RESTORING SELF-GOVERNMENT ON ABORTION: A FEDERALISM AMENDMENT

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I. INTRODUCTION

The abortion issue has increasingly charged and burdened the confirmation hearings of federal judges over the past twenty years since the Senate hearings on Judge Robert Bork's nomination in 1987. Abortion was at the center of the confirmation hearings of Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006. Senate Judiciary Committee Chairman Arlen Specter asserted that *Roe v. Wade*[1] was a "super precedent."[2] Some senators sought to get public commitments that then-Judges Roberts and Alito would support *Roe*; many voted against them for the sole reason that they would not publicly make such commitments.[3] With only five supporters of *Roe v. Wade* left on the Court, should one of those retire and give President Bush another opportunity to nominate a successor, abortion is certain to be an even more contentious issue at future confirmation hearings.

In the preceding issue of this journal,[4] we offered three major reasons why the Supreme Court has tragically failed in its self-appointed role as the national abortion control board. First was the doctrinal incoherence of the Court's abortion decisions. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court shifted its rationale for the abortion liberty from substantive due process to sociology—the "reliance interests" in abortion as a backup to failed contraception.[5] The Court, in so doing, ignored the mounting sociological and medical data of the negative impact of abortion on women physically and psychologically. The Court is less competent than the American people and their elected representatives to assess this medical

1. 410 U.S. 113 (1973).

2. Arlen Specter, Editorial, *Bringing the Hearings to Order*, N.Y. TIMES, July 14, 2005, at 12.

3. *See, e.g.*, James Sterngold, *Feinstein: Roberts' Abortion Stance Key*, S.F. CHRON., Aug. 25, 2005, at A1. *See also* John Cornyn, *Roberts Shouldn't Have to Pass Any Litmus Test*, AUSTIN AM.-STATESMAN, Aug. 8, 2005, at A9.

4. Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade: *Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005).

5. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (holding that "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail").

evidence. Second, and related to the first, the Court has been oblivious to the confusion in which it has thrown federal judges and state legislatures over the past thirty-three years because of its vague and contradictory decisions and standards of review. Third, what appears to be the Court's implicit policy of facilitating abortion on demand, far from settling the issue, increasingly conflicts with public opinion and has increasingly roiled not only judicial confirmation hearings, but American politics generally. Curiously, even though it is the Democrats (especially in the Senate) who have demonstrated strong support for *Roe v. Wade*, since the 2004 elections a growing number of liberal and Democratic political commentators have publicly stated that Democratic candidates and office-holders would be better off without *Roe v. Wade*.[6]

Based on decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Stenberg v. Carhart*,[7] it can still be said that there are at least five votes on the Court that support *Roe*. Only two Justices have expressly supported overturning *Roe*.[8] Chief Justice Roberts and Justice Alito have taken no public position; while they might be reasonably expected to uphold

6. William Baude, Editorial, *States of Confusion*, N.Y. TIMES, Jan. 22, 2006, § 4 at 17; Richard Cohen, Editorial, *Support Choice, Not* Roe, WASH. POST., Oct. 20, 2005, at A27; Benjamin Wittes, *Letting Go of* Roe, ATLANTIC MONTHLY, Jan.–Feb. 2005, at 48.

7. 530 U.S. 914 (2000).

8. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part) (stating that "this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical"); *id.* at 535 ("[O]ur retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) ("[T]he Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so."); *Casey*, 505 U.S. at 979 (Scalia, J., concurring, joined by Justice Thomas) ("The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."); Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) ("If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let them decide, State by State, whether this practice should be allowed."); *id.* at 980 (Thomas, J., dissenting) ("Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.").

regulations of abortion, their position on *Roe* itself is unknown. It is safe to say that they will be under enormous pressure to maintain the status quo.[9] Despite the changing Court membership, there are enormous institutional and political obstacles to the overturning of *Roe v. Wade*, *Doe v. Bolton*,[10] and their progeny. These obstacles are often ignored, misunderstood, or downplayed by optimistic opponents of *Roe*.

Sadly, the Court has repeatedly shown itself incapable of thoroughly and objectively reconsidering its handiwork in *Roe* and *Casey*. As we indicated in our earlier piece, some legal and institutional reasons for this failure were described by Judge Edith Jones of the Fifth Circuit in 2005 in *McCorvey v. Hill*.[11] The Court has also demonstrated that it is incapable of reconsidering the negative impact of its contradictory and constantly changing standards of review. The changed standard of review in *Casey* immediately injected confusion into the lower courts, and several federal judges expressed frustration with this situation between 1992 and 2005.[12] The Court has rejected numerous opportunities to address and attempt to resolve the confusion since *Casey*. The confusion in the standard of review serves the interests of abortion advocates by enjoining state abortion regulations for years. But the confusion directly contradicts and subverts the Court's repeated pronouncements over thirty years that the states have compelling interests in regulating abortion. The Court's unanimous January 2006 decision in *Ayotte v. Planned Parenthood*[13] merely repeats such rhetoric while doing little to see that the New Hampshire parental notice statute goes into effect any time soon.

For the reasons stated in our earlier article, we believe that the stare decisis reasons cited in *Casey* for retaining *Roe* are spurious. Nevertheless, *Casey* indicates that there are strong institutional reasons that may inhibit any Justice from revisiting *Roe*. The powerful social and political forces that continue to advocate maintaining *Roe* must be taken seriously and not be

9. *See e.g.*, Susan Estrich, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 122–23 (1989) ("[T]he real audience is one woman. Sandra Day O'Connor, the only woman in American history to sit on the United States Supreme Court, is in the position single-handedly to decide the future of abortion rights.").

10. 410 U.S. 179 (1973).

11. 385 F.3d 846 (5th Cir. 2004), *cert. denied*, 543 U.S. 1154 (2005).

12. *See* Forsythe & Presser, *supra* note 4, at 146–48.

13. 126 S. Ct. 961 (2006).

underestimated. Because of these enormous institutional and political obstacles, we propose a federalism amendment to undo the damage the Court has done, and to constitutionally resolve the abortion issue in a manner the Court has lacked the courage or will to do for the past three decades.

In Part II, we analyze mounting evidence that confirms that the original substantive due process rationale for *Roe* was without any basis in the text or history of the Constitution or in our laws and social practices. In Part III, we evaluate the reasons for leaving the issue of abortion to the people at the state level. Finally, in Part IV, we explain the purpose of the particular language that we propose for a federalism amendment on abortion.

