maintaining Medical Standards, Protecting Potential Life, and Protecting a Woman's Right to Choose an Abortion

### *A. The Methodology*

The United States Supreme Court has recognized certain rights of individuals as "fundamental rights."[88] The Court has held that these

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[88] The doctrine of fundamental rights has been a recurring theme in the Anglo-American legal tradition. The doctrine simply holds that there are certain rights which emanate from considerations of fairness or universal principles of justice superior to the sources of positive law. *See* B. Bailyn, The Ideological Origins of The American Revolution 184-89 (1967); P. Brest & S. Levinson, Processes of Constitutional Decisionmaking: Cases and Materials 114-15 (2d ed. 1983); G. Wood, The Creation of the American Republic 1776-1787, at 292-94 (1969). Fundamental rights were entitled to special protection from government intrusion by virtue of their own "*intrinsic excellence*." Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 152 (1928) (emphasis in original). A powerful reason for recognizing the "intrinsic excellence" of these rights is that they reconcile government power with individual autonomy by identifying their relative positions in society. L. Tribe, *supra* note 34, § 8-1, at 427. Each branch and level of government was thought by the framers of the Constitution to be confined to a sphere of authority defined by its nature and function, and limited by the fundamental rights of individuals. *Id.* No branch or level of government had a constitutional grant of power to act outside this jurisdictional limit to infringe fundamental rights reserved to citizens in the private domain. *Id.*; *see also* B. Bailyn, *supra*, at 175-84; G. Wood, *supra*, at 152-60.

Chancellor James Kent, an esteemed New York judge and pioneering American legal scholar, viewed fundamental rights not only as a limitation upon government power, but also as property interests vested in the individual, the deprivation of which "is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void." 1 J. Kent, Commentaries on American Law *456 (New York 1826) (citation omitted). Three features of the English common law tradition form the basis of the doctrine of fundamental rights. First, the common law judge did not make the law. As the "living oracles" of the law, 1 W. Blackstone, Commentaries on The Laws of England *69 (1767), common law judges discovered immutable legal principles through the " 'artifical reason of the law.' " P. Brest & S. Levinson, *supra*, at 114 & n.42 (quoting Prohibitions Del Roy, 12 Co. 63, 77 Eng. Rep. 1342 (K.B. 1609) (Coke, L.J.)). Second, a concept of the natural rights of men developed from the Magna Carta (1215) through the Petition of Right (1628), the English Bill of Rights (1689) and the American Declaration of Independence (1776). P. Brest & S. Levinson, *supra*, at 115. Third, John Locke, the quintessential English political philosopher, reasoned that the social compact

fundamental rights are protected by various provisions of the United States Constitution, including the privileges and immunities clauses

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developed from the pregovernment state of nature in order to improve man's security. J. LOCKE, SECOND TREATISE OF GOVERNMENT, IN TWO TREATISES OF GOVERNMENT, ch. ix, §§ 123, 124, 131, at 368, 368-69, 371 (P. Laslett ed. 1970). Locke articulated a powerful theory of government based on legislative supremacy tempered with limitations on the exercise of legislative power over individual rights. *Id.*

Several early Supreme Court cases allude to a doctrine that fundamental rights exist which are not enumerated in the text of the Constitution. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798) (seriatim opinion of Chase, J.) (holding that Connecticut legislature's setting aside decree of probate court in favor of petitioners did not deprive petitioners of a vested fundamental right of property, since no right vested by the decree); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135, 139 (1810) (Marshall, C.J.) (stating that Georgia legislature's attempt to revoke previous legislature's land grant as tainted by fraud could be held invalid under "general principles which are common to our free institutions," since "the nature of society and government . . . [sets] limits to the legislative power"); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815) (Story, J.) (stating that Virginia's attempt to divest church lands violated "principles of natural justice" and "fundamental laws of every free government"). These early cases primarily involve property rights, because the states had not yet taken to exercising their police powers against other rights. In the early cases in which the Court attempted to define the relative powers of the state and federal governments to regulate commerce, Chief Justice Marshall noted the state had the power "to regulate its police, its domestic trade, and to govern its own citizens." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 208 (1824). The police power was later described as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." The License Cases, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J.) (sustaining a state license requirement for the sale of imported liquor, despite its clear infringement on liberty). The potency of the concept of state police power as a means of limiting the exercise of individual rights was greatly increased by the Marshall Court's holding that the first eight amendments of the Bill of Rights had no application to the states. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). This did not mean, however, that individual rights not explicitly protected by the Constitution were afforded no protection. The famous case of Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J.), established that the privileges and immunities clause of article IV of the Constitution protected the entitlement of the citizens of each state to those privileges and immunities of citizens of the several states "which are, in their nature, fundamental." 6 F. Cas. at 551. Rights of citizens were thus protected from infringement by their own states under those general principles of law discussed in the Supreme Court's early cases and by the states' own constitutions. Furthermore, this Comment views the police power as insufficient to justify governmental infringement of a fundamental right protected under a specific constitutional provision because the police power is at best a vague concept with no clear underpinnings in the Constitution. Government may not infringe upon a fundamental right unless it is advancing an interest associated with a constitutional value, supported by a power or purpose of that government, as derived from specific constitutional provisions. *See infra* notes 94-97 and accompanying text.

The greatest difficulty the courts have encountered with the fundamental rights doctrine has been in giving substantive content to the concept of fundamental rights. *Corfield* provided the standard that fundamental rights are those "which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign." 6 F. Cas. at 551. Fundamental rights can be characterized under the categories of "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." *Id.* at 551-52. These rights were, however, "subject to the restraints as the government may justly prescribe for the general good of the whole." *Id.* at 552. *Corfield* enumerated several specific examples of fundamental rights:

[T]he right of a citizen of one state to pass through, or to reside in any other state . . .; to

of article four[89] and the fourteenth amendment,[90] the due process clauses of the fifth and fourteenth amendments,[91] and the equal protection

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claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; . . . an exemption from higher taxes or impositions than are paid by the other citizens of the state[;] . . . [and] the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

*Id.* at 552.

Justice Frankfurter articulated a similar principle for identifying fundamental rights in a due process clause context by suggesting the Court look to "the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples." Wolf v. Colorado, 338 U.S. 25, 28 (1949). Justice Harlan articulated the principle in yet another way. He stated that the fundamental rights which give content to the concept of due process have "represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). The balance of liberty and society "is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Id.*

The Supreme Court recently, however, has taken a most disturbing position on both the methodology by which the Court may find fundamental rights and the very parameters of the Court's power to do so. In Bowers v. Hardwicke, 106 S. Ct. 2841 (1986), the Court declined to find that the fundamental right of privacy encompasses the choice to engage in homosexual activity. *Id.* at 2843-44. The Court therefore did not require Georgia to show that its criminal sodomy statute is supported by a compelling governmental interest and is the most narrowly drawn means of advancing that interest, *id.* at 2843, but rather to show only a rational basis for the law. *Id.* at 2846. That rational basis was found in "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Id.* Justice White, writing for the majority, found that to claim a fundamental right of homosexuals to engage in consensual sodomy is " 'deeply rooted in this Nation's history and tradition,' " *id.* at 2844 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., concurring)), or " 'implicit in the concept of ordered liberty,' " 106 S. Ct. at 2844 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)), is "at best, facetious." 106 S. Ct. at 2846. Justice White purported to reach this conclusion on the basis of the long history of proscriptions against sodomy. *See id.* at 2844-46 & nn.5-6. This methodology, however, is not dispositive of whether consensual homosexual sodomy is protected by the fundamental rights jurisprudence of the Court. History is better used to establish what rights were encompassed by the concept of liberty at a given time. A review of the historical backdrop is useful only in devining the principle by which these specific rights are unified under the concept of liberty. *See infra* notes 103-06, 177-85 and accompanying text. A long history of suppression of the exercise of a right which may in fact be protected under the principle of liberty embodied in the Constitution should not be used to justify a highhanded dismissal of the existence of that right. The Court's finding of the fundamental right to choose an abortion in *Roe* is a perfect illustration of the judicial recognition of a right, the exercise of which was previously suppressed.

Justice White's opinion went further in inflicting damage on fundamental rights jurisprudence. He wrote that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution," 106 S. Ct. at 2846, and that to recognize protection for consensual homosexual sodomy would constitute such undesirable judge-made law. *See id.* The Court, however, makes no real attempt to discover whether the asserted right in fact has roots in the constitutional language or design. On the contrary, it seems that the Court has flirted with illegitimacy by not taking seriously one of its own most important roles in the constitutional scheme: the protection of individual rights from "the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia State Bd. of Educ. v. Barnette, 319 U.S.

clause of the fourteenth amendment.[92] The presence of express sources of protection for fundamental rights in the text of the Constitution

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624, 638 (1943) (Jackson, J.); *see infra* note 211. As Justice Blackmun so forcefully pointed out, "[t]he Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight" the issue of the Georgia's criminal sodomy statute's constitutionality. 106 S. Ct. at 2853 (Blackmun, J., dissenting). Justice Blackmun quite rightly concludes "that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do," *id.* at 2856, at least when this deprivation is accomplished by the Court's abdication of its responsibility to properly explore the underpinnings of an asserted constitutional right. The true test of the substance of constitutional liberty is not the freedom to differ as "to things which do not matter much," but rather "as to things that touch the heart of the existing order." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 642. Justice White's allusion to "the face-off between the Executive and the Court in the 1930's," 106 S. Ct. at 2846, is inapposite to justify the Court's abdication of responsibility in this case. *Bowers* more correctly warrants comparison to those cases in which the Court declined to properly enforce the rights of minorities acquired under the Civil War Amendments to the Constitution. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); The Civil Rights Cases, 109 U.S. 3 (1883).

[89] U.S. CONST. art. IV, § 2, cl. 1. The federal privileges and immunities clause guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.* The Court has discussed privileges and immunities in terms of fundamental rights in several cases. *See, e.g.*, Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 387-88 (1978) (holding that Montana statute which imposes substantially higher elk hunting license fees on nonresidents than residents does not violate the privileges and immunities clause because elk hunting is not one of those fundamental rights protected by that clause); Hague v. Committee for Indus. Org., 307 U.S. 496, 513 (1939) (holding that the privilege and immunity of peaceful assembly under the fourteenth amendment was infringed by state officials who under color of statutory authority denied permits to CIO members seeking to assemble to discuss the National Labor Relations Act) (Roberts, J., concurring); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180-81 (1869) (holding that because incorporation is a special privilege created only by state law, it is not a privilege and immunity constitutionally protected from imposition of higher fees on nonresidents than residents as a prerequisite to doing business).

