The Right to Reproductive Choice Without the Myth of Fundamentality: A Guide to Aborting Roe v. Wade and All of Its Bastard Progeny

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THE RIGHT TO REPRODUCTIVE CHOICE WITHOUT THE MYTH OF FUNDAMENTALITY—A GUIDE TO ABORTING ROE V. WADE AND ALL ITS BASTARD PROGENY .................................................................1

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“I am not yet prepared to accept the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion.”

INTRODUCTION

Sexual relations were once believed to exist solely for the purpose of procreation. As a result, courts typically offered the greatest protection from government intrusion to those engaged in heterosexual relationships, as opposed to their homosexual counterparts. Although such archaic attitudes towards sex have virtually disappeared, issues as to the distribution of reproductive rights between the genders are anything but settled.

Imagine yourself in a heterosexual relationship with a partner who declares to be not only infertile but also using various methods of contraception as an extra layer of assurance and protection against pregnancy. Your likely response would be to assume that birth control is not an issue, and you would probably do nothing further to protect yourself from the occurrence of

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2 See Jon Knowles, A History of Birth Control Methods, 2006 PLANNED PARENTHOOD FEDERATION OF AMERICA, Inc. 2, available at http://www.plannedparenthood.org/files/PPFA/fact-bc-history.pdf (noting that the early Christian church taught that while “nonreproductive sexual activities were ‘unnatural’ sins because they were contraceptive[,] . . . fornication, rape, incest, and adultery could lead to pregnancy . . . [and therefore] were ‘natural’ sins and much less serious than ‘unnatural’ sins . . . .”) (citing UTA RANKE-HEINEMANN, EUNUCHS FOR THE KINGDOM OF HEAVEN 203 (Doubleday 1990)). See also Lawrence v. Texas, 539 U.S. 558, 570 (2003) (“The longstanding criminal prohibition of homosexual sodomy . . . is [] consistent with a general condemnation of nonprocreative sex . . . .”).
4 See, e.g., Kevin M. Apollo, The Biological Father’s Right to Require a Pregnant Woman to Undergo Medical Treatment Necessary to Sustain Fetal Life, 94 DICK. L. REV. 199, 199-200 (1989).
an unwanted pregnancy.\(^6\) Then after some time goes by, you find out that a pregnancy did in fact occur and that you will soon be a parent.\(^7\) For a moment, you think that life’s freedoms as you know them are over, until you remember that the Supreme Court recognized the right to reproductive choice in the landmark case of *Roe v. Wade*.\(^8\) So, the right to choice recognized by the Court in *Roe* will save you from the next eighteen years of unwanted parenthood, yes? No! The right of reproductive choice is not an option for you for the simple reason that you are male.\(^9\)

The Court in *Roe* held that a woman’s right to reproductive choice is a fundamental right worthy of constitutional protection under the Due Process Clause of the Fourteenth Amendment.\(^10\) This article will examine whether recognition of such a right as fundamental violates federal constitutional principles because it does not grant that same right of reproductive choice to men.\(^11\) Accordingly, Part I examines what a fundamental right is and the history behind fundamental rights in general, primarily focusing on the judicially created unenumerated fundamental rights (as opposed to the legislatively created enumerated fundamental rights).\(^12\) Particular attention is paid to the development of the principal fountainhead of unenumerated fundamental rights, the doctrine of substantive due process.\(^13\) Part II traces the history of fundamental personal privacy rights established as part of substantive due process, leading up to one of the most controverted privacy rights ever recognized by the Supreme Court: the right to

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\(^6\) See id. ¶ 14.

\(^7\) Id. ¶ 15.

\(^8\) 410 U.S. 113, 154 (1973).

\(^9\) See discussion infra Part II.D.

\(^10\) See *Roe*, 410 U.S. at 153.

\(^11\) See supra note 9 and accompanying text.

\(^12\) “Legislatively created enumerated fundamental rights” refers to those rights added to the Constitution’s text by Congress in the form of an amendment, such as the Bill of Rights or the right to vote for women; “judicially created unenumerated fundamental rights,” on the other hand, are those rights not existing explicitly in the Constitution’s text, but recognized by the judiciary nonetheless as implied guarantees, such as the right to privacy. See discussion infra Parts I-II.

reproductive choice for women, established by the Court’s much criticized *Roe* decision.\textsuperscript{14} Part III takes what is revealed herein about the nature of unenumerated fundamental rights and applies such principles to *Roe’s* holding.\textsuperscript{15} This analysis demonstrates that the only instance in which the right to choice could be properly deemed fundamental without contradicting established constitutional principles would be if it were granted equally to men and women.\textsuperscript{16} Because such an application would result in an untenable situation for both genders, however, it then becomes apparent that under no set of circumstances could the right to choice be considered fundamental consistent with how the Supreme Court has defined and recognized unenumerated fundamental rights since the beginning of American jurisprudence.\textsuperscript{17} Thus, *Roe* was wrongly decided and should be overturned because it grants a fundamental constitutional right to women that it does not grant simultaneously to men\textsuperscript{18} and, in light of the specific problems inherent in human reproduction, would be logically unable to do so.\textsuperscript{19} Part IV addresses some of the policy issues behind the *Roe* decision.\textsuperscript{20} An in-depth analysis of why the Court in *Roe* might have given in to popular culture over principled analysis is provided,\textsuperscript{21} along with the revelation that overturning *Roe* would actually realign the Court with their previous fundamental rights jurisprudence while at the same time minimally offending the principle of stare decisis, in that such policy concerns have little relevance in modern times.\textsuperscript{22} The article then returns to the issue of substantive due process itself, reflecting on the dangers inherent in the Court’s overuse or

\textsuperscript{14} See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995-96 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“*Roe* fanned into life an issue that has inflamed our national politics . . . .”).

\textsuperscript{15} See discussion infra Part III.

\textsuperscript{16} See discussion infra Part III.B.

\textsuperscript{17} See discussion infra Part III.B.

\textsuperscript{18} See supra note 9 and accompanying text.

\textsuperscript{19} See discussion infra Part III.A.

\textsuperscript{20} See discussion infra Part IV.


\textsuperscript{22} See discussion infra Part IV.A.
misuse of the doctrine to resolve political problems. Part V considers various solutions to the reproductive choice dilemma that do not include extending the right of choice to both genders under the Federal Constitution, and recommends the state legislatures as the government bodies best suited to resolving the problem while maintaining a correct constitutional result. The article then concludes with an outlook on the reproductive choice issue as it stands today by considering a hypothesis of how Roe could successfully be overturned with the use of test case litigation pursuant to the concepts presented herein.

According to Justice O’Connor, “[w]hen the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of Roe v. Wade, there will be time enough to reexamine Roe. And to do so carefully.”

With that in mind, we begin by considering the constitutional history that preceded Roe.

I. HISTORY OF FUNDAMENTAL RIGHTS

A. The Bill of Rights—The Original Enumerated Fundamental Privileges and Immunities

Although different theories exist as to their origin, fundamental rights were initially thought to be very narrow in scope. Fundamental rights were first recognized as part of the Constitution with the addition of the Privileges and Immunities Clause (also known as the Comity Clause) in Article IV, Section 2: “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Though at the time the Comity

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23 See discussion infra Part IV.B.
24 See discussion infra Part V.
27 See discussion infra Part I.
29 U.S. Const. art. IV, § 2, cl. 1.
Clause was drafted fundamental rights remained largely undefined, it later became understood that “the privileges and immunities of citizens . . . are chiefly defined in the first eight amendments to the Constitution of the United States.” These first eight, along with the Ninth and Tenth Amendments, are known as the Bill of Rights, and comprise the original enumerated fundamental privileges and immunities. The Bill of Rights represented a collection of spheres of personal liberty to be protected by the federal courts from legislative interference. By virtue of their fundamentality, the rights enumerated by the Bill of Rights were placed beyond the reach of the legislative branch of government, in that they could not be repealed by a simple majority of Congress. Thus, although fundamental rights were originally limited to those explicitly enumerated in the Bill of Rights, they were nonetheless held equally among all eligible citizens, as evidenced by the pervasive language “the people.”

B. The Development of the Substantive Due Process Doctrine—The Principal Resting Place for Unenumerated Fundamental Privileges and Immunities

1. Early Judicial Recognition

Though enumerated fundamental rights are legislatively created, in that they are proposed and voted on by Congress prior to their recognition by the Court, unenumerated fundamental rights are the sole invention of the judiciary. In order to be properly defined as

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31 LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 1 (Yale Univ. Press 1999); see U.S. CONST. amends. I-X. The Ninth and Tenth Amendments are not considered a fundamental part of the Bill of Rights because they are federalism provisions, rather than private rights. See AKHIL REED AMAR, THE BILL OF RIGHTS 180 (Yale Univ. Press 1998).
32 See AMAR, supra note 31, at 176-77.
34 See infra note 66 and accompanying text.
35 Since that time, however, new enumerated fundamental rights have been added by the legislature to the Constitution’s text. See, e.g., U.S. CONST. amends. XIII-XV; Davis, supra note 13, at 960.
36 See Bunch, supra note 28, at 812. During this time period, the term “eligible citizens” included only white males. See AMAR, supra note 31, at 170-71; Ruth Bader Ginsburg, Sex Equality and the Constitution, 52 TUL. L. REV. 451, 451 (1978).
37 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); discussion infra Part II.
“unenumerated,” such rights must be independent of the enumerated rights already existing in the text of the Bill of Rights or other amendments to the Constitution. These unenumerated fundamental rights are limited to a class of rights that were said to not be government created but to have existed in a state of nature, been established by public policy in a supermajority of states, been nationally distributed, and been provided to any U.S. citizen.

Though decisions as early as 1798 acknowledged the concept of unenumerated “fundamental” or “natural” rights, the judiciary first officially tied the authority for recognizing unenumerated fundamental rights to the Comity Clause in the 1823 Corfield v. Coryell decision, a dispute concerning fishing rights of public waters. In an opinion by Circuit Justice Bushrod Washington, the court stated “[w]e feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right to citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states . . . .” The Privileges and Immunities Clause was again the constitutional authority for the recognition of fundamental rights. This time, however, it was declared that not all fundamental rights were limited to those actually enumerated in the Constitution’s text.