II. THE CONSTITUTIONAL ILLEGITIMACY OF *ROE*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey* the Court declined to overrule *Roe* even though the plurality opinion conceded that there was little constitutional doctrinal support for *Roe*.[14] The plurality in *Casey* did not try to defend *Roe*'s historical arguments or the original substantive due process rationale for *Roe*. Instead, the plurality denied that "the Due Process Clause protects only those practices . . . that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."[15] This is quite beside the point, however, because the state abortion laws invalidated by *Roe* in January 1973 were not frozen in 1868 but were maintained, renewed, reaffirmed, and updated by the states periodically until January 22, 1973.[16] By denying that *Roe* and *Casey* were simply the imposition of their personal values and instead calling the country to "accept[] a common mandate rooted in the Constitution," the plurality necessarily based *Casey* on the proposition that the Constitution, as a constituent act of the people in history, commands the result.[17] And the plurality's

14. *See* Forsythe & Presser, *supra* note 4, at 107 n.110; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1014 (2003).

15. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

16. *See generally* JOSEPH DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (Carolina Academic Press 2006); Clarke D. Forsythe, *The Effective Enforcement of Abortion Law Before* Roe v. Wade, *in* THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE (Brad Stetson, ed., 1996); Paul Benjamin Linton, *Enforcement of State Abortion Statutes After* Roe*: A State-By-State Analysis*, 67 U. DET. MERCY L. REV. 157 (1990).

17. *Casey*, 505 U.S. at 867.

heavy emphasis on "changes in fact" as a critical factor for stare decisis makes certain the Court's belief in the continuing validity of the facts underlying *Roe* and *Casey*.[18] Although the plurality in *Casey* contended that adherence to precedent was essential for the Court's legitimacy,[19] Justice Harlan in *Moragne v. States Marine Lines, Inc.*[20] pointed out that "a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason."[21]

The Court's opinion in *Roe v. Wade* devoted nearly half of its pages to an examination of the history of abortion for the evident purpose of finding a substantive due process right to abortion in the Fourteenth Amendment.[22] Justice Blackmun's historical analysis has been subjected to thorough and severe criticism over the past thirty-three years. Many legal and historical studies since 1973 have shown how the assertions made in *Roe* lacked historical or legal authority.[23] Although Justice Blackmun's opinion in *Roe* is commonly believed to be the definitive account of abortion history, most of his historical analysis is, in fact, in error.

The implications of these scholarly refutations of the historical and legal foundations of *Roe* have been explored most extensively by Professor Joseph Dellapenna. In an exhaustive analysis of 1,100 pages, spanning eight centuries, Dellapenna

18. *Id.* at 855, 860–61.

19. *Id.* at 865. *See also* Paulsen, *supra* note 14, at 1014.

20. 398 U.S. 375 (1970).

21. *Id.* at 405. *See also* Paul Benjamin Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15 (1993).

22. Roe v. Wade, 410 U.S. 113, 129–52. *See also* Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 167; Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 ST. LOUIS U. PUB. L. REV. 229, 272–73 (1987) (examining historical reasoning in Justice Blackmun's opinion).

23. DELLAPENNA, *supra* note 16; JOHN KEOWN, DOCTORS, MEDICINE, AND THE LAW (1988); STEPHEN KRASON, ABORTION: POLITICS, MORALITY AND THE CONSTITUTION 120–34 (1984) (explaining that ancient attitudes toward abortion were misunderstood or ignored); Joseph Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359 (1979) (explaining that the Court failed to understand the medical and technological context of the common law and the significance of the concepts of quickening, viability, and live birth); Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1273–78 (1975) (explaining that the Court's analysis of nineteenth century case law was erroneous); Horan et al., *supra* note 22, at 230 n.8 (1987) (surveying eleven points of historical criticism of the Court's analysis in *Roe*); James Witherspoon, *Reexamining* Roe*: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985) (explaining that the abortion statutes of the nineteenth century and their purpose were misconstrued).

documents how Justice Blackmun relied on the false and incomplete abortion history put forth by Cyril Means, the general counsel for the National Association for the Repeal of Abortion Laws (NARAL). Justice Blackmun "cited Means' supposed history no less than seven times in the opinion in *Roe*" but "cited no other sources on legal history more than once."[24] Relying on Means' history, Justice Blackmun promulgated a number of myths about abortion and abortion history which were central to the erroneous conclusion that abortion ought to be regarded as a substantive due process liberty: that abortion was a common practice before statutory prohibitions were enacted, that abortion was a common law right, that abortion was "far freer" in the nineteenth century than under twentieth century state abortion policies, and that the nineteenth century abortion statutes were enacted only to protect the mother and not the child.[25] All of these propositions have now been conclusively refuted.[26]

Dellapenna reviews six centuries of law in England to show the development of legal prohibition of all forms of abortion. The three categories of techniques that he identifies—injury, ingestion, and intrusion—were found to be ineffective, deadly, or both.[27] He details the "overwhelming evidence that there

24. DELLAPENNA, *supra* note 16, at 288 n.212, 684 n.403. The Kentucky Supreme Court relied on Means as recently as 2004. Commonwealth v. Morris, 142 S.W.3d 654, 656 n.2, n.3 (Ky. 2004).

25. Judges and scholars, otherwise critical of *Roe*, have been commonly misled by Justice Blackmun's erroneous history. *See, e.g.*, *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting) ("The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship."); PHILIP P. LEVINE, SEX AND CONSEQUENCES: ABORTION, PUBLIC POLICY, AND THE ECONOMICS OF FERTILITY 9 ("Abortion was not outlawed in the United States until the late 1800s, when public health concerns led states to institute bans on the procedure."); Epstein, *supra* note 22, at 159, 173 ("Abortion, however, was not a crime at common law, but was only made such by statute.").

26. DELLAPENNA, *supra* note 16, at 15. Some scholars have a tendency to address the legal status of the unborn human as though it is a wholly abstract question, like the question of whether Martians would have higher or lower IQs than humans, seemingly unaware of both the historical, legal protection of the unborn human as a human being and the extent of contemporary protection of the unborn human as a human being. *See, e.g.*, Jeb Rubenfeld, *On the Legal Status of the Proposition that 'Life Begins at Conception,'* 43 STAN. L. REV. 599 (1991); David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 6 ("The moral status of fetal life—the extent to which a fetus should be treated as a human being—is uncertain in a more fundamental sense. It is unresolvable not just in practice but in principle."). *Cf.* Linton, *supra* note 21, at 120 ("Appendix B: The Legal Consensus on the Beginning of Life") (citing authorities from thirty-eight states).

27. DELLAPENNA, *supra* note 16, at 9–58.

were no consistently safe and effective ingestive techniques."[28] He thoroughly surveys European legal, medical, and popular literature before the eighteenth century to show that there were no effective intrusion techniques.[29] Indeed, "medical evidence for intrusive abortions remained sparse until the later nineteenth century,"[30] and "abortion techniques were so crude before 1800 as virtually to amount to suicide. . . ."[31] For these reasons, Justice Blackmun's assumption that abortion was a common practice before the nineteenth century[32] is categorically wrong. Infanticide was the method of choice until the nineteenth century.