[90] U.S. CONST. amend. XIV, § 1. The privileges and immunities clause of the fourteenth amendment declares that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Id.* This clause was construed by the Court as limited to those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

[91] U.S. CONST. amend. V; amend. XIV, § 1. The fifth amendment provides that "no person . . . [shall] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment declares "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Due process under the fourteenth amendment at the very least protects those rights secured by the due process clause of the fifth amendment. Hibben v. Smith, 191 U.S. 310, 325 (1903) (Peckham, J.) (stating that "[t]he Fourteenth Amendment . . . legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty, and property, as is offered by the Fifth Amendment against similar legislation by Congress"). The fifth amendment due process clause, nevertheless, has been invoked almost exclusively against procedural, rather than substantive, violations in areas other than criminal rights. *See, e.g.* Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976) (holding that a recipient of Social Security benefits is not entitled to an evidentiary hearing before termination); Arnett v. Kennedy, 416 U.S. 134, 154-55 (1974) (holding that a hearing procedure which is part of same statutory scheme that created employment interest is not subject to full due process requirements since the interest is conditioned upon the procedural limitations of the scheme). Procedural and substantive due

has led the Court to accord a higher degree of protection to these rights against infringement by governmental action.[93] The Court has

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process are similar in that both show a recognition "that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action." L. TRIBE, *supra* note 34, § 10-7, at 501. Procedural, as opposed to substantive, due process, however, delineates not the content of government action and its effects, but rather "the constitutional limits on judicial, executive, and administrative *enforcement* of the legislative dictates." *Id.* at 502 (emphasis in original). *See generally* J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985). The fourteenth amendment due process clause has long been held to protect fundamental rights. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (stating that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause"); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding that the fundamental right of personal privacy under the fourteenth amendment due process clause encompasses a woman's right to choose an abortion); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that the "zone of privacy created by several fundamental constitutional guarantees" encompasses the choice to use contraceptives within the marital relationship); Pierce v. Hill Military Academy, 268 U.S. 510, 534-35 (1925) (recognizing that the right to choose how one's children will be educated is protected under fourteenth amendment liberty; the facts of this companion case to Pierce v. Society of Sisters, 268 U.S. 510 (1925) make clear that these decisions were based on the due process clause, not the free exercise clause or the equal protection clause, L. Tribe, *supra* note 34, § 15-6, at 902 n. 3); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (holding that a teacher's right to teach, and parent's right to engage the teacher to teach, a foreign language are within fourteenth amendment liberty). The majority of fundamental rights recognized by the Court as fundamental components of fourteenth amendment due process, excluding rights of the accused, have been related to "privacy and personhood." *See* L. TRIBE, *supra* note 34, §§ 15.1-15.6, at 886-905. In a general discussion of fourth and fifth amendment considerations involved with government interception of telephone messages, Justice Brandeis was compelled to employ the language of substantive due process. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). His words are worth considering when attempting to articulate a principle for identifying fundamental rights in a due process context:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

*Id.* Brandeis had expressed these same sentiments many years before he came to the Court. *See* Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The state and its government are not always opponents in the struggle to secure the exercise of these fundamental rights, nor should they be. Alaska, for example, amended its constitution to provide that "[t]he right of the people to privacy is recognized and shall not be infringed" by the legislature. ALASKA CONST. art. I, § 22 (1972).

[92] U.S. CONST. amend. XIV, § 1. The equal protection clause of the fourteenth amendment prohibits "any State" from denying "to any person within its jurisdiction the equal protection of the laws." *Id.* The Court has declared that fundamental rights are protected under the equal protection clause. *See, e.g*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The fifth amendment due process clause has also been treated as having an equal protection component. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 322 (1980); Washington v. Davis, 426 U.S. 229, 239 (1976). Strict scrutiny is engaged under the equal protection clause by the allegation that government action impinges the fundamental rights of any person or discriminates against any member of a judicially-recognized suspect class as to any legal right. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 17.

[93] *See supra* notes 1, 88.

thus consistently held that the government cannot take any legislative or administrative action that infringes upon the exercise of a fundamental right guaranteed to the individual by the Constitution, unless the government can offer a legitimate governmental interest which justifies the legislative or administrative action.[94] For a governmental interest to be legitimate, it must be constitutionally legitimate, and it must therefore be possible to associate the interest with some value[95] in the government's constitution.[96] Thus, a purpose or power of government, as derived from specific constitutional provisions, must support the government's assertion of the interest.[97]

In *Roe v. Wade*,[98] a woman's right to choose an abortion was recognized as a fundamental right protected by the fifth and fourteenth

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[94] *See supra* notes 1, 18-26.

[95] The term "value" will be used in this discussion in the constitutional sense to refer to anything to which a constitution expressly or impliedly accords protection by the government, or against the government, which that constitution establishes. Life, liberty, and property are three prominent values in the American constitutions.

[96] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.) (interpreting the necessary and proper clause of U.S. CONST. art. I, § 8). Chief Justice Marshall equated the legitimacy of the end of a governmental action with the presence of that end within the Constitution and insisted that the constitutional legitimacy of the end is the prerequisite to the exercise of power by government to attain that end. "Let the end be legitimate, let it be within the scope of the constitution," wrote the Chief Justice, "and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. Furthermore, if the legislature "should . . . pass laws for the accomplishment of objects not intrusted to the government," the Court would be compelled to hold that "such an act [is] not the law of the land." *Id.* at 423. Because governmental interests are synonymous with "ends" or "objects" of governmental action, they, too, must have some presence within the Constitution. That presence within the Constitution of which Chief Justice Marshall spoke exists only where the end or interest may be associated with a value expressed in, or implied from, the constitutional provisions.

[97] "The principle, that [constitutional government with enumerated powers] can exercise only the powers granted to it, would seem . . . apparent. . . ." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (Marshall, C.J.). Constitutional government is one of enumerated powers. *Id.* at 405-06. A constitution must, however, allow for "incidental or implied powers" for the effective exercise of the enumerated powers. *Id.* at 406-07. Powers are not implied incident to an enumerated power alone. The nature of constitutional government requires that "only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *Id.* at 407. Incidental and implied powers are, therefore, necessary as well as enumerated powers in order to effect those purposes of government for which specific powers have not been enumerated. *Id.* at 421. The constitutional purposes of government may thus be looked to in identifying the existence of a constitutional power which will allow government to accomplish a particular end or assert an interest related to a purpose. The "safest rule" in constitutional interpretation, then, is "to look to the nature and objects" of the provisions of the constitution and to give "each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends" which the constitution has prescribed for the government it creates. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610-11 (1842) (Story, J.).

[98] 410 U.S. 113 (1973).

amendments as a due process clause liberty.[99] The right to choose an abortion cannot therefore be impinged upon by government action, unless the government can offer a constitutionally legitimate governmental interest which will justify the challenged governmental action.[100] The Supreme Court in *Roe* recognized three governmental interests which could support the impingement of a woman's right to choose an abortion: an interest in protecting maternal health, an interest in maintaining medical standards, and an interest in protecting potential life.[101]

The *Roe* Court, however, omitted an integral step in the process of recognizing governmental interests. Justice Blackmun's opinion established neither the constitutional legitimacy of the governmental interests by associating them with a constitutional value, nor the constitutional legitimacy of the government's assertion of those interests by identifying a purpose or power of government, derived from specific constitutional provisions, supporting such an assertion.[102] Furthermore, the *Roe* Court failed to convincingly establish that that a woman's right to choose an abortion is a liberty right nor did it consider the possibility that a governmental interest exists in protecting a woman's right to choose an abortion. The Court cannot properly purport to balance governmental interests and rights against one another without both establishing the constitutional legitimacy of the governmental interests, as well as the right to choose an abortion, and identifying all of the implicated governmental interests. This section establishes both the constitutional legitimacy of the governmental interests in maternal health, medical standards, and potential life, and the existence and legitimacy of a governmental interest in protecting a woman's right to choose an abortion.

First, the inquiry will establish with which constitutional values the governmental interests in maternal health, medical standards, and potential life are associated,[103] as well as whether there is any constitutional value which would support a governmental interest in protecting a woman's right to choose an abortion.[104] This will be done for both the federal and state governments by examining the values expressed in the federal Constitution and those state constitutions contemporary with it. The values identified in those constitutions will be carefully

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[99] *Id.* at 152-53.
[100] *Id.* at 154-56.
[101] *Id.* at 155, 163.
[102] *See* A. Cox, *supra* note 34, at 113-14; Ely, *supra* note 27, at 933.
[103] *See infra* notes 117-38 and accompanying text.
[104] *See infra* notes 149-85 and accompanying text.

examined as concepts through recourse to eighteenth and early nineteenth century legal and philosophical writings as evidence of the framers' understanding of the concepts.

The inquiry, however, will not end there. This Comment does not view the eighteenth century concept of a constitutional value as either controlling, or in itself useful, as an interpretative standard. The eighteenth century concept of a value is useful when looked to in identifying those rights and interests which gave rise to the concept in the time of the framers. It is suggested that the concept of a value is merely the sum of those rights and interests recognized at any given time as derived from that value, and its definition will therefore vary with time. By reducing the concept to its component rights and interests, the unifying characteristic of the value may be determined.[105] The unifying characteristic states the principle of a value, a broader form of the value than its concept. The principle of the value is broader than the concept because it transcends those rights and interests recognized at a given time to include rights and interests unforeseen, or unforeseeable, at the given time, but nevertheless sharing the same unifying characteristic with that value. A constitution has meaningful existence as a working plan for effective government through the values that the constitution embodies. Only at the level of principle can those values which the framers sought to promote through constitutional government be effected with a flexibility that allows for effectiveness in dealing with the unforeseen "changes in the relation between states and nation or in the play of social forces that lay hidden in the womb of time."[106]

Second, the inquiry will establish which purposes and powers of government, derived from specific constitutional provisions, support the government's assertion of the interests in maternal health, medical standards, and potential life,[107] as well as the interest in protecting a

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[105] Judge Cardozo made an eloquently convincing case for a more penetrating mode of constitutional interpretation that probes well behind the mere superficial features of the letter of the law. "The judge," Cardozo wrote, "as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16 (1921). Courts must " 'search for light among the social elements of every kind that are the living force behind the facts they deal with.' " *Id.* (quoting 2 F. GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF § 176, p. 180 (1919), *translated in* 9 MODERN LEGAL PHILOSOPHY SERIES 45 (E. Bruncken trans. 1917)). Judge Cardozo thought that the method of free decision has particular application to "[t]he great generalities of the constitution [which] have a content and significance that vary from age to age," because "[t]he method of free decision sees through the transitory particulars and reaches what is permanent behind them." B. Cardozo, *supra*, at 17.

[106] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (Cardozo, J., unpublished concurrence), *printed in* P. BREST & S. LEVINSON, *supra* note 88, at 298.