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39 See Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbell); Bunch, supra note 28, at 820. See also Michael J. Perry, We the People: The Fourteenth Amendment and the Supreme Court 61 (Oxford Univ. Press 1999) (rejecting the idea that the phrase “privileges and immunities” referred to rights distributed to only some of a state’s citizens). Unenumerated fundamental rights are defined in this manner because the Court’s authority is limited to recognizing rights that are either 1) enumerated or 2) unenumerated but believed to be a substantiation of the Constitution’s “life, liberty, or property” language. U.S. Const. amends. V, XIV, § 1; cf Davis, supra note 13, at 963 (discussing the development of the right to privacy). This is because the Court has no power to determine the content of the Constitution, only the power to interpret that which the Constitution already contains. Joan Schaffner, The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?, 54 Am. U. L. Rev. 1487, 1495 (2005).
41 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).
42 See id. at 550.
43 Id. at 551.
44 See supra notes 30-32 and accompanying text.
45 See Kalt, supra note 33, at 132-33.
“[The rights enumerated] may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental.”46 As to exactly what these other rights entailed, Justice Washington noted their unenumerated character: “What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.”47 Justice Washington then listed some general examples for clarification.48 “Protection 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 . . . .”49 On the basis of that analysis, the court in Corfield determined that there was no fundamental right to fish for oysters in public waters,50 and that such an issue was therefore best left to the discretion of the legislature.51 Thus, the concept of unenumerated fundamental rights was born through the Corfield court’s refusal to recognize the existence of one in the case before it.52

2. The Fourteenth Amendment

a. Enactment

Unenumerated fundamental rights were first reserved at the state level through the enactment of the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”53

The precursor of the Fourteenth Amendment was the 1866 Civil Rights Act.54 After the Act was ratified, a legislator from Indiana described its purpose as making civil rights principles

46 Corfield, 6 F. Cas. at 552 (emphasis added).
47 Id. at 551.
48 Id.
49 Id. at 551-52.
50 See Bunch, supra note 28, at 798.
51 See Corfield, 6 F. Cas. at 552.
52 Bunch, supra note 28, at 797-98.
53 U.S. CONST. amend. XIV, § 1.
54 See Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.); Bunch, supra note 28, at 796.
of the era “permanent by writing them into the fundamental law.” Senator Trumbell, the primary author of the 1866 Act, stated that “the rights of citizens [are] . . . [t]he great fundamental rights set forth in this bill.” Other legislators during this time noted that fundamental rights were those privileges and immunities traditionally possessed in common by the citizens of free governments. The Civil Rights Bill and subsequent Fourteenth Amendment thus became the authority for recognition of unenumerated fundamental rights in the Privileges and Immunities Clause at the state level, with the framers quoting the Corfield decision at length.

The framers, however, made a textual change to the Clause found in Section 1 of the Amendment, wording it Privileges or Immunities, to distinguish it from the Constitution’s Privileges and Immunities found in Article IV. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .” In doing so, the framers affirmatively linked the meaning of the new Privileges or Immunities Clause of the Fourteenth Amendment to the rights protected under the Privileges and Immunities Clause of Article IV. In fact, every speaker in Congress who touched on the issue during the discussion of the adoption of the Privileges or Immunities Clause acknowledged that it was derived from

57 See id. at 2766 (statement of Sen. Howard); Bunch, supra note 28, at 812.
60 Compare U.S. CONST. amend. XIV, § 1, with U.S. CONST. art. IV, § 2, cl. 1.
61 U.S. CONST. amend. XIV, § 1 (emphasis added).
62 Bunch, supra note 28, at 809-10. The change in language from “and” to “or” is believed to echo a deliberate choice calculated to narrow the Amendment’s reach from the more broader wording of “privileges and immunities” so as to avoid the scope of the Amendment from including a protection of political rights against legislative interference. McConnell, supra note 58, at 959-60. The impetus for this was the framers’ belief that the Fourteenth Amendment would never be ratified if it included the grant of a right to vote for the freedmen. See PERRY, supra note 39, at 68.
the Privileges and Immunities Clause of Article IV.\textsuperscript{63} They equated the rights it protected with natural rights not created by government but existing in a state of nature,\textsuperscript{64} as opposed to those rights that are merely political and “the creature of . . . law.”\textsuperscript{65} And, like the drafters of the Bill of Rights, the framers were not content to entrust these rights to the protection of a statute subject to repeal by a simple majority of Congress.\textsuperscript{66} Thus, all citizens, including African-Americans and women, were encompassed in the Fourteenth Amendment’s recognition and protection of unenumerated fundamental rights, though at that time these groups were still denied political rights.\textsuperscript{67}

b. Jurisprudence

The first time the Supreme Court attempted to define the contours of the Fourteenth Amendment was in the \textit{Slaughter-House Cases}.\textsuperscript{68} This opinion was a consolidation of several cases brought by butchers in New Orleans to oppose the constitutionality of laws regulating the slaughterhouse industry.\textsuperscript{69} In construing the Privileges or Immunities Clause of Section 1 for the first time, Justice Samuel F. Miller in his majority opinion determined “[o]f the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State . . . it is only the former which are placed by this clause under the protection of the Federal Constitution, and . . . the latter, whatever they may be, are not intended to have any

\begin{footnotes}
\footnote{63 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens); \textit{id.} at 2542 (statement of Rep. Bingham); \textit{id.} at 2765 (statement of Sen. Howard); \textit{id.} at 2961 (statement of Sen. Poland); \textit{id.} at 3035 (statement of Sen. Henderson).}
\footnote{64 See \textit{id.} at 474 (statement of Sen. Trumbell).}
\footnote{65 \textsc{Perry}, \textit{supra} note 39, at 68. This latter category of rights is traditionally left to the domain of the states and is dependent on the legislature for recognition and implementation. See CONG. GLOBE, 39th Cong., 1st Sess. 1255 (1866) (statement of Rep. Wilson); Bunch, \textit{supra} note 28, at 800.}
\footnote{66 Bunch, \textit{supra} note 28, at 796.}
\footnote{67 \textsc{See Amar}, \textit{supra} note 31, at 216-17. Because the Fourteenth Amendment granted merely citizenship and not political rights, the Fifteenth and Nineteenth Amendments were later enacted so that such political rights (suffrage being emblematic) could be granted to African-Americans and women, respectively. See \textit{id.} at 274.}
\footnote{68 83 U.S. (16 Wall.) 36 (1872); \textsc{Amar}, \textit{supra} note 31, at 210.}
\footnote{69 \textit{Slaughter-House}, 83 U.S. (16 Wall.) at 57, 60.}
\end{footnotes}
additional protection by this paragraph of the amendment." Since the text of Section 1 spoke only of privileges or immunities of the United States (federal rights) and not of those of citizens of the several states (state rights), the Court held that the phrase “privileges or immunities” did not refer to the fundamental rights of citizens protected from state interference, but to rights derived from “the Federal government, its National character, its Constitution, or its laws [: ].”

[The clause’s] sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction. . . . [the clause does not] profess to control the power of the State governments over the rights of its own citizens.

Miller thus determined that, in the absence of federal legislation, a state did not violate the Fourteenth Amendment when it created a monopoly as part of the regulation of an industry that posed public health dangers, such as the slaughterhouse industry.

Many disagreed with Justice Miller’s interpretation, including Justice Field who, in his Slaughter-House dissent said of the Privileges or Immunities Clause that “[i]f under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States. . . . The fourteenth amendment places them under the guardianship of the National authority.” Another Slaughter-House dissenter, Justice Bradley, went further, stating

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70 Id. at 74.
71 Id.
72 Id. at 79.
73 Id. at 77. Miller’s view was based on a concern that a fundamental rights interpretation of the Clause would “leave the Court at large in the field of public policy without any guidelines other than the views of its members.” ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 37 (Collier Macmillan 1990).
74 Slaughter-House, 83 U.S. (16 Wall.) at 62-64.
75 Id. at 101.
that “[r]ights to life, liberty, and the pursuit of happiness . . . are the fundamental rights which can only be taken away by due process of law . . .”76

Controversy over Miller’s interpretation continues to this day, with one scholar opining that the *Slaughter-House* decision “strangl[ed] the privileges-or-immunities clause in its crib,”77 as the Court’s position denies the Clause any independent force.78 Although debating the proper interpretation of the Privileges or Immunities Clause is beyond the scope of this article, the *Slaughter-House Cases* is extremely significant to our discussion for one important reason: Since the decision, the Supreme Court has turned to the Due Process Clause of the Fourteenth Amendment for the protection of unenumerated fundamental rights from state interference.79 Thus, Justice Bradley’s dissent was to carry the day.80

Not five years after *Slaughter-House*, the majority of the Supreme Court, including Justice Miller, found Justice Bradley’s proposition decidedly appealing.81 Justice Miller, authoring the majority opinion in *Davidson v. New Orleans*,82 stated in that case that due process was satisfied when a plaintiff was granted, in response to her opposition to assessments made on her property, “a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is

76 *Id.* at 116 (emphasis added). See also infra note 79 and accompanying text (discussing the significance of Justice Bradley’s use of this phrase).
77 *AMAR*, supra note 31, at 213.
79 *Id.* at 333. The Fourteenth Amendment’s Due Process Clause gave the Court, as they interpreted it, the power to bypass state laws that were believed to conflict with fundamental constitutional rights by striking down contradictory state legislation and enforcing these rights against the states through a process that later became known as “selective incorporation.” See Davis, supra note 13, at 961. It should be mentioned, however, that the practice of recognizing unenumerated fundamental rights as part of the Due Process Clause had occurred at the federal level under the Fifth Amendment as early as 1856. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1856) (holding that the right of property in slaves was fundamental and guaranteed by the Constitution). See also discussion infra Part IV.B (discussing the notorious *Scott* decision in greater detail).
80 See *BORK*, supra note 73, at 38.
81 See *id.* at 40.
82 96 U.S. 97 (1877).
appropriate to the nature of the case[.]

In dicta, however, Justice Miller also stated that, although such was not the instance in the case at bar, due process could fail to be satisfied by mere procedure because the Clause also had substantive requirements.

A most exhaustive judicial inquiry into the meaning of the words ‘due process of law’ . . . [indicates] that they do not necessarily imply a regular proceeding in a court of justice. . . . [C]an a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.