Contrary to what the Court implied in *Roe*, it is clear that "[a]bortion was considered a serious crime throughout most of European history."[33] "English courts before [Sir Edward] Coke's time entertained no doubts regarding the criminality of abortion, whether inflicted on a woman against her will, induced at her request, or even self-induced."[34] Sir Edward Coke's descriptions of the law's prohibition on abortion "rapidly became the law of England."[35] England's law was adopted by the colonies.[36] "The status of abortion was much the same in the United States in 1800 as it was in England at that time. Abortion clearly was a crime before the American Revolution,"[37] though "difficult to accomplish and even more difficult to prove."[38] Cyril Means's interpretation of New York abortion law in the nineteenth century, on which the Court in *Roe* relied, was also erroneous.[39]

One of the clearest and most fundamental errors in the *Roe* opinion is Justice Blackmun's misunderstanding of the nature, application, and implications of the common law "born alive

28. *Id.* at 38.
29. *Id.* at 51–56.
30. *Id* at 55.
31. *Id.* at 57.
32. Roe v. Wade, 410 U.S. 113, 140–41 (1973) ("At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice [to have an abortion] was present in this country well into the 19th century.").
33. DELLAPENNA, *supra* note 16, at 18.
34. *Id.* at 201–02.
35. *Id.* at 204.
36. *Id.* at 211–28.
37. *Id.* at 263.
38. *Id.* at 266.
39. *Id.* at 275–88, 325–31.

rule."[40] It is central to *Roe* because Justice Blackmun predicated his theory of legal "personhood" on the born alive rule. Blackmun assumed that "born alive" meant term birth, that it was related to time and to gestation. Justice Blackmun overlooked and confused the fundamental distinction between location and gestation. Adopted in 1600 due to the primitive state of medical evidence at the time, the born alive rule was an *evidentiary* standard related to location—inside or outside the womb—not gestation. Under the born alive rule, "birth" simply meant expelled from the womb—outside. The born alive rule looked to evidence of when the unborn was alive. The born alive rule meant that a homicide charge (the killing of a human being) could only be lodged if the child was expelled alive (at any time of gestation) and died after expulsion; conversely, if the child was stillborn (at any time of gestation), no homicide charge could be brought. The born alive rule meant that an assault of a pregnant woman that resulted in live birth at two months gestation, and death thereafter, could result in a homicide charge; conversely, an assault resulting in a stillbirth at term would prevent a homicide charge. Due to the advance of medical science, the born alive rule makes no sense in modern society; it was necessitated by the state of medical knowledge in 1600.

It is clear that the purpose of the state laws prohibiting abortion in the nineteenth century was to protect the life of the unborn child. One scholar has compiled sixty-four cases from forty states demonstrating that the purpose of the nineteenth century state laws was to protect the life of the unborn child.[41] Contrary to the spurious history of Justice Blackmun based on Means, the "evidence is overwhelming that the protection of the life of the unborn child (as they termed it) was the primary purpose underlying" the nineteenth century state statutes.[42]

Furthermore, nineteenth century abortion statutes "were not part of a scheme of gender discrimination."[43] Indeed, the state abortion statutes were vigorously supported by virtually all of the

40. *See generally*, Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 570 (1987).

41. Linton, *supra* note 21, at 107–15 (finding that "at least sixty-four decisions from forty States have recognized that their nineteenth-century abortion statutes were enacted with an intent to protect unborn human life").

42. DELLAPENNA, *supra* note 16, at 313, 315–16.

43. *Id.* at 288–303, 853.

leading feminist leaders of the day to protect women and their unborn children. "The leading feminists of the time were virtually unanimous in *demanding* the criminalization of abortion. . . ."[44] They "were, if anything, more emphatic in demanding harsh punishment for abortion, and on precisely the same grounds as the male dominated organized medical profession."[45] Indeed, "Women—particularly the founding mothers of feminism—also took the lead in these nineteenth century legislative battles. And women physicians in the nineteenth century took a particularly strong leading role in the 'crusade' against abortion."[46] The law of abortion was designed to prohibit activity by abortionists, and did not have as its aim the punishment or subordination of women. The common law tradition treated "the woman as a victim of the abortion, a tradition based on both the rarity in practice of voluntary, elective abortions and the danger of the procedure when it did occur."[47] In the nineteenth century, this tradition was reinforced by procedural and evidentiary necessity of the testimony of the woman against the abortionist for effective prosecution.[48] "The attitude that the woman was a victim rather than a criminal . . . continued to be dominant in the twentieth century and remained dominant when *Roe v. Wade* was decided."[49]

Another major myth about abortion policy in the nineteenth century—promoted by historian James Mohr and others—is that nineteenth century abortion statutes "reflected a conspiracy of the organized, allopathic medical profession to suppress competition from irregular practitioners."[50] Mohr is simply incorrect that the crusade against abortion was an economic one by doctors against midwives. As Dellapenna puts it: "How a crusade against abortion helped the allopaths capture control of birthing if midwives were providing a socially accepted and sought after service that physicians were unwilling to provide

44. *Id.* at 268.

45. *Id.* at 324.

46. *Id.* at 345.

47. *Id.* at 273, 298–302. *See also* Linton, *supra* note 21, at 163 n.31.

48. DELLAPENNA, *supra* note 16, at 298–302; Forsythe, *supra* note 16.

49. DELLAPENNA, *supra* note 16, at 299 n.300.

50. *Id.* at 289 (citing JAMES MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 31–45 (1978)).

(abortions) is something Mohr and his followers have simply never explained."[51]

State laws protecting mothers and their unborn children from abortion were pervasive:

> By 1868, when the Fourteenth Amendment was ratified, thirty of the thirty-seven states had abortion statutes on the books. Just three of these states prohibited abortion only after quickening. Twenty states punished all abortion equally regardless the stage of pregnancy.
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> . . . .
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> Statutes in seventeen states and the District of Columbia denominated the crime against the unborn child as "manslaughter," "murder," or "assault with intent to murder." Most of these statutes referred to the victim as a "child," not as a fetus or some other term that might distance them from the status of born humans. Similarly, many states classified abortion with other crimes against persons, usually homicide. Generally, the severity of the punishment turned on whether the unborn child was killed (or "destroyed") rather than on the stage gestation had reached. This pattern appears in twenty of the thirty-seven states in 1868; in fourteen states, the highest degree of punishment for destroying a child in the womb was available without proof of quickening.[52]

Thus, Justice Blackmun's conclusion in *Roe* "that abortion did not generally become a crime, at least after quickening, until after the Fourteenth Amendment was adopted is simply wrong."[53]