[107] *See infra* notes 139-48 and accompanying text.

woman's right to choose an abortion.[108] When a constitution prohibits a government from infringing upon interests or rights associated with a particular constitutional value, the government cannot properly meet this limitation by merely refraining from action which subverts those interests or denies the exercise of those rights. On the contrary, the government has a duty to protect, by affirmative action, those interests and rights from infringement. Nonfeasance by government to protect an interest or a right can subvert or deny it as effectively as governmental action calculated to subvert or deny the interest or right.[109] Thus, the interest or right will not be sufficiently protected by constitutional prohibition against government action that subverts the interest or denies the exercise of the right. A concomitant duty to protect the interest in the exercise of the right must be read into the prohibition if government truly is to be restrained from subverting constitutional interests and denying constitutional rights.[110]

Because government has a duty to act in protection of interests and rights associated with a constitutional value, it has a constitutional purpose in fulfilling its duty to protect those interests and rights. All governments must have the powers necessary to effectuate their purposes.[111] Thus, when a purpose of government is the protection of an interest or the protection of the exercise of a right by the assertion of a governmental interest in protecting that interest or right, a constitutional power is implied for that government to do so.[112] Government exercises this implied constitutional power by legislative and administrative action thereby asserting its interest in protecting interests or rights associated with a constitutional value.

Subsection *B* consists of (1) establishing the constitutional textual legitimacy of the interest in maternal health, medical standards, and potential life by associating these governmental interests with life as a constitutional value,[113] and (2) establishing that the protection of maternal health, medical standards, and potential life is therefore among the purposes and powers of the federal and state governments so that government may assert these interests.[114] Subsection *C* consists of (1) establishing the textual legitimacy of the interest in protecting

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[108] *See infra* notes 186-93 and accompanying text.

[109] *See infra* notes 139-48, 186-93 and accompanying text.

[110] Two early state constitutions expressly placed a duty on government to protect its citizens in their enjoyment of life, liberty, and property. MASS. CONST. of 1780, art. X; PA. CONST. of 1776, art. VIII.

[111] *See supra* note 97 and accompanying text.

[112] *See id.*

[113] *See infra* notes 117-38 and accompanying text.

[114] *See infra* notes 139-48 and accompanying text.

a woman's right to choose an abortion by associating that right with liberty as a constitutional value,[115] and (2) establishing that the protection of a woman's right to choose an abortion is a governmental interest, the assertion of which is among the purposes and powers of the federal and state governments.[116]

### *B. Constitutional Legitimacy of Governmental Interests in Maternal Health, Medical Standards, and Potential Life*

#### 1. Constitutional Value Implicated

The governmental interests in maternal health, medical standards, and potential life implicate considerations of life. The interest in maternal health is rooted in the concern that the abortion procedure is dangerous to the life of the mother.[117] The policy decision of whether abortion should be available to a pregnant woman is the result of balancing the relative risks to the woman's life posed by abortion as compared with childbirth.[118] The interest in maintaining medical standards is rooted in the concern that abortion procedures be performed under those medical conditions, and with those medical skills, that provide a level of protection for the woman's health and life commensurate with standards of care observed by the medical profession.[119] This interest is most prominent when it is by governmental authority that a physician is licensed to perform a procedure, such as an abortion, which puts life at risk.[120] The interest in potential life is rooted in the concern that any democratic government has in maintaining the continued existence of the people from whom it ultimately derives its powers and its own existence.[121]

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[115] *See infra* notes 149-85 and accompanying text.

[116] *See infra* notes 186-93 and accompanying text.

[117] *See* Roe v. Wade, 410 U.S. at 148-49.

[118] *See id.* at 162-63.

[119] *See id.* at 150.

[120] *See id.*

[121] This rationale is offered to remove the interest as far as possible from religious considerations in the valuation of life, or determination of when a fetus becomes a legal person, issues beyond the scope of this Comment. On the issue of when a fetus becomes a legal person, see generally Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233 (1969). The *Roe* Court seems to have accepted as self-evident that the state may act to protect potential life. *See* 410 U.S. at 150. Its position appears more explicable when read with the Court's holding that the interest in potential life becomes compelling at viability, "because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. "State regulation protective of fetal life after viability," the Court continued, "thus has both logical and

Life was embodied as a constitutional value in both the federal and state constitutions extant at the time when the relations between the federal and state governments were established.[122] Life expressly appears as a constitutional value in the due process clause of the fifth amendment[123] to the federal Constitution and in the original due proc-

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biological justifications." *Id.* The Court was apparently saying that at the point a fetus may survive apart from the mother, it becomes a legal person for constitutional purposes and its life is subject to those protections extended to other legal persons. The Court, however, did not deny that the interest in potential life, although not compelling until viability, exists before the viability point. *See id.* at 162-63; City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting) (stating that "the point at which these interests become compelling does not depend on the trimester of pregnancy . . . these interests are present *throughout* pregnancy") (emphasis in original).

Professor Tribe believes that the interest in potential life emanates from the "fundamental" command that *"an innocent life may not be taken except to save the life of another."* L. TRIBE, *supra* note 34, § 15-10, at 923 (emphasis in original). He sees this command, however, as circumscribed by the danger that "the state may usurp the individual's procreative choices in an irreversible way . . . [for example] by compulsory breeding." *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)). This rationale really tells us no more than the rationale of the *Roe* Court does, and it partakes of moral overtones—"fundamental" commands—in a way that the Court's explanation scrupulously avoided.

For a sociological view, rooted in modern political philosophies, of government interests generally in the area of sexuality and family, see generally Grey, *Eros, Civilization, and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (Summer 1980).

[122] The period in our constitutional history around which the inquiry of this section is primarily focused is 1787 to 1791. Reference will be made to the federal and state constitutions of the general period encompassing those years. During this period, the federal Constitution and the federal Bill of Rights were ratified. These documents defined the relationships not only between the national government and its citizens, but also between the national government and the governments of the several states. The assertion of powers and protection of rights by state constitutions ratified prior to 1787 affected the federal Constitution in manifold, subtle ways, and these same effects were felt by those state constitutions ratified after 1787. The peculiar relationship between our national and state governments which we have come to call "federalism," Younger v. Harris, 401 U.S. 37, 44 (1971), was settled in 1787. It is submitted, therefore, that the values the framers sought to embody in their constitutional system predicated on federalism are best understood in the context of the ratification period. The true principle of each constitutional value embodied in the document during the ratification period is revealed only by reference to the concept of the value in the late eighteenth and early nineteenth centuries. Accordingly, specific provisions of the federal Constitution and original state constitutions, that is, the state constitutions contemporary with the federal Constitution, will be treated as evidence of the powers and purposes of government generally in the American constitutional system. As the inquiry will reveal, the nature of the problems explored do not require a sharp federal-state distinction.

[123] U.S. CONST. amend. V; *see supra* note 91. This inquiry will concentrate on the due process clause of the fifth amendment in order to evaluate the constitutional concepts involved at the time during which constitutional federalism was created. *See supra* note 122. This not only will allow the evaluation of the constitutional concepts in the only way in which the true principles of those values embodied in the Constitution may be discovered, but it will also allow the generally irrelevant and certainly unclear legislative history of the fourteenth amendment to be avoided. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY (1977). In any case, the concepts of life and liberty in the fifth amendment are incorporated into the fourteenth. *See supra* note 91; R. BERGER, *supra*, at 146-47, 151, 200. If the governmental interests raised by the abortion issue may be associated with fifth amendment due process values, therefore, touching the federal gov-

ess provisions of most state constitutions[124] contemporary with it, as well as in the preambles to several of those state constitutions.[125]

## 2. The Concept of Life Contemporary with the Federal and Original State Constitutions

Attempts at defining the concept of life are somewhat of an exercise in tautology. The attempt is, nevertheless, worthwhile, because life was construed more broadly in the eighteenth century than the classic, but tautological, definition of Blackstone as "the immediate gift of God, a right inherent by nature in every individual."[126] The concept of life

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ernment, they are associated with fourteenth amendment due process values, touching state government.

[124] CONN. CONST. of 1818, art. I, § 9; DEL. CONST. of 1792, art. I, § 7; MD. DECLARATION OF RIGHTS of 1776, art. XXI; MASS. CONST. of 1780, art. XII; N.H. CONST. of 1784, art. XV; N.C. CONST. of 1776, art. XII; NORTHWEST ORDINANCE, art. II (1787); PA. CONST. of 1776, art. IX; S.C. CONST. of 1778, art. XLI; VA. BILL OF RIGHTS, §§ 1, 8 (1776).

[125] DEL. CONST. of 1792; MASS. CONST. of 1780. Preambles to constitutions confer by themselves no powers upon government. *See* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462, at 339 (4th ed. 1873). A preamble to a constitution, nevertheless, is not an empty form of rhetorical flourish. In the eighteenth and early nineteenth centuries a preamble was viewed as a strong indicium of the purposes of the statutory enactment or constitutional government which the document containing the preamble purported to create. *Id.* Justice Story wrote:

> [A] constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires that every interpretation of its powers should have a constant reference to these objects.

*Id.* § 422, at 311-12 (discussing the Preamble to the United States Constitution). A preamble may therefore be employed as a guide to interpreting other sections and provisions of a statute or constitution. *Id.* §§ 459-60, at 338-39; *see* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610-11 (1842) (Story, J.). Blackstone stated that "the most universal and effectual way of discovering the true meaning of law . . . is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it." 1 W. BLACKSTONE, *supra* note 88, at *61 (emphasis in original). When dealing with the federal Constitution and state constitutions contemporary with it, this discovery is facilitated by considering the preambles.

[126] 1 W. BLACKSTONE, *supra* note 88, at *129. Blackstone and his work on the common law must be the principle guide through much of the legal philosophy of the eighteenth century Anglo-American legal tradition. No other writer before Blackstone had attempted a scholarly history and overview of the common law, although the names Coke, Hale, and Bracton are associated with earlier works expounding on various aspects of English law. These were highly practical works by lawyers for the assistance of practicing lawyers, *see* B. BAILYN, *supra* note 88, at 30-31, because the common law was treated as a trade rather than a component of "liberal education." *See id.* at 31-32. "The science thus committed to [the author's] charge," wrote Blackstone, "is that of the laws and constitution of our own country: a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides." 1 W. BLACKSTONE, *supra* note 88, at *4. The neglect of the common law as a subject for scholarly study before Blackstone is traceable to other factors than merely the status of law as a trade. The study of Roman civil law had a long history in the universities of England and held sway through

was inextricably merged with that of personal security,[127] which, together with personal liberty and personal property, was considered one of the three absolute, natural rights of individuals.[128] The term "life," taken in an appropriately expansive sense, appears coextensive to a large degree with the technical common-law term "personal security." The two terms have in fact been viewed as practically synonymous in the common-law: the enumeration of the three basic natural rights, of which personal security was a part, originally was expressed in the

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the eighteenth century. *See id.* at *5. Furthermore, because common law was a weapon of the Crown in its struggle for power against ecclesiastical forces, the clergy, who exercised great influence in the universities, developed a healthy disdain for it. *See id.* at *26. This situation was remedied by the endowment of the Vinerian "professorship of the laws of England," *id.* at *28 n.i, established at Oxford University in 1758 with Sir William Blackstone, a Justice of the Court of Common Pleas, elected as the first lecturer. Tucker, *Preface* to 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND i-ii (Tucker ed. 1803). The *Commentaries* were the product of these lectures which were designed to "instruct the rising generation in the wisdom of our civil polity, and inspire them with a desire to be still better acquainted with the laws and constitution of their country." *Id.* at *37.