As to defining which private rights the Due Process Clause protected from legislative interference, Justice Miller stated that “there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require . . . .”

Justice Miller and the majority of the Supreme Court saw fit in Davidson to validate substantive due process as constitutional doctrine. In cases that followed the Court expanded these principles and developed what we now know today as the right to privacy. Thus, the Slaughter-House Cases did not ultimately destroy recognition of unenumerated fundamental rights as applied to the states under the Fourteenth Amendment; it merely shifted the authority for such recognition from the Privileges or Immunities Clause to the Due Process Clause.

II. DEVELOPMENT OF FUNDAMENTAL PERSONAL PRIVACY RIGHTS

A. The Right to Privacy—Meyer

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83 Id. at 104-05.
84 See id. at 102; BORK, supra note 73, at 42. See also Elizabeth Spahn & Barbara Andrade, Mis-Conceptions: The Moment of Conception in Religion, Science, and Law, 32 U.S.F.L.REV. 261, 315 n.301 (1998) (“The device of dismissing a case on procedural grounds, but first planting extensive dicta on the substantive issue, is a time honored method of Supreme Court law-making.”).
85 Davidson, 96 U.S. at 102 (emphasis added).
86 Id. at 104.
87 BORK, supra note 73, at 43.
88 See discussion infra Part II.
89 Bogen, supra note 78, at 384-85.
A little over two decades after the heyday of the substantive due process doctrine, the Supreme Court again hinted at the concept of fundamental privacy rights. In *Meyer v. Nebraska* the Court considered the constitutionality of a state statute that prohibited any person from teaching languages other than English in a school setting. Without referring to any specific guarantee or enumeration of the Bill of Rights, the Court invoked the past twenty years of precedents to hold that the Fourteenth Amendment protected:

[T]he right of the individual to . . . engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Thus, the Court found that the right of the defendant to teach a foreign language was within the scope of the “liberty” protected by the Due Process Clause. Though the case involved a schoolteacher asserting his right to teach a foreign language, the holding was worded in the more generic language of “the individual.” This is consistent with previous definitions of unenumerated fundamental rights, in that they apply to any U.S. citizen.

While the *Meyer* case failed to make the historical context and rationale of a right to privacy explicit, it did provide the critical link between common law liberties and unenumerated rights that previous cases had left behind by attempting to specify what some of these privacy

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91 See supra text accompanying note 85.
92 262 U.S. 390 (1923).
93 Id. at 397.
94 Id. at 399.
95 See id. at 400.
96 Id. at 396-97.
97 Id. at 401.
98 See PERRY, supra note 39.
rights were. This link provided the initial means of guiding the Court in shaping the future content of such rights.

B. The Right to Procreate—Skinner

Following Meyer in the recognition of constitutional privacy was a case that dealt with the procreative rights of a male inmate at a penal institution. The defendant in Skinner v. Oklahoma ex rel. Williamson had been convicted once for stealing chickens and twice for armed robbery. He challenged the constitutionality of the state’s attempt to subject him to a statute that provided for the sterilization of “habitual offenders,” defined as those convicted two or more times of felonies involving moral turpitude. Justice Douglas, writing for the majority, held that the statute was unconstitutional because it subjected larcenists but not embezzlers to the possibility of sterilization, thus violating the Equal Protection Clause. “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made . . . an invidious . . . discrimination . . . .” In dictum the Court declared that the procreative right is “fundamental to the very existence and survival of the race.” Like the previous cases that recognized personal fundamental rights,

100 Smolin, supra note 99.
102 316 U.S. 535.
103 Id. at 537.
104 Id. at 536.
105 “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1; Skinner, 316 U.S. at 538-39. It is not clear why Justice Douglas turned to the Equal Protection Clause instead of due process for finding a fundamental right to procreate, considering that the switch in methodology led to what would have otherwise been the same result. Bork, supra note 73, at 64 (“Skinner was really a substantive due process case masquerading as a decision under the equal protection clause.”). Some scholars suggest that Justice Douglas’ reason for altering the Court’s privacy rights jurisprudence was to maintain consistency with an opinion he had authored the previous term, Olsen v. Nebraska ex rel. Western Reference & Bond Ass’n, in which he criticized the Court’s overuse of the Due Process Clause. 313 U.S. 236, 247 (1941) (“public policy . . . should not be read into the Constitution.”). The Equal Protection Clause will be addressed in greater detail in a later part of this article. See discussion infra Part V.B.
106 Skinner, 316 U.S. at 541.
107 Id.
Skinner did not actually place it in the context of a more general “right to privacy,” although the Court’s decision foreshadowed the later prominence of procreation as a subject of liberty protection.

C. The Right to Avoid Procreation—Griswold & Eisenstadt

Twenty-three years after Skinner first called attention to the procreative right, the Supreme Court made the landmark decision of Griswold v. Connecticut. This case challenged the constitutionality of a state statute that criminalized the use of birth control. Applying the personal privacy principles that the court had been true to for the past several decades, Justice Douglas, again writing for the majority of the Court, determined under the penumbras of the guarantees of the Bill of Rights that, “the right of privacy which presses for recognition here is a legitimate one.” Justice Goldberg, though he felt that the authority for recognition of personal privacy rights was the Ninth Amendment’s reservation of rights to the people, concurred in dicta that “the concept of liberty [that] protects those personal rights that are fundamental . . . is not confined to the specific terms of the Bill of Rights[,]” thus reaffirming the concepts established by the Corfield court over 140 years earlier. He then articulated what is now

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108 See id.
109 See BORK, supra note 73, at 67; accord Spahn & Andrade, supra note 84.
110 381 U.S. 479 (1965).
111 Id. at 480.
112 See discussion supra Part II.A-B.
113 Griswold, 381 U.S. at 484-85. “Penumbras” in this context refers to Justice Douglas’ assertion that “[v]arious guarantees create zones of privacy,” and that these zones of privacy are independent sources of unenumerated privacy rights. Id. Again Justice Douglas avoids the Due Process Clause as the grounding for privacy rights. Id. at 481-82 (“Overtones of some arguments suggest that [the Due Process Clause] should be our guide. But we decline that invitation . . . ”). This avoidance was likely due to the Court’s continued disparagement of the substantive due process doctrine. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). More modern Courts, however, regard the right recognized in Griswold as anchored in the Due Process Clause. Roe v. Wade, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring) (“[T]he Griswold decision can be rationally understood only as a holding that . . . the ‘liberty’ . . . is protected by the Due Process Clause of the Fourteenth Amendment.”).
114 Griswold, 381 U.S. at 499 (Goldberg, J., concurring); see U.S. CONST. amend. IX.
115 Id. at 486 (Goldberg, J., concurring).
116 Supra note 46 and accompanying text.
considered the modern test for determining the existence of a fundamental personal privacy right: “In determining which rights are fundamental, judges. . . . must look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] . . . as to be ranked as fundamental.’”\textsuperscript{117} Applying that test Justice Goldberg agreed with the majority that, “the right of privacy is a fundamental personal right[.]”\textsuperscript{118}

\textit{Griswold}, though its holding only protected married couples from state interference in their use of birth control, was nonetheless the first case to recognize that personal relationships fall within a zone of privacy, articulating what we know today as the “right to privacy.”\textsuperscript{119} It was the latest in a long line of cases, however, that recognized that unenumerated fundamental rights are properly defined as those belonging to \textit{all} citizens.\textsuperscript{120} By holding that the right to privacy was fundamental, and that the right of married couples to use birth control was included as one of those privacy rights, the latter was protected from legislative interference.\textsuperscript{121}

Following \textit{Griswold} was \textit{Eisenstadt v. Baird}.\textsuperscript{122} This case involved the constitutionality of a state statute that made it a felony for anyone to dispense contraceptives to an unmarried person.\textsuperscript{123} “We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the law] violate[s] the Equal Protection Clause.”\textsuperscript{124} More significantly, the Court in dictum stated, “[i]f the right of privacy means anything, it is the right of the \textit{individual}, married or single, to be free from unwarranted government intrusion into

\textsuperscript{117} \textit{Griswold}, 381 U.S. at 499 (Goldberg, J., concurring) (emphasis added) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); see also Washington v. Glucksberg, 521 U.S. 702, 719-720, 733 (1997) (a right deemed fundamental is one such that “‘every man \textit{and} woman in the United States must enjoy it.’” (emphasis added) (quoting Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir.1995))).

\textsuperscript{118} \textit{Griswold}, 381 U.S. at 494 (Goldberg, J., concurring).

\textsuperscript{119} \textit{See id.} at 485-86; BORK, supra note 73, at 99.

\textsuperscript{120} \textit{See discussion supra Parts I.B., II.A-B.}

\textsuperscript{121} \textit{See Griswold}, 381 U.S. at 485-86.

\textsuperscript{122} 405 U.S. 438 (1972).

\textsuperscript{123} \textit{Id.} at 440-42.

\textsuperscript{124} \textit{Id.} at 454-55.
matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

Such declaration was consistent with what an unenumerated fundamental right essentially is and always has been: “those privileges and immunities which are, in their nature, fundamental; 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 . . . .”

**D. The Right to Reproductive Choice for Women—Roe v. Wade**

*Roe v. Wade* was the first Supreme Court decision to recognize the right to choose whether to become a parent once a child has already been conceived, commonly known as the right to voluntary abortion. This right, as crafted by the Supreme Court, is encompassed by the right to privacy established and first recognized by *Griswold* and extended by *Eisenstadt* interpreting privacy as a fundamental constitutional right. However, *Roe* granted this right of reproductive choice to women exclusively, stating, “[a] state criminal abortion statute . . . that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.”

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125 Id. at 453. Later decisions have interpreted this dictum as the Court validating a fundamental right of the individual to use contraceptives under the Due Process Clause. See, e.g., Carey v. Population Services Int’l, 431 U.S. 678, 685-87 (1977).


128 See id. at 116. This article examines and critiques the right to choose abortion only as it pertains to voluntary or non-therapeutic abortions, as this author does not take issue with the notion that “[n]o woman is required to build up the world by destroying herself.” ANNE HENDERSHOTT, THE POLITICS OF ABORTION 87 (Encounter Books 2006) (quoting Rabbi Bonnie Margulis, Reproductive Freedom Is a Jewish Moral Imperative, THE WISCONSIN JEWISH CHRONICLE, 2002, http://www.jewishchronicle.org/issues/20050729/oped_opinions.htm).