Finally, there is the novel and misplaced emphasis that the Court in *Roe* gave to the notion of fetal viability, which the plurality in *Casey*—after throwing out many other parts—held to as the essence of *Roe*. Viability played no part in abortion law's or homicide law's protection of the unborn child; gestational age was never a line of demarcation.[54] Dellapenna reaffirms that "[t]he earliest legal use of the concept, although not the term itself, was by [Judge Oliver Wendell] Holmes in his *Dietrich* opinion"[55] as a justice on the Massachusetts Supreme Judicial Court in 1884—a case involving tort law and prenatal injury, not

51. *Id.* at 344.
52. *Id.* at 315–16, 319 (citations omitted).
53. *Id.* at 321
54. Forsythe, *supra* note 40.
55. DELLAPENNA, *supra* note 16, at 463.

criminal law. Justice Holmes inserted the concept into tort law's treatment of the unborn. It has no basis in English or American law relating to abortion or homicide.[56]

Consequently, "In *Roe* and since, the Court has never actually considered the values and perceived facts underlying the prohibition of abortion. All we have in *Roe* is a falsified argument that abortion was 'contested' throughout history, a matter of taste rather than an expression of mores basic to our culture."[57] So it is "time that the Court took seriously its own premise"—framed as a "covenant" with such solemn tones in the plurality opinion in *Casey*—"that the constitutional status of a claimed right to abort is to be tested against the history and traditions of this nation."[58] Without an historical foundation, there is no right to abortion because there is no non-historical constitutional argument in favor of an abortion right. The critics of the relevance of history and tradition to Supreme Court decision-making, like Ronald Dworkin, still appeal "to history and tradition to buttress their arguments regarding abortion,"[59] as Justice Stevens did in his opinions in *Thornburgh* and *Casey*.[60] Nevertheless, under either an historical or "aspirational" argument, "the claim of a freedom to abort fails if the history fails—and the history does fail."[61] Without any abortion right enacted by the people at any time of Anglo-American history prior to 1967, and with the American people and their representatives actively engaged in updating, reforming, or retaining abortion policy at the state level through the November elections of 1972, how is *Roe* or *Casey* based on any "common mandate rooted in the Constitution"?

Beyond the historical myths that were offered as the basis for a substantive due process right, the logical and doctrinal weaknesses of *Roe* and *Casey* have been subject to exhaustive criticism over the past thirty-three years by a wide variety of legal scholars. Many renowned constitutional scholars—including

56. *Id.* at 463–65; Clarke D. Forsythe, *The Legacy of Oliver Wendell Holmes*, 69 U. DET. MERCY L. REV. 679, 685–91 (1992) (book review); Forsythe, *supra* note 40, at 570.

57. DELLAPENNA, *supra* note 16, at 1083–84.

58. *Id.* at 1084.

59. *Id.* at 17–21.

60. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 780 n.10, 781 n.11, 782 n.12 (1986); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 913 (1992). *See also* Horan et al., *supra* note 22.

61. DELLAPENNA, *supra* note 16, at 694.

Alexander Bickel,[62] Archibald Cox,[63] John Hart Ely,[64] Philip Kurland,[65] Richard Epstein,[66] Mary Ann Glendon,[67] Gerald

62. ALEXANDER BICKEL, THE MORALITY OF CONSENT 28 (1975) ("The Court . . . refused the discipline to which its function is properly subject. It simply asserted the result it reached. If medical considerations only were involved, a satisfactory rational answer might be arrived at. But, as the Court acknowledged, they are not. Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?").

63. ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113–14 (1976) ("[T]he Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences. Nor can I articulate such a principle—unless it be that a State cannot interfere with individual decisions relating to sex, procreation, and family with only a moral or philosophical state justification; a principle which I cannot accept or believe will be accepted by the American people. The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus. . . . Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.").

64. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–37 (1973) ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. . . . And that, I believe . . . is a charge that can responsibly be leveled at no other decision of the past twenty years. At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking."). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST—A THEORY OF JUDICIAL REVIEW 2–3, 247–48 n.52 (1980).

65. Philip B. Kurland, *Public Policy, The Constitution, and the Supreme Court*, 12 N. KY. L. REV. 181, 196 (1985) ("But for a capacity to make constitutional bricks without any constitutional straws, certainly no prior case can be equaled by that of the abortion decisions. However much I like the results—and I do—I can find no justification for their promulgation as a constitutional judgment by the Supreme Court.").

66. Epstein, *supra* note 22, at 182 ("Justice [Blackmun] simply cannot strike the balance for the first trimester of pregnancy unless he has some theory of life of his own which shows that there is no 'compelling' interest of the unborn child. His exhaustive history of the abortion question indicates quite clearly that there is no consensus on the question, and it is simple fiat and power that gives his position its legal effect. . . . *Roe v. Wade* is symptomatic of the analytical poverty possible in constitutional litigation. Even in cases that do not give rise to the devilish questions of what counts as a person, the term 'compelling state interest' is an analytical snare of no modest proportions. But here, where the question is not 'how much' but 'whose,' the phrase is but a plaything of the judges, an excuse but never a reason for a decision. Thus in the end we must criticize both Mr. Justice Blackmun in *Roe v. Wade* and the entire method of constitutional interpretation that allows the Supreme Court in the name of Due Process both to 'define' and to 'balance' interests on the major social and political issues of our time.").

67. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 2 (1987) ("[T]o a greater extent than in any other country, our courts have shut down the legislative process of bargaining, education, and persuasion on the abortion issue."). *See also id.* at 47 ("*Roe v. Wade* and succeeding cases . . . have virtually closed down the state legislative

Gunther,[68] Robert Nagel,[69] Michael Perry,[70] and Harry Wellington[71]—have recognized the lack of any constitutional foundation for *Roe*. Several others, like Mark Tushnet, have pointed out the incoherence of the lines drawn and concepts created by the Court or have argued that different foundations should be found for *Roe*.[72] Justice Powell referred to *Roe* and *Doe* as "the worst opinions I ever joined."[73]

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process with regard to abortions prior to viability."); *id.* at 44 ("The problem of abortion regulation in the United States is immeasurably aggravated . . . by the fact that the extreme position of the Supreme Court . . . represents the views of only a minority of Americans."); MARY ANN GLENDON, A NATION UNDER LAWYERS 4 (1994) ("[The plurality in *Casey*] claimed for the Court a more exalted role than any to which the original judicial activist, John Marshall, had aspired in his boldest moments. . . . [Marshall] never proposed, as did Justices Anthony Kennedy, Sandra O'Connor, and David Souter, that the Court's powers should include telling the country what its 'constitutional ideals' should be. Nor can one imagine Marshall proclaiming that the American people would be 'tested by following' the Court's leadership. . . . [*Casey*] was less notable for its result . . . than for the plurality's grandiose pretensions of judicial authority.").

68. Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L.Q. 817, 819 ("I have not yet found a satisfying rationale to justify *Roe v. Wade* . . . on the basis of modes of constitutional interpretation I consider legitimate.").

69. ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 99 (2001) ("[B]ecause judicial supremacy distances interpretations from the rich variety of experiences and understandings that make up the American political culture, reliance on centralized judicial authority does not produce stability. Indeed, it produces unrooted interpretative innovations and frequent fluctuations that themselves add to anxiety about anarchy. The paradoxical consequence is to induce ever more extravagant claims for judicial power. This can be demonstrated, I think, by a close examination of one of the most dramatic and extraordinary opinions of the twentieth century, *Planned Parenthood v. Casey*.").

70. MICHAEL PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 1 (1982) ("[*Roe*] cannot be explained by reference to any value judgment constitutionalized by the framers.").

71. Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 299 (1973) ("*Roe* perpetuates what seems to me a basic terminological mistake: The Court insists on describing the plaintiff's interest as 'fundamental.' This is misleading, for it suggests either that the text of the Constitution has singled out the abortion decision for special attention or that the judge, as wise philosopher, has imposed his ethical system upon the people. . . . [*Doe*] lacks persuasive force and treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association.").

72. Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMMENT. 75, 80 (1991). *See also* Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765 (1973); Paul A. Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983) (explaining that the Court prescribed "a kind of legislative code, to the exclusion of alternatives"); Linton, *supra* note 21, at 17–34; Arnold H. Loewy, *Why* Roe v. Wade *Should be Overruled*, 67 N.C. L. REV. 939, 939 (1989) ("For an academic to advocate the overruling of a case so firmly entrenched . . . requires more than a demonstration that the case is wrong. Academics think many cases are wrong, and a healthy respect for stare decisis requires that simple wrongness not be the predicate for overruling a decision that the Court recently and resoundingly endorsed. *Roe v. Wade*, however, is not simply wrong; it is Wrong in a fundamental way that few, if any, recent decisions of the Supreme Court can match. The unique *Wrongness* of *Roe* lies in its utter lack of support from any source that is legitimate for constitutional interpretation, coupled with its wholesale denial to a substantial portion of the populace

The incoherence of *Roe*'s "substantive due process" analysis is demonstrated by the contrasting treatment of the issue in *Roe*, *Doe*, and *Casey* on the one hand, and the Court's two decisions in *Washington v. Glucksberg*[74] and *Vacco v. Quill*[75] in 1997 on the other. In *Glucksberg* and *Vacco*, the Supreme Court refused to find in the Fourteenth Amendment a constitutional right to assisted suicide, even though the Court's famous "mystery" passage in *Casey*—and the radical individualism of which it is an expression—would seem to support such a personal decision to terminate one's own life.[76] The Court has never explained why the "mystery" passage does not confer a "right" to suicide. *Roe/Casey* and *Glucksberg/Vacco* are irreconcilable as a matter of constitutional reasoning and constitutional principle.

Although the Court in *Roe* relied heavily on *Griswold v. Connecticut*[77] and *Eisenstadt v. Baird*,[78] *Roe* is not logically supportable as an extension of these cases.[79] Up until *Roe*, the decisions in *Griswold* and other cases like it relied on the

of a meaningful opportunity to effectuate legislative change."); Michael J. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); Laurence Tribe, *Toward a Model of Roles in the Due Processs of Life and Law*, 87 HARV. L. REV. 1 (1973).

73. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 341 (1994).

74. 521 U.S. 702 (1997).

75. 521 U.S. 793 (1997).

76. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

77. Griswold v. Connecticut, 381 U.S. 479 (1965).

78. Eisenstadt v. Baird, 405 U.S. 438 (1972).

79. *See id.* Consider the logical and analytical lapse in *Eisenstadt v. Baird* when Justice Brennan employs the question-begging phrase, "if privacy means anything," in order to manufacture, pretty much out of whole cloth, a meaning apparent only to him. Justice Brennan included dictum in *Eisenstadt* (referring to a right to bear a child) while writing the opinion in anticipation—with *Roe* pending before the Court—that Justice Blackmun (or another Justice) could use the *Eisenstadt* dictum in writing an opinion in *Roe*. EDWARD LAZARUS, CLOSED CHAMBERS 364–65 (1998) ("Brennan's comments about the right to privacy [in *Eisenstadt*] were gratuitous dicta. . . . Brennan added the crucial 'bear or beget' language in *Eisenstadt* precisely because, while he was working on his *Eisenstadt* draft, the Court already was considering *Roe*. Brennan knew well the tactic of 'burying bones'—secreting language in one opinion to be dug up and put to use in another down the road. . . . And taking full advantage, Brennan slipped into *Eisenstadt* the tendentious statement explicitly linking privacy to the decision whether to have an abortion. As one clerk from that term recalled, 'We all saw that sentence, and we smiled about it. Everyone understood what that sentence was doing.' It was papering over holes in the doctrine.") As Lazarus points out, "Brennan's *Eisenstadt* opinion commanded only four votes and was a 'majority' only because the Court was shorthanded at the time." *Id.* at 365.

rationale that the specific practices given constitutional protection were "deeply rooted in the laws and traditions of the people."[80] The importance of that rationale in those precedents is demonstrated by the fact that Justice Blackmun devoted half of his opinion in *Roe* to history. In reality, though, *Roe* did not rely on that tradition but radically broke from it:

> *Roe* invented the abortion right out of the penumbras and emanations of *past decisions* that had invented new rights out of the perceived penumbras and emanations of constitutional texts. The Court reasoned from specific prior extrapolations (like *Griswold*, *Eisenstadt*, and *Skinner*) to a general "right of privacy" and then read that principle back into the Constitution to create a right to abortion. In *Roe*, there is even less pretense of a mooring in constitutional text than the Court faked in *Dred Scott*. *Roe* is *all* extrapolation from precedent and jumping back and forth between general and specific. Yet, *Roe* lacks even any serious mooring in cases like *Griswold* that had extrapolated those other constitutional rights. In this respect, *Roe* took *Dred Scott* to a whole new level. In *Dred Scott*, one sees judicial willfulness disguised by the most flimsy and contrived distortion of the constitutional text one could imagine. In *Roe*, one sees the constitutional text disappear entirely. *Roe* is judicial legislation completely cut loose from any pretense of textual justification.[81]

Indeed, the shaky foundation of *Roe* is reflected in the Court's explicit recognition in *Roe* that the long line of preceding substantive due process cases was "inherently different."[82] Thus,

80. Linton, *supra* note 21. *See also* Regan, *supra* note 72, at 1639; Jeffrey Rosen, *dissenting*, in WHAT *ROE* SHOULD HAVE SAID (Jack Balkin ed., 2005).