The common law concepts of the constitutional values discussed in this Comment are essential as the basis for understanding the principle of those values which the framers embodied in the Constitution. The English common law served as the background against which American constitutional concepts of rights, powers, and separation of powers developed. According to the first important commentator on Blackstone in the United States, Professor St. George Tucker of the College of William and Mary, the *Commentaries* turn the "rude chaos" of the common law, "now [after the Revolution] the *general law* of the land" in the states and nation, "instantly [into] the semblance of a regular system." Tucker, *Preface* to 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND i, viii (Tucker ed. 1803) (emphasis in original). "The common law was manifestly influential in shaping the awareness of the Revolutionary generation," and "[i]n the later years of the Revolutionary period, Blackstone's *Commentaries* . . . became [a] standard authorit[y]." B. BAILYN, *supra* note 88, at 30-31. The general adoption of the English common law in post-Revolutionary America and Blackstone's status as the only commentator of academic quality upon the common law are not the only reasons for the influence of the *Commentaries* in America. The American attitude towards Blackstone's *Commentaries* during the late eighteenth and early nineteenth centuries also justifies looking to Blackstone as the primary touchstone for giving specific content to the concepts of American constitutional values. "The great appeal for Americans of Blackstone's *Commentaries* stemmed not so much from its particular exposition of English law," writes Gordon Wood, "but from its great effort to extract general principles from the English common law and make of it, as James Iredell [a framer] said, 'a science.' " G. WOOD, *supra* note 88, at 10 (footnote omitted). This American attitude was encouraged by the situation and aspiration of the framers:

> The general principles of politics that the colonists sought to discover and apply were not merely abstractions that had to be created anew out of nature and reason. They were in fact already embodied in the historic English constitution — a constitution which was esteemed by the enlightened of the world precisely because of its "agreeableness to the laws of nature." The colonists stood to the very end of their debate with England and even after on these natural and scientific principles of the English constitution. And ultimately such a stand was what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it.

*Id.* (footnote omitted).

[127] 1 W. BLACKSTONE, *supra* note 88, at *129; *see* 4 J. KENT, *supra* note 88, at *12-16.

[128] 1 W. BLACKSTONE, *supra* note 88, at *129; 4 J. KENT, *supra* note 88, at *1; *see* J. LOCKE, *supra* note 88, at ch. IX, §§ 123-24.

legal tradition beginning with the Magna Carta as "life, liberty, and property."[129] The framers of our own constitutions continued the use of this trilogy to express a concept of fundamental rights evolving out of the Anglo-American legal tradition in which life and personal security were merely slightly different approaches to a basic concept of self-preservation.

The concept of personal security encompassed "a person's [rights to the] legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[130] Life, as the broadest example included under the concept of personal security, was recognized by the law "as soon as an infant is able to stir in the mother's womb."[131] Other examples under the concept of personal security included: a man's limbs, which were "those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law;"[132] the human body was recognized as secure "from the corporal insults of menaces, assaults, beating, and wounding[,] though such insults amount not to destruction of life or member;"[133] health was recognized as a fit subject for protection "from such practices as may prejudice or annoy it,"[134] and finally, a man's reputation required the protection of "his . . . good name from the arts of detraction and slander" because without these "the perfect enjoyment of any other advantage or right" would become "impossible."[135]

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[129] THE DECLARATION OF INDEPENDENCE (1776) ("[a]ll men . . . are endowed . . . with certain unalienable Rights . . . among [which] . . . are Life, Liberty, and the pursuit of Happiness"); N.Y. CHARTER OF LIBERTIES (1683); PA. FRAME OF GOVERNMENT (1682); CONCESSIONS & AGREEMENTS OF WEST N.J. (1677); MASS. BODY OF LIBERTIES (1641); MD. ACT FOR THE LIBERTIES OF THE PEOPLE (1639); Bill of Rights 1 W. & M., ch. 2 (1689); Petiton of Right, 3 Car. 1 (1625); Right of Trial, 28 Edw. 3, ch. 3 (1354) ("No man . . . shall be put out of land or tenement, nor taken nor imprisoned, nor put to death, without being brought in answer by due process of law."); 25 Edw. 3, ch. 4 (1351); Confirmation of the Great Charter, 5 Edw. 3, ch. 9 (1331) ("No man shall be . . . forejudged of life or limb, nor his lands, . . . goods, nor chattels . . . against the form of the Great Charter and the law of the land."); Magna Carta, 9 Hen. 3 (1225). The trilogy of life, liberty, and property has its origins in the thirty-ninth article of the original Magna Carta, which states that "[n]o freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed; nor will we pass upon him, nor send upon him, unless by the legal judgment of his peers, or by the law of the land." Shattuck, *The True Meaning of the Term "Liberty" in those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365, 372 (1891).

[130] *See* 4 J. KENT, *supra* note 88, at *1, *12. Chancellor Kent's unmodified repetition from Blackstone that personal security is one of the absolute rights of individuals seems to indicate that the American view of the concept of personal security had changed little since Blackstone's day.

[131] 1 W. BLACKSTONE, *supra* note 88, at *129.

[132] *Id.* at *130.

[133] *Id.* at *134.

[134] *Id.*

[135] *Id.*

### 3. The Principle of Personal Security and the Association of Governmental Interests in Maternal Health, Medical Standards, and Potential Life with Life as a Constitutional Value

The principle of personal security may be determined from the specific rights which were derived from the eighteenth century concept of personal security.[136] Protecting the life of the individual in both its physical and social aspects is the characteristic unifying the rights recognized in the eighteenth century as derived from the concept of personal security. The principle of personal security, therefore, is the protection of the individual's life in its physical and social aspects from the infliction of unjustified harm. An interest in maternal health involves the protection of an expectant mother from unjustified risk of harm in the course of medical treatment.[137] An interest in potential life involves the protection of the continued existence of a people by assuring that no unjustified harm comes to the unborn who are the source of that people's continued existence.[138] The principle of personal security is thus clearly broad enough to include these interests. Since the principle of personal security is expressed as a constitutional value by the term "life," the governmental interests in maternal health, medical standards, and potential life are associated with life as a constitutional value.

### 4. Constitutional Purposes and Powers Supporting the Assertion of Governmental Interests in Maternal Health, Medical Standards, and Potential Life

Life as a constitutional value was embodied in both the federal Constitution and those state constitutions in existence at the time when the relationship between the federal and state governments was established.[139] The most important embodiment of life in these constitutions was in their due process clauses. The fifth amendment of the federal Constitution,[140] and most state constitutions contemporary with it,[141] contain a prohibition against the deprivation of life by government without due process of law. This prohibition creates a duty

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[136] *See supra* notes 105-06 and accompanying text.
[137] *See supra* notes 117-20 and accompanying text.
[138] *See supra* note 121 and accompanying text.
[139] *See supra* note 122 and accompanying text.
[140] *See supra* note 123 and accompanying text.
[141] *See supra* note 124 and accompanying text.

on the part of the federal and state governments not to infringe upon life. These governments fail to fulfill this duty, however, by mere abstinence from legislative or administrative action which infringes upon life as a protected constitutional value.[142] To effectively satisfy their obligation the federal and state governments have a duty to protect life by legislative or administrative action. This will prevent the deprivation of life by inaction.[143] The existence of a governmental duty in protecting life leads *a priori* to the conclusion that a purpose of the federal and state government is the protection of life.

Government must have the powers needed to effect its purposes.[144] The federal and state governments, having the protection of life as a purpose, must therefore have an implied constitutional power[145] to protect life. The federal and state governments exercise this implied power to protect life through legislative or administrative action calculated to prevent deprivation of those specific governmental interests associated with life. Since the governmental interests in maternal health, medical standards, and potential life are associated with life as a constitutional value, the protection of those interests by government is among the purposes and powers of the federal and state governments. The purpose and power of these governments to protect those interests therefore supports the assertion of governmental interests in maternal health, medical standards, and potential life.

### 5. Legitimacy of the Governmental Interests in Maternal Health, Medical Standards, and Potential Life

The interests in maternal health, medical standards, and potential life are associated with life as a constitutional value.[146] Both the federal and state governments may assert these as governmental interests through legislative and administrative action, because a purpose and a power of government to protect life and those interests associated with

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[142] *See supra* note 109 and accompanying text.

[143] *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that state inaction constituted state action for fourteenth amendment purposes where the Wilmington Parking Authority did nothing to prevent its lessee restaurateur from refusing to serve minorities). Although decided under the equal protection clause, the racial discrimination complained of also represented a deprivation of liberty under the due process clause of the fourteenth amendment. As Justice Clark wrote, "[b]y its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." *Id.* at 725.

[144] *See supra* note 111 and accompanying text.

[145] *See supra* note 97.

[146] *See supra* notes 136-38 and accompanying text.

it are derived from the due process clauses in the federal and state constitutions.[147] The governmental interests in maternal health, medical standards, and potential life are therefore constitutionally legitimate.[148]

### *C. Constitutional Legitimacy of a Woman's Right to Choose an Abortion and of the Governmental Interest in Protecting that Right*

#### 1. Constitutional Value Implicated

A woman's right to choose an abortion and a governmental interest in protecting that right implicate considerations of liberty. A woman's right to choose an abortion is rooted in a concern for the freedom and autonomy of the individual in making decisions touching one of the most intimate and private subjects of human existence, reproduction.[149]

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[147] *See supra* notes 139-45 and accompanying text.

[148] *See supra* notes 95-97 and accompanying text.

[149] The decisions of the Supreme Court have gone far in the recognition of an individual autonomy concern in personal reproduction decisions. The progress the Court has made in the reproductive rights area mirrors the changing attitudes of American society. This becomes clear when reference is made to the most famous of the Court's early reproductive rights cases, Buck v. Bell, 274 U.S. 200 (1927). Justice Holmes, in an opinion for the majority which shocks the modern reader by its callous self-righteousness, characterized the plaintiff as "a feeble-minded white woman . . . [who] is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child." *Id.* at 205. Plaintiff was sterilized pursuant to a state statutory proceeding. *Id.* at 205-06. Justice Holmes summarily dismissed the plaintiff's fourteenth amendment due process and equal protection challenges to the law providing for such a proceeding:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

*Id.* at 207 (citation omitted). The modern reader would say that Justice Holmes failed to perceive the real issue. Appropriate sensitivity to the individual autonomy rights involved in reproduction appeared at last in Skinner v. Oklahoma, 316 U.S. 535 (1942). The Court struck down Oklahoma's Habitual Criminal Sterilization Act. *Id.* at 541. In the course of the majority opinion, Justice Douglas spoke of the right to reproduce as "one of the basic civil rights of man . . . [which, along with marriage] are fundamental to the very existence and survival of the race." *Id.* In addition to concerns for individual autonomy, Justice Douglas saw a need to protect as fundamental the "basic liberty" of the right of reproduction because the "power to sterilize, if exercised . . . [i]n evil or reckless hands . . . can cause races or types which are inimical to the dominant group to wither and disappear." *Id.*

Griswold v. Connecticut, 381 U.S. 479 (1965), worked full scale the revolution in the Court's view of reproductive rights initiated in *Skinner*. The Court struck down a Connecticut statute which made the use, or provision for use, of contraceptives a criminal offense. *Id.* at 480-85.