130 This article will avoid using the term “mother” as opposed to “woman,” and “father” as opposed to “man,” except when maintaining the accuracy of quoted language, as the latter terms rather than the former ones are more viewpoint neutral in the context of the abortion controversy. See Spahn & Andrade, supra note 84, at 317 n.309.

131 *Roe*, 410 U.S. at 164.
explicitly tied the reproductive choice right to those unenumerated personal rights recognized as fundamental under the Due Process Clause.\textsuperscript{132}

From there the Court went on to say that although the right of personal privacy includes the abortion decision, this right is not absolute and must be balanced against important state interests in regulation.\textsuperscript{133} The court commenced by determining that the word ‘person,’ as used in the Fourteenth Amendment, did not include the unborn.\textsuperscript{134} From there the Court established a trimester framework that delineated when the right to choice ended and the State’s interest in preserving the life of the fetus began.\textsuperscript{135} This framework did not recognize the legitimate interests of the state in preserving fetal life until the beginning of the third trimester, and even then the state was allowed but not required to protect the unborn child from the act of abortion.\textsuperscript{136}

Since no paternal interests in \textit{Roe} were asserted, the Court did not rule on the issue of male reproductive choice rights.\textsuperscript{137} The majority did, however, acknowledge this omission, as well as at least a suspicion of the constitutional infirmity of \textit{Roe}: “[I]n this opinion …[we do not] discuss the father’s rights, if any exist in the constitutional context, in the abortion decision.”\textsuperscript{138} In a later abortion case, \textit{Planned Parenthood of Central Missouri. v. Danforth},\textsuperscript{139} the Court came the closest it ever has to answering the question of men’s reproductive choice rights.\textsuperscript{140} The statutory provision at issue in this case was a requirement that a married woman obtain her husband’s written consent in order to obtain an abortion during the first trimester of her

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\textsuperscript{132} See \textit{id}; discussion \textit{supra} Part II.B-C.
\textsuperscript{133} \textit{Roe}, 410 U.S. at 154.
\textsuperscript{134} \textit{Id.} at 158.
\textsuperscript{135} See \textit{id.} at 164-65.
\textsuperscript{136} See \textit{id.}
\textsuperscript{138} \textit{Roe}, 410 U.S. at 165 n.67.
\textsuperscript{139} 428 U.S. 52 (1976).
\textsuperscript{140} Cf. Totz, \textit{supra} note 137, at 213 n.427 (alleging that paternal rights cases have failed because of the holding in \textit{Danforth}).
\end{flushright}
pregnancy, unless the abortion was necessary to preserve her life.\textsuperscript{141} The Court held that the State may not constitutionally require the consent of the spouse to do what the State itself is not permitted to do, which is to unilaterally prevent or veto an abortion during the first trimester of the pregnancy.\textsuperscript{142} The Court in \textit{Danforth}, however, only viewed the consent provision in terms of a delegation of state interest, rather than an independent recognition of a male reproductive right.\textsuperscript{143} Such phraseology hints at the Court’s awareness of the difficulty of asserting a fundamental male reproductive right alongside that of the female.\textsuperscript{144} The Court did concede, however, that “when a woman . . . without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally.”\textsuperscript{145} The dissent addressed the issue more directly, stating that any reasonable man would be affected by the reproductive choice decision, and that states should be free to recognize the man’s interest in the life of his unborn child.\textsuperscript{146} In holding as they did, the \textit{Danforth} Court avoided the constitutional issue of fundamental male reproductive choice rights, though not precluding them altogether.\textsuperscript{147}

\section*{III. Roe’s Holding Cannot Be Maintained}

\subsection*{A. The Right to Choice as a Fundamental Right Would Be Untenable if It Included Both Genders}

Although the fetus is the creation of both parties,\textsuperscript{148} it is unlikely that a Court or society would be willing to accept the notion that men and women are equally situated in either the

\begin{footnotesize}
\textsuperscript{141} \textit{Danforth}, 428 U.S. at 67-68.
\textsuperscript{142} See \textit{id.} at 69.
\textsuperscript{143} See \textit{id.} at 71.
\textsuperscript{144} See \textit{id.} at 90 (1976) (Stewart, J., concurring) (“This seems to me a rather more difficult problem than the Court acknowledges.”).
\textsuperscript{145} Id. at 71.
\textsuperscript{146} See \textit{id.} at 93 (White, J., concurring in the judgment in part and dissenting in part) (“A father’s interest in having a child—perhaps his only child—may be unmatched by any other interest in his life.”).
\textsuperscript{147} Cf. \textit{Danforth}, 428 U.S. at 91 (Stewart, J., concurring) (“Previous decisions have recognized that a man’s right to father children and enjoy the association of his offspring is a constitutionally protected freedom.”).
\end{footnotesize}
incidence of pregnancy itself or the decision whether or not to terminate one.\textsuperscript{149} Were the Supreme Court to reinterpret \textit{Roe} to include recognition of a fundamental right by a man in his offspring that attaches prior to birth, the assertion of such a right would have the effect of forcing a woman to simultaneously waive her right to choice.\textsuperscript{150} Moreover, if a man had standing to prevent a woman from terminating the pregnancy, he would also have the corresponding standing to compel the termination of the pregnancy notwithstanding the woman’s desires.\textsuperscript{151} The action of a court balancing competing constitutional interests, however, would put any controversy between a man and a woman on this subject in the parameters of a suit between two private parties, rather than subjecting the assertion of that right by either party to strict scrutiny.\textsuperscript{152} Furthermore, since the presumption here is that the right to choice is fundamental for both genders,\textsuperscript{153} and since fundamental rights originate “outside the power and authority of the state [and derive from] something akin to ‘natural’ law,”\textsuperscript{154} cases such as \textit{Shelley v. Kraemer}\textsuperscript{155} would not apply.\textsuperscript{156} Additionally, if mere state court involvement by itself were considered state

\begin{thebibliography}{9}
\bibitem{149} Cf. Totz, \textit{supra} note 137, at 235 n.585 (it is not discriminatory to compel a woman to carry a fetus to term because men and women are not similarly situated in pregnancy).
\bibitem{151} See Jones v. Smith, 278 So. 2d 339, 344 (Fla. Dist. Ct. App. 1973), \textit{cert. denied}, 415 U.S. 958 (1974); see also Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (the party desiring to avoid procreation should prevail, as long as the other party can procreate by other reasonable means).
\bibitem{153} See \textit{supra} text accompanying note 150.
\bibitem{154} Brief of Appellee Father, \textit{supra} note 152, at 28 (citing Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (“[T]he liberty interest in family privacy has its source . . . not in state law, but in intrinsic human rights”).
\bibitem{155} 334 U.S. 1 (1948) (state court enforcement of a racially restrictive covenant constitutes state action within the meaning of the Fourteenth Amendment).
\bibitem{156} This is because the contract right (which was at issue in \textit{Shelley}) is considered an \textit{economic} act between two private parties that is not part of a “natural” fundamental right protected under substantive due process, cf. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-92 (1937) (the right to contract is not absolute and is subject to state regulations), while the right to choice as crafted by the Court is a \textit{personal} right fundamental in nature and therefore derived from “natural rights.” \textit{See} \textit{Roe} v. \textit{Wade}, 410 U.S. 113, 155 (1973).
\end{thebibliography}
action, then “all legally significant private action would be state action.”  Viewed in this context, the effects of making the right to choice properly fundamental would be that neither party would have the protection of a true fundamental right. Rather, they would each have the equivalent of a private interest, which would have to be balanced against competing private interests.

B. Because the Right to Choice Does Not and Cannot Include Both Genders, It Is Not Fundamental

1. The Right to Reproductive Choice Does Not Meet the Requirements For Fundamentality

As the right to reproductive choice cannot logically include both genders within its purview, the question remains as to how a judge can determine whether rights are fundamental or merely political rights best addressed by legislatures. Scholars have previously addressed and answered this debate:

If the right is inscribed in an enduring bill of rights, that inscription is itself decisive evidence of fundamentality. If not, a judge could see which rights the present government chose to extend to its most-favored citizens, and treat this extension as similar evidence of fundamentality. But if the government then chose to withdraw this right from its most-favored class rather than extend it to all citizens, that withdrawal would dissolve the basis on which our judge deemed the right fundamental in the first place. As a practical matter, this second category of mere state-law-created rights would enjoy a kind of antidiscrimination (“equal”) protection rather than fundamental rights (“full”) protection.

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157 Brief of Appellee Father, supra note 152, at 30; see also DeShaney v. Winnebago County Dep’t of Soc. Services, 489 U.S. 189, 195-96 (1989) (holding that the government is not obligated to protect a person from the acts of another individual).
158 As it is this article’s assertion that properly crafted unenumerated fundamental rights apply to everyone, the term “properly fundamental” is used to mean that the right to reproductive choice would have been extended to include both genders. See discussion supra Part I.B.
159 Cf. Brief of Appellee Father, supra note 152, at 27 n.4 (noting that Roe only provides women “an immunity” from state interference and, accordingly, does not guarantee a woman’s right to have an abortion without “interference from the asserted rights of the Father.”).
160 See id. at 36.
161 See discussion supra Part III.A.
162 See discussion infra Part V.B.
163 AMAR, supra note 31, at 179 n.*. See also infra Part IV.B (discussing the appropriateness of the Equal Protection Clause to govern assertion of the abortion right).
Since the right to reproductive choice has never been explicitly enumerated in any part of the Constitution or its amendments, nor has it ever been extended to all citizens as an unenumerated right, it therefore is not a true fundamental right.\textsuperscript{164}

2. The Court’s Declaration That the Right to Reproductive Choice is Fundamental Violates Its Own Fundamental Rights Jurisprudence

A decision by the Supreme Court to grant an unenumerated fundamental right cannot and should not do so exclusively in favor of one gender of citizens over another.\textsuperscript{165} A textual analysis of the Fourteenth Amendment, as derived from the Privileges and Immunities Clause, makes it obvious that an unenumerated right cannot be said to be fundamental unless it extends to all citizens, since the relevant phrases of section 1 are “of citizens” and “any person.”\textsuperscript{166} Since men and women encompass the definition of “citizens,” the right to reproductive choice as crafted by Roe cannot be properly defined as fundamental or be considered part of the right to privacy recognized by the Griswold and Eisenstadt Courts.\textsuperscript{167} An unenumerated fundamental right applies regardless of biology; it cannot survive both as an unenumerated fundamental right and as a limited right, limited only to people who can become pregnant.\textsuperscript{168}

Roe, as it stands, has the effect of abridging a man’s constitutional rights to procreate and to “decide whether to beget a child[,]” established under Skinner and Eisenstadt, respectively.\textsuperscript{169} The Roe Court violated the individuality principle of personal privacy rights when it analogized the right to abort a fetus to the rights recognized in previous unenumerated fundamental rights

\textsuperscript{164} See supra text accompanying note 131. This is the crux of the fundamental rights issue; a fundamental right has only been defined two ways—either as explicitly enumerated or as unenumerated but applying to all citizens equally. See discussion supra Parts I-II. Since the right to reproductive choice does not and could not meet either test, it is therefore not and never could be fundamental. See discussion infra Part V.A; discussion supra Part III.A.