81. Paulsen, *supra* note 14, at 1014. As another commentator has summarized *Roe*'s reasoning:

> Presented with the challenge of extending the right to privacy from contraception to abortion, the Court largely skipped the process of interpretation and moved on to announcing its conclusions. While the Court decorated the fringes of its opinion with historical details, it left the center barren. *Roe* makes no attempt to define the contours of the right to privacy or its underlying principles. . . . The opinion simply lists precedents bearing some relation to the idea of privacy. The entire section runs but a paragraph, as if the connection between the Court's prior cases . . . and abortion was self-evident. Then, in the critical culminating sentence, the opinion equivocates even on the basic question of whether the right is properly located in the Ninth Amendment or the Fourteenth Amendment's due process clause.

LAZARUS, *supra* note 79, at 366.

82. Roe v. Wade, 410 U.S. 113, 159 (1973) ("The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation therefore is inherently different from marital privacy, or bedroom possession of obscene material, or

Roe both embraced and simultaneously cut itself off from that line of cases. Even if it is assumed that the woman seeking an abortion is completely autonomous—unburdened by social, psychological, and relational pressures in making the abortion decision—that "liberal conception of the person," as Michael Sandel notes,

> is not characteristic of our political and constitutional tradition as such. The image of the person as a freely choosing, unencumbered self has only recently come to inform our constitutional practice. Whatever its appeal, it does not underlie the American political tradition as a whole, much less "the public culture of a democratic society" as such.[83]

The Court has no authority except that which the Constitution gives it. Even Justice Douglas recognized that "[a] judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[84] The spinning out of generalities from holdings in prior cases does not cancel out specific areas of legal and constitutional authority that the people, through their representatives, have traditionally exercised. After all, the Tenth Amendment clearly states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[85] The making of public policy regarding abortion before and after the passage of the Fourteenth Amendment is one of the areas that the people have long understood—until 1973—as being one for the people in the states. The history of such regulation by state and local authorities stretches back to the colonial era and extended to the November 1972 elections, when the people of Michigan and North Dakota rejected legalization of abortion by casting their ballots, just two months before the Court's decision in *Roe* in January 1973. To partially nullify the Tenth Amendment

marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* were respectively concerned.").

83. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 103 (1996).

84. William Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

85. U.S. CONST. amend. X.

through a strained construction of the Fourteenth, as the Court did in *Roe* and *Casey*, simply cannot be defended on textual or historical grounds.

When the spurious nature of *Roe*'s abortion history was presented to the Court in *Webster v. Reproductive Health Services*,[86] the Court jettisoned substantive due process as a rationale for *Roe*. Since then, no Justice has offered any alternative constitutional justification—or any alternative substantive due process rationale—for the abortion "right." The plurality in *Casey* did not engage in any serious substantive due process or historical analysis. Justices Kennedy, O'Connor, and Souter called the nation to a "mandate rooted in the Constitution" but never tried to demonstrate that such "roots" existed. The Court in *Carhart* merely cites the plurality opinion in *Casey* and adopts its reasoning (or lack thereof).[87] Consequently, the *Casey* plurality's claim that there is "a *common* mandate *rooted* in the Constitution" is wholly vacuous.[88]

Alternative sources for a "right" to abortion are no more plausible than substantive due process. The Ninth Amendment is a rule of construction, and the question of what rights are "retained by the people" begs the historical existence of an abortion right and how the people, through their representatives, have treated abortion.[89] The historical record is clear: the people cannot be said to "retain" a "right" that they regularly and consistently prohibited to protect mothers and their unborn children. Nor, as other scholars have suggested, is the Equal Protection Clause a plausible alternative.[90] The actual

86. 492 U.S. 490 (1989).

87. *See generally* Stenberg v. Carhart, 530 U.S. 914 (2000).

88. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (emphasis added).

89. *See, e.g.*, Paulsen, *supra* note 14, at 1008 n.34 ("On its face, the [Ninth Amendment] plainly does not create any rights. It is a rule of construction ('shall not be construed') about the effect of the enumeration of other rights. . . . But a federal constitutional rule of non-preemption clearly does not create or authorize future judicial creation of new federal law constitutional rights. It merely leaves unaffected existing state law, common law, and natural law understandings."); Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 93, 94 (1988).

90. Linton, *supra* note 21, at 21–22 n.37 (citing David Smolin, *Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621 (1990); James Bopp, Jr., *Will There be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade*?*, 15 J. CONTEMP. L. 131, 136–41 (1989); James Bopp, Jr., *Is Equal Protection a Shelter for the Right to Abortion?*, *in* ABORTION, MEDICINE AND THE LAW 160–80 (J. Butler & David Walbert, eds. 4th ed. 1992)); David M. Smolin, *The*

history of abortion regulation justifies Professor Michael McConnell's pointed comment that identifying a plausible, legitimate rationale for the Court's decision in *Roe* has been "the holy grail of modern constitutional theorizing" and Judge Richard Posner's comment that *Roe* is the "wandering Jew of constitutional law."[91] None of these "alternative rationales" for *Roe* is any more "rooted" in the Constitution than *Roe* is; none can find any connection to a constituent act of the American people to constitutionalize abortion, assign its regulation to the Supreme Court, and withdraw it from the realm of self-government through elected representatives.

III. THE WISDOM OF SELF-GOVERNMENT AND FEDERALISM

A. *The Consent of the Governed and Republican Government*

The American founding generation recognized natural law principles and endeavored to form their governmental structures in accord with those principles. Like political philosophers that preceded them—Richard Hooker, Algernon Sidney, John Locke, The Baron de Montesquieu—the Founders did not believe that any particular form of government was divinely dictated, and that different forms of government could be consistent with natural law, as long as they rested on the consent of the governed.[92] In our case, consent of the governed comes from the American people themselves. In the founding political document of America, the Declaration of Independence proclaimed:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed . . . .[93]

Jurisprudence of Privacy in a Splintered Supreme Court, 75 MARQ. L. REV. 975, 993–1013 (1992).

91. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1539 (1989) (reviewing MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988)).

92. *See generally* DOUGLAS KMIEC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER (2000); ROBERT H. HORWITZ, THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (3d ed. 1986).

93. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Government that derived its power from the consent of the governed was republican government, and the founders considered republican government synonymous with "popular government."[94] James Madison defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."[95] Patrick Henry emphasized a republican government's representative character: "The delegation of power to an adequate number of representatives, and an unimpeded reversion of it back to the people, at short periods, form the principal traits of a republican government."[96] In this country, "Sovereignty resides in the people, not in any organ of government."[97] As James Madison wrote in *Federalist No. 49*: "[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . . ."[98] Madison refers to the various branches of government as having a "commission" from the people,[99] and his co-author, Alexander Hamilton, justifies judicial review in *Federalist No. 78* as the Court carrying out the will of the sovereign people, who have delegated this task to the Court as the agent of the people.[100]

In the most famous early Supreme Court case—the one that followed the logic of *Federalist No. 78* to establish the Court's ability to set aside a statute for exceeding the authority conveyed to Congress by the Constitution—Chief Justice Marshall said in *Marbury v. Madison* that "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."[101]

94. *See* THE FEDERALIST NO. 10 (James Madison).