Since it is the individual who must live with the physical, mental, and moral consequences of the personal choice concerning reproduction,[150] government has a concern to see that the individual is able to make

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Justice Douglas, writing for the majority, spoke of various guarantees enunciated in the Bill of Rights creating zones of privacy. *Id.* at 482-85. One of these zones of privacy surrounds the marriage relationship and includes reproductive rights. *Id.* at 485-86. Inclusion of reproductive rights in the broader category of a zone of sexual privacy would allow the Court to bring more activities within the protection of the fourteenth amendment and increase the degree and amount of legislative deference which must be given to individual autonomy in matters of reproduction. The real touchstone for this and subsequent decisions in the reproductive rights area, however, is autonomy. As Judge Posner wrote, "[t]he real objection to the Connecticut contraception statute [struck down in *Griswold*] is not that it invades privacy but that prohibiting contraception, at least by married people, is an undue limitation of freedom of action." R. POSNER, THE ECONOMICS OF JUSTICE 327 (1981). Eisenstadt v. Baird, 405 U.S. 438 (1972), followed *Griswold* and invalidated a purported health regulation which made contraceptives less available to unmarried persons than to married couples. *Id.* at 453. "[T]he effect of *Eisenstadt v. Baird* was to single out as decisive in *Griswold* the element of reproductive autonomy. . . ." L. TRIBE, *supra* note 34, § 15-10, at 922 (footnote omitted).

Roe v. Wade, 410 U.S. 113 (1973), represents the extension of the protection of individual autonomy in reproductive decisionmaking to a woman's decision whether to have an abortion. The majority wrote that the "[fourteenth amendment] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. The line of decisions which culminated in *Roe* "began from a perspective that attached special significance to child-bearing autonomy." L. TRIBE, *supra* note 34, § 15-10, at 926. The Court has subsequently overturned other governmental attempts to restrict autonomy of choice in the area of reproductive rights. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), the Court invalidated the board's regulations that required a pregnant teacher to take her leave several months prior to giving birth and to remain on leave until several months after the birth. *Id.* at 647-48, 650. The Court held that "overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms" by in effect penalizing the pregnant woman "for deciding to bear a child." *Id.* at 640. The Court in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), disallowed the intrusion of spousal or parental consent requirements upon the autonomy of a woman in choosing whether to have an abortion. *Id.* at 69, 74. In Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), the Court "made clear" that autonomy was the decisive concern in reproductive rights cases, L. TRIBE, *supra* note 34, § 15-10, at 922, when it invalidated state limitations on sale of contraceptives by non-pharmacists and to minors. 431 U.S. at 687-90. Finally, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), reaffirmed the Court's emphasis on individual autonomy in the abortion choice. The Court, inter alia, struck down the portion of ordinance that required certain information be given to a woman before she chooses to have an abortion. *Id.* at 441-45. The Court found that the information mandated by ordinance attempted "to extend the State's interest in ensuring 'informed consent' beyond permissible limits," and thereby was invalid in its design to influence the woman's informed choice between abortion or childbirth. *Id.* at 444-45.

[150] Writing for the majority in *Roe*, Justice Blackmun recognized these consequences:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it . . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153.

this choice as freely and intelligently as possible.[151]

Liberty was embodied as a constitutional value in both the federal and state constitutions existing at the time when the relation between the federal and state governments was established.[152] Liberty appears as a constitutional value in the due process clause of the fifth amendment[153] to the federal Constitution and in the original due process provisions of most state constitutions[154] contemporary with it, as well as in the preambles to the federal Constitution[155] and several state constitutions[156] contemporary with it.

### 2. The Concept of Liberty Contemporary with the Federal and Original State Constitutions

Personal liberty, along with personal security and personal property, is one of the conceptual sources from which the fundamental rights of individuals were derived at common law.[157] The framers were most familiar with the concept of personal liberty through Blackstone's definition of it as "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may

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[151] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 (1976). "The decision to abort," the Court stated, "is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Id.* The Court concluded that "[t]he woman is the one primarily concerned and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent." *Id.* The state's concern with a free and intelligent decision on whether to have an abortion, therefore, is broader than merely assuring that informed medical consent is obtained. *Cf.* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 443 (1983) (stating that the abortion decision has such greater implications than most other medical treatments that the state may legitimately ensure that it has been made with regard to all relevant physical, psychological and emotional circumstances).

[152] *See supra* note 122.

[153] *See supra* note 123.

[154] *See supra* note 124.

[155] The Preamble states in pertinent part that "WE THE PEOPLE of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America." U.S. CONST. preamble. The Preamble, however, grants no specific powers to the federal government. *See supra* note 125.

[156] CONN. CONST. of 1818 ("in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors"); DEL. CONST. of 1792 ("all men have, by nature, the rights . . . of enjoying and defending life and liberty"); N.Y. CONST. of 1777 ("establish such a government . . . calculated to secure the rights, liberties, and happiness of the good people of this colony"). Other state constitution preambles spoke of protecting natural rights, among which are those rights associated with liberty. *See* GA. CONST. of 1777; MASS. CONST. of 1780; PA. CONST. of 1776.

[157] *See supra* note 128 and accompanying text; H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND *27-*28 (S. Thorn trans. 1968).

direct."[158] Such a concept of personal liberty prohibits government restraint of the exercise of individual liberty rights through positive restraints, particularly physical detention.[159] The writ of habeas corpus was the most prominent example of a personal liberty right at common law[160] and was embodied in the federal Constitution in the ninth section of article one.[161]

The identification of other examples of personal liberty, however, requires consideration of three other eighteenth century definitions of personal liberty that approach the concept from different perspectives. Personal liberty was said to be the residuum of the liberty humankind had in a state of nature.[162] This residuum of liberty must include rights beyond those merely associated with locomotion,[163] because it would not have been to the parties' benefit to enter into a social contract which called for the sacrifice of the bulk of individual liberty in order

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[158] 1 W. BLACKSTONE, *supra* note 88, at *134; *see* 4 J. KENT, *supra* note 88, at *26.

[159] *See supra* note 88 and accompanying text.

[160] 1 W. BLACKSTONE, *supra* note 88, at *134-*35; 4 J. KENT, *supra* note 88, at *26-*27. The writ of habeas corpus, by which a prisoner is ordered produced before a court, was considered a cornerstone of common-law liberty. "[C]onfinement of the person," wrote Blackstone, "by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." 1 W. BLACKSTONE, *supra* note 88, at *136.

[161] The provision declares that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. In 1826, Chancellor Kent wrote that "[t]he privilege of this writ is also made an express constitutional right . . . by the [federal] Constitution . . . and by the constitutions of most of the states in the Union." 4 J. KENT, *supra* note 88, at *27. The executory provisions of the Habeas Corpus Act, 31 Car. 2, ch. 2 (1691), were effected by statute in every state at the time Chancellor Kent wrote. 4 J. KENT, *supra* note 88, at 27.

[162] 1 W. BLACKSTONE, *supra* note 88, at *125; H. BRACTON, *supra* note 157, at *29. John Locke formulated the eighteenth century concept of the relationship between personal and natural liberty, stating that people join into society "for the mutual *Preservation* of their Lives, Liberties, and Estates." J. LOCKE, *supra* note 88, ch. IX, § 123, at 368 (emphasis in original). The individual who undertakes to become or remain a member of such a society for preservation of his rights "is to part . . . with as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the Society shall require." *Id.* § 130, at 371.

[163] This is made clear by eighteenth century references to speech, press, and exercise of conscience as liberties and freedoms. *See* U.S. CONST. amend. I (freedom of speech, press, and exercise of religion); DEL. CONST. of 1792, § 1 (freedom of religion), § 5 (freedom of press); GA. CONST. of 1789, art. IV, § 3 (freedom of press), § 5 (free exercise of religion); MD. DECLARATION OF RIGHTS of 1776, art. XXXIII (religious liberty), art. XXXVIII (liberty of the press); MASS. CONST. of 1780, pt. 1, art. XVI (liberty of the press); N.H. CONST. of 1784, pt. 1, art. IV (rights of conscience unalienable); N.C. CONST. of 1776, art. XV (freedom of press), art. XIX (unalienable right to worship); PA. CONST. of 1790, art. IX, § 3 (freedom of religion), § 7 (freedom of press); S.C. CONST. of 1778, art. XXXVIII (freedom of religion), art. XLIII (liberty of the press); VA. BILL OF RIGHTS, § 12 (freedom of the press is a great bulwark of liberty), § 16 (freedom of religion) (1776); *see also* 4 J. KENT, *supra* note 88, at 35 (stating that "[c]ivil and religious liberty generally go hand in hand"). Liberty is used in this Comment as a term describing the conceptual source of certain rights called freedoms, or liberty rights.

to preserve the narrow liberty of locomotion.[164] Furthermore, a personal liberty was stated to consist of the exercise of individual free will except when that exercise would be contrary to the necessities of the public good.[165] The free will of individuals was not thought to consist merely of decisions affecting locomotion,[166] nor is it in any sense reasonable to view any general exigency of the public good as requiring such a limitation on personal liberty. Rather, the concept of personal liberty was called the preservative of all other rights.[167] If personal liberty was limited to the mere freedom of locomotion, however, it could not even begin to effectively preserve all other rights. Even if the individual were free to move about as he wished, the exercise of a legion of other individual rights would remain impossible.[168] These common-law comments on personal liberty, taken to-

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[164] The nature of the political philosopher's "benefit of the bargain" in the social contract is apparent from both Locke and Rousseau. Since liberty is freedom "from restraint and violence" by others, the end of organized society is "not to abolish or restrain, but *to preserve and enlarge Freedom*" through law. J. LOCKE, *supra* note 88, ch. VI, § 57, at 324 (emphasis in original). Rousseau wrote even more bluntly in the language of social calculus:

> What [the individual member of society] loses by the social contract is his natural liberty and the absolute right to anything that tempts him and that he can take; what he gains by the social contract is civil liberty and the legal right of property in what he possesses.