\textsuperscript{165} See generally discussion supra Part II (detailing the inclusive nature of unenumerated fundamental rights).

\textsuperscript{166} U.S.CONST. amend. XIV, § 1.

\textsuperscript{167} Supra note 129.

\textsuperscript{168} See Response to Motion to Dismiss and Brief in Opposition to Intervening-Defendant’s Motion at 6-7, Dubay v. Wells, 2006 442 F.Supp. 2d 404 (E.D. Mich. 2006) (No. 06-11016).

\textsuperscript{169} See Totz, supra note 137, at 148; supra notes 107, 125.
cases.\textsuperscript{170} Since part of the concept of privacy rights is that they are a choice to be exercised by the \textit{individual}, the abortion situation is inherently different from education, marriage, procreation, contraception and sexual intimacy, all of which involved the individual making the decision to engage in these activities while truly in an individual capacity.\textsuperscript{171} On the other hand, the choice to have an abortion is not individual, as humans do not procreate individually.\textsuperscript{172} Were that the case, \textit{Roe} would have been correctly decided, at least on this basis.\textsuperscript{173} The same cannot be said here, where the woman is not “isolated in her privacy” and does not procreate individually (or asexually).\textsuperscript{174} For any species that procreates asexually (as some do), the right to reproductive choice could certainly be said as that belonging to the individual.\textsuperscript{175} As humans do not reproduce asexually and the choice to have an abortion would not be possible until after procreation has occurred, the issue of reproductive choice could therefore not be said to be individual,\textsuperscript{176} as the act of abortion centers on the destruction of a joint creation.\textsuperscript{177} As the Supreme Court itself has previously noted, “[w]e cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people—rather like inquiring whether there is a liberty interest in

\textsuperscript{172} Biological Reproduction Help, http://en.wikipedia.org/wiki/Biological_reproduction (last visited Aug. 25, 2007) (“Sexual reproduction requires the involvement of two individuals, typically one of each sex. Normal human reproduction is a common example . . .”).
\textsuperscript{173} See Thornburgh, 476 U.S. at 792 n.2.
\textsuperscript{174} See id.
\textsuperscript{175} See Biological Reproduction Help, supra note 172 (“In asexual reproduction, an individual can reproduce without involvement of another individual of that species.”).
\textsuperscript{177} See Conn v. Conn, 526 N.E.2d 958, 960 (Ind. 1988) (Pivarnek, J., dissenting).
firing a gun where the case at hand happens to involve its discharge into another person’s body.” 178

Furthermore, the Court could not maintain Roe by merely rewording the decision to include both genders and thereafter balancing the parties’ interests on a case-by-case basis. 179 Constitutional protections are “a shield . . . against government action, not a sword of government assistance to enable [someone] to overturn the private decisions of his fellow citizens.” 180 One’s personal circumstances and preferences are legally irrelevant to the possession and exercise of a fundamental right, and the exercise of such a right should not by definition clash with another’s exercise of that same right. 181 When a man and a woman disagree on an issue such as the decision whether or not to continue a pregnancy, only one of them can prevail. 182 Subjecting either gender to a balancing test would lead to the conclusion that inherent in the right of choice is the right to simultaneously destroy someone else’s right of choice. 183 As such, the right to choice could not apply to both genders, as it could only operate in the context of one party vetoing the other party’s fundamental right. 184

Moreover, all of the other fundamental individual privacy rights previously recognized by the Court did not require the adoption of a whole framework, complete with detailed rules and distinctions, to govern cases in which the asserted liberty interest would have to be balanced against a state’s significant interests. 185 The reason for that is simple: in all of the cases where a

179 See discussion supra Part III.A.
182 See Sharrin, supra note 150, at 1374.
184 See supra note 150 and accompanying text.
185 See Webster v. Reprod. Health Services, 492 U.S. 490, 520 (1989) (Rehnquist, J., plurality opinion). Note that Roe is the only substantive due process decision that grants a fundamental right exclusively to one gender, requires a subsequent balancing test with the state, and ultimately could only operate to cut off another’s fundamental right.
particular fundamental right to privacy has been recognized, both before and since \textit{Roe}, regulation of such a right did not properly serve any significant state interest.\textsuperscript{186} Very clearly then, the right to choice is more in line with a political right, rather than a fundamental personal privacy right, in that political rights are always balanced against competing legitimate state interests, and do not presume that all citizens are similarly situated in relation to that right.\textsuperscript{187} Thus, the right to choice is not fundamental and, accordingly, \textit{Roe}'s holding cannot be maintained.\textsuperscript{188}

\textbf{IV. \textit{Roe v. Wade} Can and Should Be Overturned}

As this article has demonstrated that \textit{Roe} cannot withstand constitutional scrutiny,\textsuperscript{189} it is now appropriate to address the Court’s greatest obstacle to overturning \textit{Roe}: The doctrine of stare decisis as applied to its previous abortion jurisprudence.\textsuperscript{190} When put into perspective, however, it is apparent that \textit{Roe} was merely a response to its time and most of its principles and rationales are no longer relevant.\textsuperscript{191}

\textit{A. \textit{Roe}'s Justifications No Longer Survive the Realities of Modern Culture}

\textbf{1. Improved Birth Control}

\textsuperscript{186} See \textit{Webster}, 492 U.S. at 547 n.7 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{187} See discussion infra Part V.B.

\textsuperscript{188} See discussion supra Part III.

\textsuperscript{189} See \textit{generally discussion supra} Parts I-III (describing why the right to reproductive choice for women is not a properly crafted fundamental right).

\textsuperscript{190} Translated from Latin literally, \textit{stare decisis} means “to stand by things decided.” \textit{BLACK’S LAW DICTIONARY, supra} note 134, at 1443.

\textsuperscript{191} See discussion \textit{infra} Part IV.A.
During the 1960’s and 1970’s the Sexual Revolution was occurring, which led to an increase in sexual activity and a general lack of reliable birth control.\textsuperscript{192} At that time, birth control information and devices were hard to come by, and there was a need for safer and more easily accessible methods of contraceptives.\textsuperscript{193} The predictable result was that many women were left with unwanted pregnancies.\textsuperscript{194} Once pregnant, the only means these women had of immediately regaining control of their lives was to obtain an abortion.\textsuperscript{195} It was in this environment that \textit{Roe v. Wade} was decided.\textsuperscript{196}

Since that time, however, many more forms of effective contraception have become available that easily replaces abortion as a form of birth control.\textsuperscript{197} At the time of \textit{Roe}, birth control carried with it a 20 to 40\% failure rate as compared to today’s birth control pill,\textsuperscript{198} which is 99\% effective when used properly.\textsuperscript{199} Also at the time of \textit{Roe}, condoms were not a popular or easily accessible form of birth control, and did not in fact become either until the mid-1980’s, when the virus that causes AIDS was identified.\textsuperscript{200} The contraceptive sponge was introduced in 1983 and the cervical cap in 1988, both barrier methods of contraception.\textsuperscript{201} The 1990’s witnessed the introduction of Depo-Provera, a long-lasting, injectable form of birth control that does not require the woman to remember to take a pill every day or insert a barrier device before sex.\textsuperscript{202} In the twenty-first century women now have the additional option of implantation devices such as Implanon and IUD’s, both of which release steady doses of hormones and are effective

\begin{footnotes}
\item[192] See \textsc{Sarah Weddington, A Question of Choice} 60 (G. P. Putnam’s Sons 1992).
\item[193] See id. at 26.
\item[195] See \textsc{Weddington, supra} note 192, at 26-27.
\item[196] Totz, \textit{supra} note 137, at 199.
\item[197] See generally \textsc{Knowles, supra} note 2, at 5-12 (detailing the various contraceptive options available to both men and women).
\item[198] \textsc{Weddington, supra} note 192.
\item[200] \textsc{Knowles, supra} note 2, at 5-6.
\item[201] \textit{Id.} at 6.8.
\item[202] See id. at 10.
\end{footnotes}
for three and five years, respectively.\textsuperscript{203} And, since July 1999, women have even had an option other than abortion post-coital: Plan B, which works by either delaying ovulation or by preventing fertilization.\textsuperscript{204} With the number of options available, as well as their extended durations of effectiveness, women now have greater choices than ever, thus making a national abortion mandate unnecessary.\textsuperscript{205}

2. Woman of the Twenty-First Century

A change in women’s status in society would also be indicative of the modern day irrelevance of the \textit{Roe} decision.\textsuperscript{206} In the Sixties and early 1970’s, in order to endure single motherhood women had to “abandon educational plans . . . sustain loss of income . . . forgo the satisfactions of careers . . . [and] bear the stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.”\textsuperscript{207} Accordingly, the \textit{Roe} decision was intended to deal with “the demands of the profound problems of the present day.”\textsuperscript{208} As a result, the nature of the woman’s interest in terminating a pregnancy was framed by the \textit{Roe} court in terms of the post-birth burdens of rearing a child, \textit{not} an interest in controlling her own body during pregnancy.\textsuperscript{209} Additional support for this position is evidenced by the fact that, under \textit{Roe}, the greatest parameter of rights afforded to women by the Court were during the first trimester of the pregnancy, the time period during which a pregnant woman’s body is least affected by the fetus, with complete preclusion by the state possible in the last trimester, the time when the