95. THE FEDERALIST NO. 39, at 280–81 (James Madison) (Benjamin Fletcher Wright ed., 1996).

96. Patrick Henry, Remarks at the Virginia Ratifying Convention (June 14, 1788) (transcript available at http://www.constitution.org/rc/rat_va_12.htm).

97. Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 95 (1993).

98. THE FEDERALIST NO. 49, at 348 (James Madison) (Benjamin Fletcher Wright ed., 1996).

99. *Id.*

100. THE FEDERALIST NO. 78 (Alexander Hamilton).

101. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

> The words of the Constitution are . . . [authoritative] because they are the verbal embodiment of certain collective decisions made by the people. The theory of judicial review is not based on any claim that judges are superior to the people, but on the claim that in enforcing the Constitution they are carrying out the will of the people. It follows, then, that judges act legitimately under the Constitution only when they are faithfully enforcing those collective decisions. To enforce *something else* . . . separates the text from the source of its authority.[102]

In opposing the Supreme Court's decision in *Dred Scott*,[103] President Lincoln spoke in his First Inaugural Address of the dangers of the Supreme Court binding the people through unconstitutional decisions:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[104]

What the Supreme Court has done in the abortion area—by dictating abortion policy for the past thirty-three years and repeatedly silencing the voice of the people expressed through their state legislatures—is directly contrary to the American vision of republican government because it simply has not been legitimized by the consent of the governed.

B. *Federalism*

If the first principle of American government is a republican government, the second is that certain prudential arrangements were necessary to promote justice, avert despotism, and preserve liberty. The Founders who incorporated these prudential structures in the state constitutions in the 1770s, and then in the

102. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1278–79 n.45 (1997). *See also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

103. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

104. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101-10, at 139 (1989).

Federal Constitution of 1787, derived these arrangements from the lessons of ancient republics, the British political experience, the ideas of political writers, and the colonial American experience. The most important arrangements were the separation of powers and the checks and balances among the branches of government.

The United States is a constitutional, federated republic shaped by prudential judgments about popular government, the rule of law, and the preservation of freedom against the abuse of power. The Founders discovered, in the writings of Aristotle, Montesquieu, and others, support for a mixed government consisting of elements of monarchy, aristocracy, and democracy. Along with Aquinas, Luther, and Calvin, the Founders did not believe that one particular form of government was divinely dictated and believed that reason and prudential judgment necessarily played a large role in formulating the best political structure. In a move that borders on the miraculous, the Framers convening in Philadelphia, following the lead of the newly-formed state constitutions, transformed the old ideas of a balanced constitution that relied on different orders in society into a framework for a balanced constitution that incorporated the concepts of dual state and federal sovereignty and featured checks and balances among the three elements of government—legislative, executive, and judicial. Dual state and federal sovereignty and the separation of powers enabled Americans to have a government that would respond to their wishes without the need for what they regarded as an inconvenient aristocracy and monarchy. No longer was there a need for a divinely-sanctioned monarch, or, in Jefferson's words, a few men "booted and spurred" to ride on the backs of others.[105] Both the state and federal governments drew their authority from the people themselves, and each branch of the federal government was also theoretically responsive to the people. The Executive would be selected by representatives of the people, casting their votes in the Electoral College, the members of the legislature would either be selected by popular vote or by the vote of the people's representatives in the states, and the Supreme Court would interpret the Constitution and laws in a manner consistent with the will of the people.

105. Letter from Thomas Jefferson to Roger C. Weightwan (June 24, 1826) *in* JEFFERSON: WRITINGS 1516, 1517 (M. Peterson ed., 1984).

The American people, acting through their state constitutional ratifying conventions, established a federal system. The people of the states created the Federal Constitution; the Constitution did not create the states. As Madison expressed the principle in *Federalist No. 39*, the consent of the people on which the Constitution's authority rests was "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."[106] And a few years later, in 1791, a national Bill of Rights was designed to make clear the limitations on the delegated power of the federal government. The Establishment Clause, for example, is "a federalism provision intended to prevent Congress from interfering in state establishments."[107] It is often assumed that the Bill of Rights is the arrangement that protects the people's liberties; but a much more convincing argument can made, based on the understanding of the Framers and the experience of two centuries, that federalism and the separation of powers are more important than the Bill of Rights in preserving the people's liberties.[108] James Madison articulated the prudential reasoning that supported these various features in *Federalist No. 51*, where he indicated that there was a need to govern the governors, to protect the people from their government, and that this could be done "by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[109]

Two hundred years later, it is occasionally difficult for academics and federal judges to remember that the states preceded and formed the national government. As Professor Russell Hittinger has written:

> That the original framers and ratifiers restricted the Bill of Rights to the federal government's dealing with individuals bespeaks the conviction that the states were reliable guardians

106. THE FEDERALIST NO. 39, at 283 (James Madison) (Bejamin Fletcher Wright ed., 1996).

107. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

108. *See, e.g.*, WILLIAM WATKINS, RECLAIMING THE AMERICAN REVOLUTION: THE KENTUCKY AND VIRGINIA RESOLUTIONS AND THEIR LEGACY (2004).

109. THE FEDERALIST NO. 51, at 355 (James Madison) (Benjamin Fletcher Wright ed., 1996).

> of liberties. There was no perceived need for a national clearinghouse for individual rights claims.[110]

This was "a prudential judgment of the founders."[111] Indeed, the notion that the federal government should be the primary actor in national life, and that it might, for example, abolish or pre-empt state criminal laws was something the proponents of the Constitution had to refute, or it would have been impossible to secure its ratification.

Does prudence or experience compel the conclusion that one federally-dictated national standard for abortion, either constitutional or statutory, is necessary? Certainly, American history does not support one uniform national rule for abortion. The states formed their own policy on abortion—originally derived from English law—for more than two hundred years, from colonial times to 1973. Before *Roe*, no serious argument was raised that one uniform national standard on abortion must be adopted by federal statute or by constitutional amendment.

In order to return policy-making over abortion to the American people, where it belongs, we advocate a federalism amendment, one that would make clear that, as the Tenth Amendment directs, it is the genius of our federal system to reserve unenumerated powers and rights to the people of individual states, and not to the Federal Judiciary. As Justice Brennan once said, "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections."[112] A federalism amendment would correct the Supreme Court's erroneous declaration of a national "right" to abortion and return the issue to the states. Seeking to secure the passage of such an amendment, does, of course, raise fundamental questions of prudence and constitutional law. These were the sort of questions that the Framers addressed in 1787, acting pursuant to what was then understood as the "science of politics," and drawing their inspiration particularly from the Baron de Montesquieu, who declared that "there is no

110. Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 449 (1990).