J. ROUSSEAU, THE SOCIAL CONTRACT bk. I, ch. 8, at 65 (M. Cranston tr. 1968). To invoke the work of an eighteenth century French *philosophe* might appear unusual in a Comment which has focused on the Anglo-American legal tradition. The framers, however, were substantially influenced by the writings of Montesquieu, Rousseau, and other *philosophes*. B. BAILYN, *supra* note 88, at 26-28; *see* G. WOOD, *supra* note 88, at 7.

[165] 1 W. BLACKSTONE, *supra* note 88, at *126; MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 3 (Nugent-Pritchard trans. 1905); J. ROUSSEAU, *supra* note 164, bk. II, ch. 4, at 74; J. LOCKE, *supra* note 88, ch. IX, § 131, at 371; H. BRACTON, *supra* note 157, at *22, *27-*28, *29.

[166] *See* 1 W. BLACKSTONE, *supra* note 88, at *125-*26; J. LOCKE, *supra* note 88, ch. 4, § 22, at 301-02. Blackstone called natural liberty the "power of acting as one thinks fit, [restrained only] . . . by the law of nature; being a right inherent in us by birth . . . when [we were] endued . . . with the faculty of free will." 1 W. BLACKSTONE, *supra* note 88, at *125. Blackstone spoke of "free will" when he wrote that man was "considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable." *Id.* When people enter into society, however, they give "up a part of . . . [their] natural liberty, as the price of so valuable a purchase" when that surrender is for the good of the whole. *Id.* Nevertheless, "every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny." *Id.* at *126. The law may serve the good of civil liberty by restraining a man only from "doing mischief to his fellow citizens." *Id.* at *125-*26. "Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of reach of human laws." *Id.* at *124.

[167] 1 W. BLACKSTONE, *supra* note 88, at *135; J. LOCKE, *supra* note 88, ch. 4, § 23.

[168] Justice Bushrod Washington's opinion in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), clearly suggests this, for he enumerates "[t]he right of a citizen of one state to pass through or to reside in any other state, for the purpose of trade, agriculture, professional pursuits or otherwise" that is, locomotion, as only one of several equally fundamental rights protected by the privileges and immunities clause of the Constitution. *see id.* at 552; *see also* PA.

gether, compel the conclusion that the eighteenth century concept of common-law personal liberty extended far beyond merely those rights associated with locomotion. The true concept of personal liberty in the eighteenth century was that the individual should be free to act in recognized areas of conduct without government coercion.

The personal liberty concept that an individual should be free to act in recognized areas of conduct without government coercion is exemplified in the Bill of Rights, which effectuated the preamble's declaration that a purpose of the federal government is to "secure the Blessings of Liberty."[169] The Bill of Rights shows a solicitude for liberty rights which extends far beyond those merely of locomotion.[170]

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CONST. of 1776, art. XV (listing emigration from state to state as a "natural inherent right"). He also lists as fundamental the rights

> to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and [to be exempt] from higher taxes or impositions than are paid by the other citizens of the state.

6 F. Cas. at 552. The nature of these other fundamental rights makes it clear that locomotive liberty is not sufficient to secure their preservation. The privilege of the writ of habeas corpus is claimed when the individual has lost his locomotive liberty. The right to institute judicial proceedings could be thwarted by exorbitant court access fee requirements or a system of narrow procedural writs, which in fact characterized the English courts at various times. *See* F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 4 (1983). The right to transact in property could be eviscerated by a variety of oppressive taxes. The right to proportional taxes is, obviously, violated by discriminatory imposition. Each of these examples demonstrates that the exercise of fundamental rights may be thwarted whether or not locomotive liberty is present. If personal liberty is indeed a preservative of other fundamental rights, it must guarantee much more than the mere right of free locomotion.

The origin of Justice Washington's enumeration of fundamental rights is not at first obvious. The jurisprudence of the Marshall Court, of which Justice Washington was a member, was more concerned with delineating and applying the substantive principles of the newly-created American constitutional law, than with the objective application of precedent. This was because the Marshall Court had first to delineate those principles embodied in the Constitution from which the nature of powers and rights were gleaned in order to create a body of fundamental precedent for later courts to apply objectively. *See* K. LLEWELLYN, THE COMMON LAW TRADITION 35-37 (1960); Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532, 539 (1969). Justice Washington, therefore, was simply practicing this style of jurisprudence in *Corfield* when he attempted to flesh out clearly, perhaps for the first time in a judicial opinion, some of those fundamental rights which he believed inhered in our constitutional system.

[169] U.S. CONST. preamble.

[170] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). In his majority opinion in *Griswold*, Justice Douglas used a form of analysis that extracts a principle of privacy from the amendments comprising the Bill of Rights. Judge Richard Posner has criticized Justice Douglas' methodology, which he characterizes as reading "separate amendments . . . as if they were common-law decisions expressing a uniform principle." R. POSNER, *supra* note 149, at 328 n.50. Judge Posner states that this methodology is based on the assumption that "a statute or constitution is animated by a coherent 'spirit' which informs all of its provisions and enables one to decide cases not within the letter of the statute by reference to its spirit." *Id.* Such a presumption, he asserts, rests on the "failure to understand the difference between legislative enactments, including con-

For example, Congress cannot coerce the individual by making any law to establish a religion, prevent its free exercise, or abridge freedom

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stitutions, and common-law decisions." *Id.* (citation omitted). Judge Posner, however, neglects to mention that interpretation according to the spirit of the law has long been considered a legitimate methodology. *See supra* notes 105, 125. This methodology was applied particularly in statutory interpretation in the eighteenth and nineteenth centuries under the appellation of "equitable interpretation." *See supra* note 125. The "spirit" of which Judge Posner writes is a jurisprudential euphemism for "purpose," and interpretation of constitutional provisions according to "spirit" or purpose was indorsed by no less a founder of American constitutional jurisprudence than Justice Story. *See id.* Judge Posner would doubtless not consider interpretation by "spirit" illegitimate if it were to be called in the same context interpretation by "purpose." He circumvents this point by emphasizing that the provisions of the Bill of Rights are seriatim in nature. *See* R. POSNER, *supra* note 149, at 328 n.50. The seriatim nature of the amendments suggests to him that they are more likely than not the product of interest-group pressure:

> Thus the fact that there is one amendment to the Constitution in favor of the press . . . and another establishing a right against being forced to incriminate oneself could be the result of the jockeying of interest groups represented at the Constitutional Convention rather than expressions of a consistent concept of the right to be left alone.

*Id.*

Judge Posner's argument is open immediately to two objections. First, the amendments were not the product of the Constitutional Convention of 1787. Amendments were produced at each of the several state ratifying conventions and returned to Congress where they were debated and then sent back to the states for ratification. The product was the Bill of Rights as we have it. *See generally*, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (B. Schwartz ed. 1971). The debates in the state ratifying conventions and in Congress do not evidence a "jockeying" of pressure groups over special interests. The real conflicts occurred over issues of federalism and whether individual rights were better protected by a specific enumeration. *See* G. WOOD, *supra* note 88, at 536-43. The latter conflict leads us to statements made by Jefferson before any amendments had been debated or proposed:

> "I will now add what I do not like [about the Constitution as ratified in 1787]. First, the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies . . . the eternal and unremitting force of the habeas corpus laws, and trials by jury [. . . .] Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."

TO SECURE THESE BLESSINGS: THE GREAT DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1787 35 (S. Padover, ed. 1962)(quoting letter from Thomas Jefferson to James Madison (Dec. 20, 1787)).

The striking similarities between Jefferson's concerns and the subjects of the amendments actually adopted from the seventy-eight proposals submitted by the state ratifying conventions, *id.* at 38, lead to the second objection. Rather than the product of pressure-group jockeying, the Bill of Rights represents the reaction of the framers to specific and repeated attempts of colonial government to violate those principles of liberty which were the source of individual rights. This assertion receives powerful support from the inclusion of many of the matters addressed by the Bill of Rights in state constitutions adopted after the Revolution. Provisions were made to protect freedom of the press and religion, which are protected in the federal Constitution by the first amendment. *See supra* note 163. The federal Constitution's second amendment protection of the right to bear arms appeared earlier in several state constitutions. *See* MASS. CONST. of 1780, pt. 1, art. XVII; N.C. DECLARATION OF RIGHTS of 1776, art. XVII; VA. BILL OF RIGHTS § 13 (1776). The federal Constitution's third amendment limitation on quartering of troops appeared earlier in the state constitutions. *See* MASS. CONST. of 1780, pt. 1, art. XXVII. The Constitution's fourth amendment prohibition on unreasonable searches and seizures appeared earlier in state constitutions. *See* MD. DECLARATION OF RIGHTS of 1776, art. XXIII; MASS. CONST. of 1780, pt. 1, art.

of speech, press, or assembly.[171] The consent of a homeowner is required before soldiers may be quartered in any house when a state of war does not exist.[172] Persons, houses, papers and effects are secured from unreasonable searches and seizures by the government.[173] The

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XIV; PA. CONST. of 1776, art. X. The due process clause embodied in the fifth amendment appeared earlier in many state constitutions. *See supra* note 124. The bail provision of the fifth amendment appeared in several earlier state constitutions. CONN. CONST. of 1776, para. 4; MD. DECLARATION OF RIGHTS of 1776, art. XXII. The indictment provisions of the fifth amendment appeared earlier in one state constitution. *See* N.C. CONST. of 1776, pt. 1, art. VIII. The fifth amendment prohibition against self-incrimination appeared earlier in many state constitutions. *See* MD. DECLARATION OF RIGHTS of 1776, art. XX; MASS. CONST. of 1780, pt. 1, art. XII; N.H. CONST. of 1784, pt. 1, art. XV; N.C. CONST. of 1776, pt. 1, art. VII; PA. CONST. of 1776, art. IX; VA. BILL OF RIGHTS, § 8 (1776). Many earlier state constitutions also embodied the sixth amendment requirements of trial by jury, information of accusation, and confrontation with accusers and opposing witnesses. *See* GA. CONST. of 1777, art. LXI (trial by jury); MASS. CONST. of 1780, pt. 1, art. XII; N.H. CONST. of 1784, pt. 1, art. XV; N.C. CONST. of 1776, pt. 1, arts. VII, IX; PA. CONST. of 1776, art. IX; VA. BILL OF RIGHTS, § 8 (1776). Several earlier state constitutions embodied the sixth amendment right to counsel. *See* MASS. CONST. of 1780, pt. 1, art. XII; N.H. CONST. of 1784, pt. 1, art. XV; PA. CONST. of 1776, art. IX. Various provisions of the eighth amendment were embodied in earlier state constitutions. *See* GA. CONST. of 1777, art. LIX (bail); MD. DECLARATION OF RIGHTS of 1776, art. XXII (punishment); MASS. CONST. of 1780, pt. 1, art. XXVII (punishment); N.C. CONST. of 1776, pt. 1, art. X (punishment); VA. BILL OF RIGHTS, § 9 (1776) (punishment).