\textsuperscript{203} \textit{Id.} at 10, 12.
\textsuperscript{204} \textit{Id.} at 11.
\textsuperscript{205} See supra note 197.
\textsuperscript{206} See discussion \textit{infra} Part IV.A.2.
\textsuperscript{207} \textit{Roe} v. Wade, 410 U.S. 113, 215 (Douglas, J., concurring).
\textsuperscript{208} \textit{Id.} at 165.
\textsuperscript{209} \textit{Id.} at 153-54.
woman’s body typically undergoes the most significant changes involved in the labor and delivery of a child.\textsuperscript{210}

In the twenty-first century, however, women’s status in society has dramatically changed.\textsuperscript{211} Paternalistic reasoning such as that contained in the \textit{Roe} decision is actually considered to be sexist, in that men don’t have to endure such stigmas to be single parents, so why should women?\textsuperscript{212} Furthermore, “[w]e are now living, for better or for worse, in the era of Murphy Brown, where many women are choosing single motherhood and either deserting the natural father or abrogating any rights of the father by . . . raising the child without ever informing the father of his legal status.”\textsuperscript{213} Many women have decided to be single parents, or to co-parent with a person other than the natural father, and many of these women have turned to reproductive options such as artificial insemination by donor (AID) or \textit{in vitro} fertilization.\textsuperscript{214} In addition, various statutes enacted after \textit{Roe} now protect the careers and earnings of pregnant women and mothers.\textsuperscript{215} Larger companies also now sponsor programs to lessen the child-care burden for both men and women by providing employee benefits such as on-site day care,\textsuperscript{216} flex-time,\textsuperscript{217} and job-sharing.\textsuperscript{218}

Furthermore, statutory law has made \textit{Roe} largely irrelevant because of the enacting of “Baby Moses” laws in over forty states, the majority of which did not have these laws until as

\footnotesize{\textsuperscript{210} Totz, \textit{supra} note 137, at 188 n.267.  
\textsuperscript{211} See \textit{id.} at 199.  
\textsuperscript{214} Sharrin, \textit{supra} note 150, at 1402 n.200.  
\textsuperscript{216} Ellen Ernst Kossek & Victor Nichol, \textit{The Effects of On-Site Child Care on Employee Attitudes and Performance}, 45 PERSONNEL PSYCHOL. 485, 485 (1992).  
\textsuperscript{218} Totz, \textit{supra} note 137, at 201; \textit{see, e.g.}, Patricia G. Persuhn, \textit{Job Sharing: Two Who Made It Work}, AM. J. NURSING, Sept. 1992, at 75, 75-80.}
As these laws allow a mother to leave her child at a state facility within the first seventy-two hours of its birth with no threat of criminal liability, women now have another alternative to abortion. If her circumstances change, the woman is free under these laws to reunite with her child if the child has not yet been adopted. Because her decision under Baby Moses is now revocable rather than irrevocable as in the case of having an abortion, her range of choices and her liberty are greater than they ever have been before, thus severely undercutting the rationale in Roe. Because of these changes, today the average woman is not required to face the same hardships as Jane Roe did in 1973, as the facts upon which Roe was based and sustained are no longer a reality of modern society. Since overturning Roe would not violate the decision’s rationale, the stare decisis issue no longer has teeth.

B. The Supreme Court Has Previously Overturned Wrongly Decided Cases

There are dire ramifications when the Court’s jurisprudence interferes with political issues that deeply divide the nation through the pretext of “due process.” One example is the infamous Dred Scott v. Sandford decision, believed by many to be the original precedent for Roe. Dred Scott was a slave whose owner took him into the State of Illinois, where slavery was illegal. Scott then sued for his freedom on the theory that he had become free once taken

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219 Brief of Appellant at 18, McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004) (No. 03-10711).
220 Id.
221 Id. at 40-41.
222 Id. at 41.
223 Totz, supra note 137, at 201.
224 See discussion supra Part IV.A.2.
225 See discussion supra Part IV.A.
227 60 U.S. (19 How.) 393 (1856).
229 BORK, supra note 73, at 29.
into a state where slavery was outlawed.\textsuperscript{230} The Supreme Court responded to Scott’s argument by reading into the Constitution the legality of slavery forever and denying the federal and state governments the right to enact laws to prevent it:\textsuperscript{231}

[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.\textsuperscript{232}

This decision was the result of a judicial desire to protect slavery, rather than the statute’s lack of conformance to the Constitution.\textsuperscript{233} By striking down the Missouri Compromise, the Court made it a fundamental right to own slaves.\textsuperscript{234} The Civil War and the enacting of the Fourteenth Amendment later overturned the \textit{Scott} case.\textsuperscript{235} The parallels between \textit{Scott} and \textit{Roe}, however, are unmistakable:

\textit{Dred Scott} was fashioned as an opinion to put an end to a bitter dispute in America. It took one of the most contentious and personal of political issues out of the national debate. But instead of resolving controversies, \textit{Dred Scott} tore the nation apart. Although \textit{Roe} and its progeny have not resulted in a civil war, the peace over abortion since 1973 has been anything but civil. The last twenty years have seen political protest over the Court’s abortion jurisprudence unmatched by any other political issue of our day. Protest marches, clinic bombings, and fatal shootings have punctuated the debate. Putting the lid on this pot has caused it to boil over.\textsuperscript{236}

Another notorious substantive due process decision was \textit{Bradwell v. Illinois}.\textsuperscript{237} This case involved the Court’s refusal to overturn a decision by the state courts that was clearly

\begin{itemize}
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.} at 30.
\item \textsuperscript{232} \textit{Scott}, 60 U.S. (19 How.) at 450.
\item \textsuperscript{233} See \textit{Bork}, supra note 73, at 43.
\item \textsuperscript{234} See \textit{id.} at 30.
\item \textsuperscript{235} Cf. Graglia, supra note 228, at 25 (noting that the result of the \textit{Scott} decision was to “leave it for settlement by the Civil War.”).
\item \textsuperscript{236} Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1123 (5th Cir. 1997) (Garza, J., concurring specially) (arguing that \textit{Roe} is bad constitutional law).
\item \textsuperscript{237} 83 U.S. (16 Wall.) 130 (1872).
\end{itemize}
unconstitutional. The plaintiff was a woman who had been denied admission to the bar based on her gender.
The Court upheld the decision of the lower courts and constitutionally relegated women to second-class status:

> It certainly cannot be affirmed, as an historical fact, that . . . to engage in any and every profession, occupation, or employment in civil life . . . has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfit[s] it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. . . . For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

Such discrimination had been rationalized by an attitude of ‘romantic paternalism’ that in reality put women “not on a pedestal, but in a cage.” It was not until almost fifty years later that women began to attain recognition of political rights with the passing of the Nineteenth Amendment. Finally, over one hundred years after the Bradwell decision, the Supreme Court began to recognize women as equal to men, holding that “according differential treatment to male[s] and female[s] . . . violate[s] the Due Process Clause . . . .” Bradwell not only exemplifies the long and unfortunate history of sex discrimination in our Nation, it also bears a striking resemblance to Roe in that it denied an entire gender a fundamental right.

One final example of judicial blunder was Plessy v. Ferguson. Plessy held that legislatively mandated racial segregation worked no denial of equal protection. “[T]he assumption that the enforced separation of the two races stamps the colored race with a badge of

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239 Bradwell, 83 U.S. (Wall.) at 140 (Bradley, J., concurring).
240 Id. at 140-42 (emphasis added).
241 Frontiero, 411 U.S. at 684.
242 See U.S. CONST. amend. XIX; supra note 67 and accompanying text.
243 Frontiero, 411 U.S. at 690-91.
244 Id. at 684.
245 See supra Part II.D.
246 163 U.S. 537 (1896).
247 Id. at 548-49.
inferiority [is a fallacy]. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”

Fifty-eight years later, the Court repudiated *Plessy* in the landmark decision of *Brown v. Board of Education*, which declared unconstitutional school segregation laws:

In approaching this problem, we cannot turn the clock back to . . . 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. . . . Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Though *Plessy* had stated the opposite, the Court did not hesitate to find that modern psychological studies indicated that segregation caused feelings of inferiority. *Brown* was a triumph amidst intense political pressure. Most notably, the Court in *Brown* recognized that “it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.”

Accordingly, the Supreme Court should take the same stand as it did in *Brown* and not hesitate to overturn *Roe*, as it is constitutionally incorrect and the principles upon which it is based are no longer relevant. The answer to *Roe* can be found in the Constitution itself: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”

But in *Roe* the Court did one worse: not only did they sanction the killing of more than a million unborn children a year, they made it a fundamental right to do so. “No other [fundamental

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248 *Id.* at 551.
250 *Id.* at 492-93, 495.
251 See *id.* at 494.
252 BORK, supra note 73, at 77.
254 See discussion *supra* Part IV.A.
255 U.S. CONST. amend. XIV, § 1 (emphasis added).
right] involves the purposeful termination of a potential life.”258 In the case of other wrong decisions history has witnessed correction, by constitutional amendment in Scott and by Supreme Court abrogation in Bradwell, and Plessy.259 The time has come to abrogate Roe as well.260

V. A LEGISLATIVE PROPOSAL FOR RESOLVING THE RIGHT TO REPRODUCTIVE CHOICE DILEMMA WITHOUT THE CONSTITUTIONAL BLUNDER

Moral views that do not properly fit the definition of unenumerated fundamental rights,261 such as the right to reproductive choice, should become law only through the legislative process.262 Profound disagreement exists among our citizens on many other issues, such as the death penalty, but such disagreement is adequately worked out at the legislative level through political compromise.263 Furthermore, issues such as the life of the fetus and the impact of abortion upon women’s lives are ever evolving.264 Legislatures would be allowed to constantly re-examine the issue by holding hearings, making findings of fact, and enacting legislation based on evidence, none of which is possible when an issue is given constitutional immunity.265

The question then remains, at which legislative level should the issue be resolved—the federal or the state level?266

A. The Federal Legislative Level Via Constitutional Amendment—Not Very Practical 267

260 See BORK, supra note 73, at 116 (“Roe, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned. The Court’s integrity requires that.”).
261 See generally discussion supra Part I.B.
262 See Rehnquist, supra note 259, at 705.
266 See discussion infra Part V.A-B.
267 This article purposely leaves the constitutionality of a federal statutory remedy for another day, as the Court has failed to rule on that matter thus far. See, e.g., Gonzales, 127 S.Ct. at 1640 (Thomas, J., concurring) (noting the failure of the parties and the lower courts to address the issue of the proper scope of Congress’ Commerce Clause
The Constitution, including the Fourteenth Amendment, may be amended. Yet the remedy of a constitutional amendment is largely inapposite in this context. As the abortion right is so highly controverted, a consensus would be unlikely. Since 1789, there have been more than 5000 proposed amendments to the Constitution, many proposing new fundamental rights. Only seventeen provisions, however, have successfully ever made it through the Article V process. Moreover, many of the amendments that passed were either the product of incredibly strong historical forces or the result of historical incidents that exposed fundamental flaws in the original Constitution. And even if a consensus did support the right to choice, the process of securing a constitutional amendment at the expense of an unwilling state may be politically divisive.