Since Judge Posner's objections to the *Griswold* methodology of extracting principles from groups of specific constitutional provisions are in fact illusory, one may look to his concluding statement in the discussion to discover the motivation underlying his objection. "[I]f the Constitution has a 'spirit,' " he writes, "it is one of distrust of government. The modern welfare state is contrary to that spirit, which should give pause to those who would create constitutional rights based on the Constitution's 'spirit.' " R. POSNER, *supra* note 149, at 329 n.50. It is submitted that Judge Posner objects to the extraction of principle from constitutional provisions because it allows the constitution to be interpreted in ways to meet changing social and economic conditions. He seems to prefer that the courts interpret the document as if it had been hewn in stone in 1787. This would allow the judiciary to employ the narrowest readings possible, leaving little room for accomodating societal change in a manner which runs against his own jurisprudential predilictions. The Constitution, however, no more enacts *The Economics of Justice* than it does "Mr. Herbert Spencer's Social Statics." *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*" (emphasis in original)).

[171] The first amendment provides that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[172] The third amendment provides that "[n]o Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

[173] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

government cannot coerce the individual to bear witness against himself.[174] Criminal defendants have a variety of procedural rights which serve as a shield against the immense coercive power of government exerted through criminal prosecutions.[175] Even the convicted prisoner is protected in the manner and degree of coercion the government may inflict upon him as punishment.[176] A concept of liberty emphasizing individual freedom of action with a minimum of government coercion imbues each of the specific provisions of the Bill of Rights. Thus, it was this concept of personal liberty, not Blackstone's concept stated in terms of locomotion, from which the framers drew the principle of personal liberty embodied in the federal and state constitutions.

### 3. The Principle of Personal Liberty and the Association with it of a Woman's Right to Choose an Abortion and a Governmental Interest in Protecting the Exercise of that Right

The principle of personal liberty embodied in the federal and original state constitutions may be determined from those specific liberty rights which served as the basis of the eighteenth century concept of common-law personal liberty.[177] The characteristic which unifies those rights which the framers considered protected under the concept of personal liberty is a concern for protecting the individual's liberty to act according to his own will free from government coercion.[178] Those

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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.

U.S. CONST. amend. IV.

[174] The fifth amendment provides in pertinent part that "[n]o person . . . shall be compelled in any Criminal Case to be a witness against himself." U.S. CONST. amend. V.

[175] The fifth amendment provides in pertinent part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor . . . for the same offense . . . be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

[176] The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[177] *See supra* notes 105-06 and accompanying text.

[178] *See supra* notes 157-76 and accompanying text.

areas of human activity expressly singled out for protection by the framers were not selected because they alone reasonably required, or were worthy of, protection. The framers' concern for the liberty rights which they protected was the product of a history of attempts by government to coerce individual action by infringing upon those rights.[179] An attempt was thus made to forever insulate from governmental coercion the exercise of the liberty rights expressly embodied in the federal Constitution.[180]

There remained, however, many individual liberty rights which inhered in the common law.[181] These rights could not be impinged upon consistent with the concept of personal liberty unless there were legitimate, overriding concerns of public policy.[182] The privileges and immunities clause of the second section of article four[183] and the due process clause of the fifth amendment[184] were two mechanisms by which the framers protected the exercise of nontextual rights from government coercion. The concern which had evolved for the framers, then, is clear: the government should not unnecessarily interfere with the exercise of individual free will. The principle of personal liberty embodied in the federal and state constitutions, therefore, is that the individual should be free to act according to his own will without government coercion, except when legitimate necessities create a concern for the public good. In these circumstances, the exercise of a liberty right can only be restrained so far as required to meet those necessities. A woman's choice to have an abortion is the exercise of her free will in deciding whether to take an action affecting her own body.[185] As such, a woman's choice to have an abortion falls within the principle of personal liberty which protects an individual's liberty to act according to her own free will. Since the principle of personal liberty is expressed as a constitutional value by the term "liberty," a woman's liberty right to choose an abortion is associated with liberty as a constitutional value. Since a woman's right to choose an abortion is legitimately associable with liberty as a constitutional value, a governmental interest in protecting the exercise of that right exists if the

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[179] *See supra* note 170; G. WOOD, *supra* note 88, at 536-43; *see also* L. LEDER, LIBERTY AND AUTHORITY: EARLY AMERICAN POLITICAL IDEOLOGY 1689-1763 (1968) (giving examples of coercion of American colonists by the British government).

[180] *See infra* note 211 and accompanying text.

[181] *See supra* note 88 and accompanying text.

[182] *See supra* notes 93-94 and accompanying text.

[183] U.S. CONST. art. IV, § 2.

[184] U.S. CONST. amend. V.

[185] *See supra* note 149 and accompanying text.

protection of liberty as a constitutional value is among the purposes and powers of government.

4. Constitutional Purposes and Powers Supporting the Assertion of a Governmental Interest in Protecting a Woman's Right to Choose an Abortion

Liberty as a constitutional value was embodied in the federal Constitution and those state constitutions extant at the time when the relationship between the federal and state governments was established.[186] The most important embodiment of liberty in those constitutions was in their due process clauses. The fifth amendment to the federal Constitution[187] and most state constitutions[188] contemporary with it contain a prohibition against the deprivation of "liberty" by government without due process of law. This prohibition creates a duty on the part of the federal and state governments not to infringe liberty as a constitutional value. The federal and state governments neither observe this prohibition nor fulfill this duty, however, by mere abstinence from legislative action[189] which infringes upon liberty as a protected constitutional value. A concomitant duty upon the federal and state governments to protect liberty and the rights associated with it, by legislative or administrative action, must be read into the prohibition of the due process clause if government is to be in fact prohibited from depriving the people of liberty. The existence of a governmental duty to protect liberty and the rights associated with it leads *a priori* to the conclusion that a purpose of the federal and state governments is the protection of liberty.

Government must have the powers necessary to effect its purposes.[190] The federal and state governments, having the protection of liberty as a purpose, must therefore have an implied constitutional power to protect liberty and the rights associated with it. This implied power to protect liberty and the rights associated with it is exercised through legislative or administrative action calculated to prevent their deprivation. Since a woman's right to choose an abortion is a right associated with liberty as a constitutional value, the protection of the exercise of that right by government is among the purposes and powers of

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[186] *See supra* note 122 and accompanying text.
[187] *See supra* note 123 and accompanying text.
[188] *See supra* note 124 and accompanying text.
[189] *See supra* note 109 and accompanying text.
[190] *See supra* note 111 and accompanying text.

the federal and state governments. The purpose and power of the federal and state governments to protect a woman's right to choose an abortion support the assertion of a governmental interest in the protection of a woman's right to choose an abortion.

### 5. Legitimacy of the Governmental Interest in Protecting a Woman's Right to Choose an Abortion

A woman's right to choose an abortion and a governmental interest in protecting the exercise of that right are associated with liberty as a constitutional value.[191] Both the federal and state governments must assert the governmental interest in protecting a woman's right to choose an abortion through legislative and administrative action, because a purpose and power of government to protect liberty and the rights associated with it are derived from the due process clauses in the federal and state constitutions.[192] The governmental interest in protecting a woman's right to choose an abortion therefore exists and is constitutionally legitimate.[193]

## III. Analysis: Ramifications of the Legitimacy of the Governmental Interests in Maternal Health, Medical Standards, Potential Life, and the Liberty Right of a Woman to Choose an Abortion

The foregoing inquiry into the preambles and due process clauses in the federal and state constitutions and the eighteenth century meanings of "life" and "liberty" reveals that the governmental interests in maternal health, medical standards, and potential life are constitutionally legitimate and may limit the right to choose an abortion. In addition, this inquiry has established that an additional constitutionally legitimate governmental interest exists: the protection of the liberty right of a woman to choose an abortion. The question remains, however, of what ramifications this finding of legitimacy has for *Roe v. Wade*,[194] its progeny, and the compelling state interest jurisprudence of the Burger Court in abortion cases.

The first ramification of the legitimacy of the governmental interests

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[191] *See supra* notes 179-85 and accompanying text.
[192] *See supra* notes 186-90 and accompanying text.
[193] *See supra* notes 95-97 and accompanying text.
[194] 410 U.S. 113 (1973).

articulated in *Roe* concerns their constitutional order, or strength, as compared with the right to choose an abortion and the governmental interest in protecting the liberty right of a woman to choose an abortion. The governmental interests articulated in *Roe* are directly derived from the explicit protection of life in the federal and state constitutions of the eighteenth century.[195] A woman's right to choose an abortion and a governmental interest in the protection of that right are directly derived from the principle of liberty as conceptualized in the federal and state constitutions of the eighteenth century.[196] A woman's right to choose an abortion and the governmental interests in protecting maternal health, medical standards, potential life, and a woman's right to choose an abortion, are therefore of the same constitutional order, for both the right to choose an abortion and the governmental interests are directly derived from explicit constitutional guarantees.[197]

The second ramification of the legitimacy of the governmental interests articulated in *Roe* concerns judicial deference. A survey of the abortion decisions of the Supreme Court[198] makes it obvious that the judiciary has difficulty in balancing governmental interests and individual rights when they are of the same constitutional order.[199] These difficulties, however, are merely symptoms of the underlying problem. Balancing constitutional interests of the same order is not a process based on legal reasoning with a result ineluctably ordained by logic; it is a choice over which reasonable people could disagree,[200] a classic example of a policy decision reserved to the legislature.[201]After identifying the fundamental right of a woman to choose an abortion and

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[195] *See supra* notes 117-38 and accompanying text.

[196] *See supra* notes 149-85 and accompanying text.

[197] *See supra* notes 136-38, 177-85 and accompanying text.

[198] *See supra* notes 16-87 and accompanying text.

[199] *See supra* notes 40-86 and accompanying text.

[200] J. ELY, *supra* note 27, at 943. On this point, Ely writes:

> *Roe*'s "refutation" of the legislative judgment . . . is *not* obviously wrong, for the substitution of one nonrational judgment for another concerning the relative importance of a mother's opportunity to live the life she has planned and a fetus's opportunity to live at all, can be labeled neither wrong nor right. The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business.

*Id.* (footnote omitted).

[201] Justice Holmes had this to say of the Court's intrusion on policy choices:

> I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . .
>
> I think that the word liberty [sic] in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J. dissenting).

striking down a statute which absolutely prohibited the exercise of that right,[202] the Court in *Roe* should not have set up a trimester framework to review legislation which places restrictions on the exercise of the right. Such a framework of review acts as a mechanism for making legislative policy choices, because the governmental interests and the right it balances are of the same constitutional order. In cases such as the abortion cases, in which the governmental interests and individual right involved are of the same constitutional order, the Court should defer to the legislature when the legislation is not "plainly,

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[202] The Court in *Roe* acted within its traditional powers when it held that the fundamental right of personal privacy, founded in the fourteenth amendment concept of personal liberty, encompasses a woman's right to choose an abortion. Such a tradition of a nontextual, rights-based jurisprudence has its origins in the English common-law view that judges, as "living oracles," find the law, *see* 1 W. BLACKSTONE, *supra* note 88, at *69, and has been made absolutely necessary by the minimalist nature of our Constitution and Bill of Rights, in order to "help give . . . life and substance" to the explicit guarantees they contain. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The Court's recognition of the nontextual constitutional right of a woman to choose an abortion did not result from a balancing of rights and interests. The Court was compelled to find this right because of its understanding of the sections of the Constitution implicated by the nature of the abortion decision.