B. The State Legislative Level With Review Available Under the Equal Protection Clause—Much More Workable

Passing a statute is far easier than amending the Constitution. Removing the issue from the Due Process Clause and placing it in the realm of Equal Protection has the additional benefit of producing a correct constitutional result. Where privileges and immunities (and therefore Due

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268 See U.S. CONST. art. V.
269 Shaffer, supra note 59, at 749 n.180.
270 See supra text accompanying note 236.
271 Davis, supra note 13, at 966.
272 See id. amends. XI-XXVII. It should be mentioned that one of these seventeen was cancelled out, leaving only sixteen still in existence. See id. amend. XVIII, repealed by id. amend. XXI.
273 See, e.g., U.S. CONST. amend. XXV (providing for presidential succession, enacted after the assassination of President Kennedy); Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 HARV. J.L. & PUB. POL’Y 769, 868 n.343 (2006).
274 See Shaffer, supra note 59, at 749 n.180.
275 Calabresi & Lindgren, supra note 273, at 868.
276 Cf. discussion supra Part III.B (discussing why classifying the right to choice as fundamental violates all previously recognized principles of constitutional law).
Process) secure a minimum of rights across all states via the Constitution, Equal Protection secures an equality of rights under law within the bounds of a legislature or jurisdiction.\textsuperscript{277} Thus, equal protection keeps the focus on the discrimination rather than the “fundamentality” of the subject matter.\textsuperscript{278} As this article has already established the lack of fundamentality with the right to choice and the lack of malleability of the right to the amendment process, the proper grounding for it is therefore with the state legislatures.\textsuperscript{279}

1. How Equal Protection Will Balance the Interests of Women, Men, and the State in the Reproductive Choice Decision

Consistent with other constitutional norms, legislatures may draw lines that appear arbitrary without the necessity of offering a justification, although the courts may not.\textsuperscript{280} Under the Equal Protection Clause, the government can treat similarly situated persons equally and dissimilarly situated persons differently.\textsuperscript{281} As men and women are not equally or similarly situated in the pregnancy physically, they would likely not be considered similarly situated in the reproductive choice decision.\textsuperscript{282} Thus, on the basis of situation alone, states would be free to draft legislation giving as much or as little protection to men in the reproductive choice decision as they please,\textsuperscript{283} as the Equal Protection Clause, unlike an unenumerated fundamental right, does not require “‘things which are different in fact . . . to be treated in law as though they were the same.’”\textsuperscript{284}

\textsuperscript{277} Shaffer, supra note 59, at 731.
\textsuperscript{278} Bogen, supra note 78, at 392.
\textsuperscript{279} See discussion supra Parts II-III, V.A.
\textsuperscript{280} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (O’Connor, J., plurality opinion).
\textsuperscript{281} See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1438-39 (Foundation Press, Inc. 2d ed. 1988).
\textsuperscript{282} See supra text accompanying notes 148-149.
\textsuperscript{283} See Michael M. v. Superior Court, 450 U.S. 464, 481 (1981) (Stewart, J., concurring) (“[T]he Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded.”).
\textsuperscript{284} Id. at 469 (quoting Rinaldi v. Yeager, 384 U.S. 305, 309 (1966)).
From there, however, a particular state’s abortion statute would need to be scrutinized for impermissible discrimination in order to determine its constitutionality.\textsuperscript{285} As applied to potential legislation governing the exercise of reproductive choice rights in the absence of a fundamental rights mandate, determination of the level of scrutiny to be applied would turn on whether the proper focus of the law is on gender itself or on the condition of pregnancy.\textsuperscript{286} Since reproductive choice becomes relevant only after a pregnancy has occurred, the distinction will turn on the physical instance of pregnancy rather than on gender.\textsuperscript{287} “While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification.”\textsuperscript{288} Pregnancy is more akin to an objectively identifiable physical condition rather than an immutable characteristic like gender, in that not all women can even become pregnant and pregnant women are not so for their entire lives.\textsuperscript{289} Furthermore, a statutory abortion regulation does not discriminate against women because they are women, but because of the conduct they seek to employ.\textsuperscript{290} “‘Discriminatory purpose’ . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”\textsuperscript{291} Thus, the proper classification in the context of reproductive choice legislation is “women seeking abortion” rather than merely “women,”\textsuperscript{292} and any state legislation challenged for discriminatory intent would be reviewed under rational basis and subsequently upheld, as long as the discrimination in

\textsuperscript{285}Cf. id. at 481 (Steward, J., concurring) (“[T]he physiological differences between men and women . . . must never be permitted to become a pretext for invidious discrimination”).
\textsuperscript{288}Id. at 496 n.20.
\textsuperscript{289}See id. at 497.
\textsuperscript{290}See Bray, 506 U.S. at 269.
\textsuperscript{291}Id. at 271-72 (quoting Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
\textsuperscript{292}See id. at 269.
question is realistically related to a legitimate state purpose. Indeed, this seems to be the way the Supreme Court is headed with its abortion jurisprudence anyway, as it recently upheld the federal Partial Birth Abortion Ban Act of 2003 under a rational basis review.

2. Allowing Each State’s Majority to Decide the Issue Would Best Maximize Choice for Everyone

It has not been the goal of this article to resolve exactly how these issues should be balanced, but rather whom the Constitution and the Court’s stare decisis says should do the balancing. As the State has legitimate interests in protecting the welfare of both the woman and the man, as well as in protecting the potential life of the fetus, a state could enact legislation that would allow a man the opportunity to participate in deciding the fate of his unborn child (a possibility that current Supreme Court jurisprudence denies him), by allowing him to seek judicial review of the woman’s proposed decision if he disagrees with it. This would balance everyone’s interests in a democratic manner that would ultimately allow for the greatest amount of choice for the greatest number. Conversely, if a particular state wishes to grant women the right to abortion on demand, a right that even Roe itself did not grant, they would also be able

294 See Gonzales v. Carhart, 127 S.Ct. 1610, 1633 (2007) (“Where it has a rational basis to act . . . the [government] may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”).
295 See, e.g., discussion supra Part V.B.1.
297 See, e.g., Conn v. Conn, 526 N.E.2d 958, 961 (Ind. 1988) (Pivarnik, J., dissenting) (advising that the court balance the parties’ interests by using a rebuttable presumption in favor of the woman’s right to terminate her pregnancy).
298 See Casey, 947 F.2d at 726 (Alito, J., concurring in part and dissenting in part).
299 See Roe v. Wade, 410 U.S. 113, 154 (1973) (refusing to recognize an unlimited right to do with one’s body as one pleases); id. at 208 (Burger, C.J., concurring) (“Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.”).
to do so.\textsuperscript{300} After all, maximizing choice seems to be one goal that the pro-life and pro-choice movements share in common.\textsuperscript{301}

The concern remains that the resulting geographic differences of opinion on abortion resulting from adoption of the proposal advocated herein would result in forcing women to travel out of state to seek “safe, legal abortions” as they did pre-\textit{Roe}, or else face the back alleys.\textsuperscript{302} This issue of women dying due to illegal abortions, however, has been greatly exaggerated over the years.\textsuperscript{303} According to Bernard Nathanson, founder of the National Association for Repeal of Abortion Laws (NARAL) who eventually turned his back on abortion, admitted that his group lied when testifying before the Supreme Court in 1972: “We spoke of 5,000-10,000 deaths a year . . . [we] knew the figures were totally false but it was a useful figure, widely accepted, so why go out of our way to correct it with honest statistics?”\textsuperscript{304} Government data from the National Center for Health Statistics shows that in reality the number of deaths from illegal abortion averaged around 250 per year through the 1950s.\textsuperscript{305} By 1966, with abortion still illegal in all states, the number of deaths had dropped to 120, due to advances in medical science.\textsuperscript{306} By the time of \textit{Roe} in 1973, the annual death rate for illegal abortion had fallen to just 24, rising to 26 in 1974, after abortion was legalized.\textsuperscript{307} With all but seven states having since repealed their criminal abortion laws, it is highly unlikely that overturning \textit{Roe} would lead to any sort of

\textsuperscript{300} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (Scalia, J., concurring in the judgment in part and dissenting in part).
\textsuperscript{301} See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 801 (1986) (White, J., dissenting) (“[T]he ostensible objective of \textit{Roe v. Wade} is not maximizing the number of abortions, but maximizing choice.”).
\textsuperscript{302} See \textit{Weddington}, supra note 192, at 27.
\textsuperscript{303} See \textit{Hendershott}, supra note 128, at 135-36.
\textsuperscript{305} Id.
\textsuperscript{306} See id.
\textsuperscript{307} Id.
epidemic in women dying from illegal abortions.\footnote{308} And even in those states that would re-criminalize voluntary abortion in response to overturning Roe, such an occurrence would not have the impact upon women’s lives as it did thirty-five years ago, in that women now have more choices than ever both in preventing unwanted pregnancy and in dealing with parenthood once conception occurs.\footnote{309} And after all, abortion is the intentional termination of a human life.\footnote{310} Should it be so easy for anyone, man or woman, to commit a violent and permanent act such as abortion against their unborn child?\footnote{311} Do we legalize illicit drugs out of fear that someone might try to seek heroin in back alleys that turns out to be cyanide?\footnote{312} The reality of the situation is that abortion today is almost always a birth control technique rather than a response to a serious health problem of either the woman or the fetus, or even an unintended result of rape or incest.\footnote{313} Whatever the morals of that may or may not be, it certainly does not justify the Supreme Court continuing to constitutionalize a right that is clearly constitutionally illegitimate and largely unnecessary.\footnote{314}

Some surprising names have at one point or another criticized Roe as bad constitutional law.\footnote{315} These include Justice Ruth Bader Ginsburg, Alan Dershowitz, Cass Sunstein, and Edward Lazarus.\footnote{316} Even more surprising are those who would advocate for Roe’s abrogation.\footnote{317} In 2003

\footnote{308} See HENDERSHOTT, supra note 128, at 136.
\footnote{309} See discussion supra Part IV.A.
\footnote{310} See supra text accompanying note 258.
\footnote{312} Cf. Gonzales v. Raich, 545 U.S. 1, 31-33 (2005) (declining to strike down a Congressional statute outlawing the medical use of marijuana).
\footnote{313} The average study conducted by the Alan Guttmacher Institute, a pro-choice group, shows that only a little over 7% of abortions are conducted for health or crime victim reasons, with the other 93% conducted purely for convenience. See ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 180-81 (HarperCollins 1996).
\footnote{314} See BORK, supra note 73, at 111 (“Whatever the proper resolution of the moral debate . . . few people imagined that the Constitution resolved it.”); discussion supra Part II-IV.A.
\footnote{315} See, e.g., McCorvey v. Hill, 385 F.3d 846, 847 (5th Cir. 2004) (McCorvey the “named appellant in Roe,” asks the court in this case to reverse Roe).
\footnote{316} Brief of Appellant, supra note 219, at 33 n.82 (Justice Ruth Bader Ginsburg has described Roe as “heavy-handed judicial intervention” that “was difficult to justify”; Alan Dershowitz has described Roe as a case of “judicial
Norma McCorvey, the “Jane Roe” of Roe v. Wade, filed a relief from judgment of that decision, requesting that the State of Texas reinstate laws that formerly criminalized abortion.\textsuperscript{318} Ms. McCorvey presented the Fifth Circuit 5347 pages of substantial evidence that sharply drew into doubt the factual premises upon which the original decision had been sustained.\textsuperscript{319} She presented affidavits of about a thousand women who had suffered long-term emotional damage and impaired relationships from their decision to abort,\textsuperscript{320} as well as scientific findings not available in 1973 showing how a baby develops sensitivity to external stimuli and to pain much earlier than previously believed.\textsuperscript{321} The court declared her case moot and dismissed her appeal.\textsuperscript{322}

Most surprising of all, however, were the revelations of Sandra Cano, the original “Mary Doe” of Roe’s companion case, Doe v. Bolton.\textsuperscript{323} In an amicus brief supporting the Partial-Birth Abortion Ban Act at issue in Gonzales v. Carhart,\textsuperscript{324} Ms. Cano revealed that in 1973 her lawyer, whom she had hired solely to help her gain custody of her other children, deceived the Supreme Court by claiming that Cano had desired an abortion, when in fact she had vehemently insisted throughout the case that she did not.\textsuperscript{325} Now educated as to how her circumstances had been misused, Ms. Cano seeks to share “the real truth about the real woman who was used to deceive . . . the women of this nation about the reality of abortion.”\textsuperscript{326} Her revelations that the legalization

\textsuperscript{317} See generally id. at 30-47 (advocating to overturn Roe); Brief of Sandra Cano, supra note 265, app. at 2-10 (advocating in favor of the Partial-Birth Abortion Ban Act of 2003).

\textsuperscript{318} McCorvey, 385 F.3d at 850 (Jones, J., concurring).

\textsuperscript{319} See id.; Brief of Appellant, supra note 219, at 25.

\textsuperscript{320} McCorvey, 385 F.3d at 850 (Jones, J., concurring).

\textsuperscript{321} Id. at 852.

\textsuperscript{322} See id. at 850.

\textsuperscript{323} Brief of Sandra Cano, supra note 265, app. at 2-10.

\textsuperscript{324} 127 S.Ct. 1610 (2007).

\textsuperscript{325} Brief of Sandra Cano, supra note 265, app. at 6.

\textsuperscript{326} Id. app. at 2.
of abortion began with manipulations and misrepresentations and that *Doe v. Bolton* was nothing more than “a fraud upon the court” is astounding.\(^{327}\)

**CONCLUSION**

Thus, *Roe v. Wade* was wrongly decided and can and should be overturned, as it improperly grants an unenumerated fundamental right to women that it denies to men.\(^{328}\) The fundamentality of any substantive due process right, including the right to privacy, extends to men and women alike.\(^{329}\) Any other result would “protect inadequately a central part of the sphere of liberty that our law guarantees *equally* to all.”\(^{330}\) As the right to choice cannot be logically extended to both genders, *Roe*’s holding cannot be maintained.\(^{331}\) It is therefore the Court’s duty to reconsider *Roe* in light of these principles, as its holding “‘depar[t]s from a proper understanding’ of the Constitution.”\(^{332}\)

Erroneous decisions in constitutional cases are uniquely durable because correction through the legislative process is impossible.\(^{333}\) Placing the right of reproductive choice under the umbrella of equal protection will correct the constitutional infirmity of anchoring it to the Due Process Clause’s requirement of fundamentality, while at the same time affording an ever evolving contentious issue the opportunity for continuous debate through the legislative process.\(^{334}\) Overturning *Roe* would not only realign the Court with the fundamental rights jurisprudence they have carefully crafted over the course of the past two hundred years, it would do so with negligible injury to the principle of stare decisis in terms of the Court’s prior abortion

\(^{327}\) *Id.* app. at 8.

\(^{328}\) See discussion *supra* Parts II-III.


\(^{330}\) *Id.* (emphasis added).

\(^{331}\) See discussion *supra* Part III


\(^{333}\) *Id.* at 954-55 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

\(^{334}\) See *supra* notes 264-265 and accompanying text.
jurisprudence, as an overly permissive abortion right is unnecessary in light of the non-abortive options available to women today. Since Roe was decided in 1973, abortion has been the cause of death for more than 40 million unborn children in the United States, easily making it “the premier civil rights issue of our time.”

So then, how do we manage to overturn Roe v. Wade? Justice O’Connor already told us how: “When the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of Roe v. Wade . . . .” Accordingly, the case that could do it would likely be one that involved a male plaintiff whose female partner was pregnant and intended to obtain an abortion against his desire for the child to be born; the man could then sue based upon a deprivation of a constitutional right under color of state law. The man’s standing could be asserted based on his alleging an existing right to reproductive choice in the face of its fundamentality status given by the Roe Court, a status which, by definition, vests such a right in all citizens. As a remedy the man could request that, based on his inherent fundamental right to reproductive choice, that the Supreme Court either explicitly recognize his fundamental right and review the state statute based on strict scrutiny, or else overturn Roe altogether, leaving the state the freedom to legislate in the area of abortion as it pleases, as long as the legislation’s

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335 See discussion infra Parts II, IV.A.
336 Rev. Dr. Alveda King, Keynote Speaker at the Rhode Island State Right to Life Committee Rally (Jan. 25, 2007) (newsletter on file with author) (Dr. Alveda King, niece of Dr. Martin Luther King, Jr. and an avid pro-life supporter, describes the virtual genocide to the African-American community of a 60% abortion rate by African-American pregnant women). Indeed, the fact that 78% of abortion clinics are located in or near minority communities certainly lends credence to the assertion that “[a]bortion is racism in its ugliest form. . . . [A]bortionists have eliminated more African-American children than the KKK ever lynched.” Reverend Johnny Hunter, Abortion: The Robbing of a Heritage, www.pregnantpause.org/racism/robherit.htm (last visited Feb. 10, 2008).
338 See 42 U.S.C. § 1983 (1996) (“Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”).
339 See supra text accompanying note 39.
discrimination is rationally related to further a legitimate state interest.\textsuperscript{340} And, once this test case filtered its way through the federal court system, the Supreme Court might very well grant certiorari, since now “the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of \textit{Roe v. Wade}.”\textsuperscript{341} Were certiorari granted, women such as Norma McCorvey and Sandra Cano would finally have a forum to present their findings and persuade the Supreme Court that, in addition to the legal conclusions presented herein, substantial factual evidence supports a decision that the very precedents that they were once deceived into creating should now be overturned.\textsuperscript{342}

The Constitution protects all individuals, male or female, from the abuse of government power.\textsuperscript{343} It is the Court’s responsibility not to retreat from interpreting the full meaning of the Constitution in light of all of its precedents.\textsuperscript{344} On the right to reproductive choice, the Supreme Court should invoke its wisdom once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.\textsuperscript{345} The time has come to recognize that \textit{Roe v. Wade} “departs from ‘a proper understanding’ of the Constitution,”\textsuperscript{346} as its holding does not grant that same right of reproductive choice to men as it does to women.\textsuperscript{347} It thus should be overruled and the issue of reproductive choice returned to the people.\textsuperscript{348}

\textsuperscript{340} See discussion supra Part V.B.1. In terms of the latter proposal, the state of South Dakota has already demonstrated a desire to legislate freely in the area of reproductive choice rights, lending support to the conclusion that given the choice the states would prefer to not be bound by a national abortion mandate. See Kari Lydersen, \textit{Antiabortion Ballot Initiative Appears Likely}, WASH. POST, Apr. 2, 2008, at A2, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/04/01/AR2008040102207.html.

\textsuperscript{341} \textit{Webster}, 492 U.S. at 526 (1989) (O’Connor, J., concurring in part and concurring in the judgment).

\textsuperscript{342} Cf. \textit{McCorvey v. Hill}, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring) (criticizing the Supreme Court for placing the issue beyond the reach of meaningful debate).

\textsuperscript{343} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (O’Connor, J., plurality opinion).

\textsuperscript{344} \textit{Id.} at 901.

\textsuperscript{345} \textit{Id.}


\textsuperscript{347} See supra note 9 and accompanying text.

\textsuperscript{348} \textit{Thornburgh}, 476 U.S. at 797 (White, J., dissenting).