Once the Court has recognized a constitutional right, the exercise of that right cannot be absolutely prohibited in all situations either by the judiciary or the legislature. The recognition of a particular action as protected by a right implies that there must be *some* cases in which that right may be exercised. It is unreasonable per se that the assertion of any state interest against a right can accomplish the absolute prohibition of the exercise of that right in all cases. *See* 1 W. BLACKSTONE, *supra* note 88, at *54 (stating that "no human legislature has the power to . . . destroy" a fundamental right). A constitutional amendment can alone effect such a result. Thus the Court in *Roe* had no choice but to strike down the Texas criminal abortion statute which, by prohibiting an abortion in all cases except to save the life of the mother, effectively prohibited the exercise of a woman's right to choose an abortion in any case where that right could be reasonably exercised.

Some might argue that a woman's right to choose an abortion could be absolutely prohibited by the legislature in all non-lifesaving cases because such a prohibition does not absolutely extinguish a right at all. They would insist that the characterization of a woman's choice to have an abortion as a right suffers from the logical fallacy of misplaced concreteness, for the right involved is actually liberty. As only an instance of the exercise of liberty would be prohibited, the actual right itself would remain. These views, however, are incorrect. Liberty is not a right. It is an amorphous concept from which specific rights, interrelated by a transcendental principle of liberty, are derived. When the exercise of a right derived from the concept of liberty is prohibited in all cases, that right is destroyed. The Court's decisions are consistent with this point of view. In Meyer v. Nebraska, 262 U.S. 390 (1923), a Nebraska statute was challenged which made it a crime to teach foreign languages to children until after the eighth grade. The statute was invalidated as abrogating a teacher's "right . . . to teach and the right of parents to engage him so to instruct their children," rights which were "within the liberty of the [fourteenth] [a]mendment." *Id.* at 400. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court reviewed an Oregon criminal statute which prohibited the parent or guardian of a child to send him to a private, rather than a public school. The statute thus absolutely prohibited the exercise of the parental right to choose a private school for their children, a right which the Court included within the protection that fourteenth amendment liberty extended to "parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. The statute was therefore struck down. *Id.*

palpably, beyond all question, inconsistent with the Constitution,"[203] unless the exercise of the right is unduly burdened[204] or where other constitutional factors are present.[205] The decision of the abortion cases under a rights-based jurisprudence further evinces the need for judicial deference in those cases involving the reasonable regulation of the exercise of rights.[206] A rights-based jurisprudence requires that the judiciary defer to the legislature when a choice among competing governmental interests and individual rights of the same order cannot be made as a matter of constitutional law, but would require favoring either the governmental interests or the right on grounds open to reasonable dispute.[207]

The judiciary should not, however, always defer to the legislature in a case involving governmental interests and individual rights of the same constitutional order. Deference to the legislature is precluded when the individual right falls within certain well-defined classes. These classes are rooted in broad concepts of the proper functioning of a fair and effective democratic government.[208] The Court should not defer to the legislature when "prejudice against discrete and insular minorities [is] . . . a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[209] The Court should not defer to the legislature when the challenged legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[210] The Court should not defer to the legislature when explicit

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[203] Lochner v. New York, 198 U.S. 45, 72-73 (Harlan, J., dissenting). Justice Harlan wrote in *Lochner*:

> [I]t is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. . . .
>
> [T]he State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States.

*Id.*

[204] *See infra* notes 214-16 and accompanying text.

[205] *See infra* notes 208-13 and accompanying text.

[206] 410 U.S. at 152-56. Here, the Court clearly set out the rights-based nature of its jurisprudence.

[207] *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 77 (1977). Ackerman gives the example of a judge adhering to a philosophy of judicial restraint under a rights-based, or Kantian, system of jurisprudence in the context of a compensation clause case. Legislation is passed which results in the value of *A's* land decreasing dramatically, but which benefits *B*. While the judge will still inquire in his analysis under the compensation clause whether it is possible to compensate *A* without making *B* worse off than *B* was before the legislation, he will nevertheless give the benefit of the doubt to the legislature in cases "open to reasonable dispute." *Id.*

[208] *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101-04 (1980).

[209] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[210] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Brown v. Board of Educ., 347 U.S. 483 (1954), although not explicitly decided under the analysis set out in *Carolene*

guarantees of the Bill of Rights are burdened.[211] The Court may also legitimately show special solicitude for rights implied as corollaries of the explicit guarantees of the Bill of Rights that are necessary to give those explicit guarantees substance and force.[212] Finally, the Court should not defer to the legislature when the challenged legislation burdens a right implied from the structure of government.[213] In any of the foregoing classes of cases, the Court may balance the state interests asserted against the rights burdened and require that the state interests be effected only through the means least restrictive on the right. The right of a woman to choose an abortion articulated in *Roe* does not, however, come within any of the foregoing classes and the Court was therefore remiss to attempt a balance of the interests against the right.

The third ramification of the legitimacy of the governmental interests articulated in *Roe* concerns the level of judicial review that should be accorded to legislation which burdens the right to choose an abortion. When legislation affects a right which, as is the case with a woman's right to choose an abortion, does not come under any of the special classes enumerated above, such legislation is entitled to a presumption of constitutionality. The Court must review such legislation under a rational basis standard[214] if it is to give proper deference to the legislature.[215] The Court should apply a more exacting standard of scrutiny only when such legislation unduly burdens the right.[216]

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*Products*, is the epitome of this class of case. That an exception to the rules of deference to, and conclusiveness of, the framer's intent is necessary in a case such as *Brown* is apparent from Chief Justice Warren's declaration that "we cannot turn back the clock to 1868." 347 U.S. at 492.

[211] Justice Jackson perhaps put it best:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [They] may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[212] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding that before questioning a suspect, police must inform him of certain of his fifth and sixth amendment rights); Weeks v. United States, 232 U.S. 383 (1914) (holding that evidence seized in violation of fourth amendment warrant requirement be excluded at trial).

[213] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (holding that apportionment for state legislatures must be on population basis); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (affirming citizen's right of interstate mobility).

[214] Justice O'Connor advocated rational basis review for most abortion legislation in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

[215] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[216] Justice O'Connor recognized this exception to the usual presumption of validity in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting). *See supra* notes 79-80 and accompanying text. However, because a fundamental right

## IV. CONCLUSION

The United States Supreme Court held in *Roe v. Wade*[217] that the governmental interests in protecting maternal health, maintaining medical standards, and protecting potential life could limit a woman's right to choose an abortion.[218] The majority opinion, however, did not establish the constitutional legitimacy of the asserted governmental interests by associating them with some constitutional value[219] and by establishing which purposes and powers of government, derived from specific constitutional provisions, support their assertion by government.[220] Had the Court undertaken this inquiry, it would have arrived at conclusions essential to the proper judicial adjudication of the abortion decisions.[221] The interest in maternal health, medical standards, and potential life are associated with life as a constitutional value.[222] Both the federal and state governments may assert these as governmental interests through legislative and administrative action, because a purpose and power of government to protect life and those interests associated with it are derived from the due process clauses in the federal and state constitutions.[223] The governmental interest in maternal health, medical standards, and potential life are therefore constitutionally legitimate.[224] A woman's right to choose an abortion and a governmental interest in protecting the exercise of that right are associated with liberty as a constitutional value.[225] Both the federal and state governments may assert the governmental interest in protecting a woman's right to choose an abortion through legislative and administrative action, because a purpose and a power of government to pro-

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is involved in the abortion cases, rational basis scrutiny cannot be satisfied by a mere conceivable rational basis, but rather only by a basis that is directly and clearly related to promoting one of the legitimate state interests. Surely an undue burden must be found when the state legislates on abortion merely to discourage the exercise of the right because some portion of the electorate is hostile to abortion on moral grounds. As Justice Blackmun has so eloquently stated, "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2178 (1986). The unduly burdensome standard is not suggested to open the door for the improper imposition of one group's morality upon another, but rather to protect the exercise of a fundamental right from the flaws inherent in the trimester system.

[217] 410 U.S. 113 (1973).

[218] *Id.* at 154, 159.

[219] *See supra* notes 27-34, 103-06 and accompanying text.

[220] *See supra* notes 27-34, 107-12 and accompanying text.

[221] *See supra* notes 40-87, 194-215 and accompanying text.

[222] *See supra* notes 103-06, 117-38 and accompanying text.

[223] *See supra* notes 107-12, 139-45 and accompanying text.

[224] *See supra* notes 146-48 and accompanying text.

[225] *See supra* notes 103-06, 149-85 and accompanying text.

tect liberty and the rights associated with it are derived from the due process clauses in the federal and state constitutions.[226] A governmental interest in protecting a woman's right to choose an abortion therefore exists and is constitutionally legitimate.[227]

Finding the governmental interests in maternal health, medical standards, potential life, and a woman's right to choose an abortion to be legitimate has three ramifications which bear on *Roe*, its progeny, and the compelling state interest jurisprudence of the Burger Court in abortion cases. First, the governmental interests articulated in *Roe* are of the same constitutional order as the right to choose an abortion and the state interest in protecting the liberty right of a woman to choose an abortion.[228] Second, because the governmental interests and the right to choose an abortion are of the same constitutional order, the choice between the governmental interests and the right is one about which reasonable people could disagree. The disagreement on the Court over what level of review to apply and which governmental interests are implicated in the abortion cases further supports this conclusion.[229] Since the right to choose an abortion does not involve other factors of constitutional significance that might place it in one of the special classes of rights entitled to heightened judicial scrutiny whenever burdened,[230] the Court should not have set up a trimester framework to balance the governmental interests and the right to choose an abortion in cases involving legislation which affects that right without unduly burdening it. The choices made by the Court in the abortion cases between the governmental interests and the right to choose an abortion should have been deferred to the legislature.[231] Finally, because the right to choose an abortion does not come within any of the classes of rights entitled to heightened judicial scrutiny, legislation affecting the right to choose an abortion should be reviewed under a rational basis standard,[232] except when the legislation unduly burdens the right.[233]

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[226] *See supra* notes 107-12, 186-90 and accompanying text.
[227] *See supra* notes 191-93 and accompanying text.
[228] *See supra* notes 194-97 and accompanying text.
[229] *See supra* notes 40-81 and accompanying text.
[230] *See supra* notes 208-13 and accompanying text.
[231] *See supra* notes 27-39 and accompanying text.
[232] *See supra* notes 214-16 and accompanying text.
[233] *See supra* note 216 and accompanying text.