111. *Id.*

112. *Excerpts of Brennan's Speech on Constitution*, N.Y. TIMES, Oct 13, 1985, at 36.

liberty, if the power of judging be not separated from the legislative and executive powers."[113]

The federal nature of the American system of government is itself a prudential arrangement, and returning the issue of abortion to the states is in keeping with this original, prudential arrangement:

To be for federalism is not to be for the evils which federalism may leave untouched. The famous Lincoln-Douglas debates of 1858 illustrate the difference. Douglas was for states' rights on slavery, holding that the federal power should not override each state's own determination of whether it was free or slave. He also professed himself indifferent as to the choice each state made: In Lincoln's paraphrase of his position, "He cares not whether slavery is voted down or voted up." Lincoln had precisely the same view of states' rights on the issue: The federal power should not in peacetime determine the question for the states. But he was convinced that slavery was a "political, social, and moral evil" and that the right choice of each state would be to end slavery. Douglas' indifference, he observed, was equivalent to "blowing out the moral lights around us." Lincoln believed in the self-government of the states within the federal system, but, trusting in the moral lights around us, he also believed it unnecessary for the national government to extirpate the evil of slavery in the states where it was established. . . . His respect for federalism could never be confused with the "don't care" philosophy of Douglas.[114]

Pursuant to the liberty-enhancing features of federalism and the separation of powers inherent in the Federal Constitution, the American people were content to leave abortion policy to the states and to actively enforce laws at the state level until the Court intervened in 1973.[115] Approximately thirteen states altered their abortion law in the direction of permitting more abortions in the period from 1967 and 1972, but several others rejected ending the prohibitions on abortion, some by actions in the legislature and others by action at the ballot box. The result

113. THE FEDERALIST NO. 78, at 491 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1996) (footnote omitted). For Montesquieu's influence on the Constitution, see, for example, PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM (2003).

114. JOHN NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 186 (1979).

115. *See* Forsythe, *supra* note 16.

was that, as of 1973, thirty states still retained their prohibitions on abortion except to save the life of the mother.[116] At no time before the Supreme Court's decision in *Roe* was there any kind of strong public sentiment that the enforcement of abortion law should be taken over by the federal government.

The realistic insight that the ideal state is not achievable and that government is the art of the possible goes back to Aristotle.[117] This truth was emphasized by Thomas Aquinas and dominated the political theory of the Founders. Neither reason nor prudence dictates that abortion law and its enforcement be exclusively controlled by the federal government. Positive law in a world of practical constraints can only attempt to reflect moral law.[118]

Given the complexity of the questions we have raised here about abortion, and the myriad public policy approaches to abortion, one national regime of abortion policy is not only not necessary, it may be counterproductive. Moreover, there is nothing in natural law—the basis articulated in the Declaration of Independence for our basic rights—that dictates a national rule for abortion. As Professor Gerard Bradley has pointed out: "*the* fundamental natural right in the Revolutionary and early republican eras was the right of a community to be governed by laws of its own choosing. Republican government was the paramount liberty."[119]

For most of American history, the states, not the federal government, have been the ultimate guarantors of natural rights

116. Thirteen states adopted the ALI statute or something similar; four states (Alaska, Hawaii, New York, and Washington) allowed abortion on demand up to twenty-four weeks; two states allowed abortion for life or health (Alabama and Massachusetts); one state allowed for life or rape (Mississippi); and the remaining thirty states prohibited abortion exception to save the life of the mother. Linton, *supra* note 21, at 77–102. *See also* Linton, *supra* note 16.

117. As Aristotle said, "For the best is often unattainable. . . . We should consider, not what form of government is best, but also what is possible." W.T. JONES, A HISTORY OF WESTERN PHILOSOPHY 236 (1952).

118. On these issues of law and morality for republican governments, see generally MORTIMER N.S. SELLERS, REPUBLICAN LEGAL THEORY: THE HISTORY, CONSTITUTION AND PURPOSES OF LAW IN A FREE STATE (2003).

119. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 303–04 (1991) (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787 (1969); Hittinger, *supra* note 110, at 445–49; Robert C. Palmer, *Liberties as Constitutional Provisions: 1776–1791*, *reprinted in* WILLIAM E. NELSON & ROBERT C. PALMER, LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55 (1987)). *See also* STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED (1994).

and the people's liberties. This was understood by the Framers and was inherent in their creation of a federal system, their division between the federal and state governments, and in their enactment of the Bill of Rights. It should be acknowledged, however, that the Constitution's Framers and the American people who ratified the document did understand that there were limits on what could be done by the states, and hence the power to regulate interstate commerce was granted to the federal government, and the states were forbidden from interfering with contracts or from establishing anything but republican governments. And even some policies left to the states, over time, were properly placed in the hands of the federal government, as was the matter of prohibiting slavery and enforcing the Civil Rights laws to prevent racial segregation or discrimination. This was done, of course, by constitutional amendment, and not by dictates of the Supreme Court.

As important as freedom from racial discrimination is, however, and even though the Supreme Court itself chose education as an area to make a firm stand against enforced racial segregation in *Brown v. Board of Education* in 1954,[120] the Supreme Court has always resisted transferring all regulation of education to the federal government, and thus has tread warily in this area. Curiously, in 1973, the same year that *Roe* was decided, the Court, in *San Antonio Independent School District v. Rodriguez,* acknowledged, in a manner it should have heeded in *Roe*, that:

> The ultimate wisdom as to these [issues] is not likely to be divined for all time even by the scholars who now so earnestly debate [them]. In such circumstances, the judiciary is well advised to refrain from imposing upon the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions . . . and to keeping abreast of ever-changing conditions.[121]

Public health and medical regulation is an area generally left to the states in our federal system; abortion, as a matter of public health, might best be left to the states as well.[122] Thus, in *Jacobson*

120. 349 U.S. 294, 301 (1955).

121. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 43 (1973).

122. Wellington, *supra* note 71, at 299 ("In terms of comparative institutional competence, the regulation of health matters and the regulation of economic affairs are

v. Massachusetts,[123] the Court upheld a conviction for refusal to undergo a smallpox vaccination, despite the defendant's claim that the mandatory vaccination violated his right to "care for his own body and health in such way as to him seems best."[124] There the Court enunciated a policy that may prudently apply to abortion:

> The fact that the belief is not universal [in the medical community] is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to common belief of the people, are adapted to [address medical matters]. In a free country, where government is by the people, through their chosen representatives, practical legislation admits of no other standard of action.[125]

Criminal law, too, is best left to the states to administer and enforce, as has been our tradition. Practical issues of abortion law enforcement will exist whether the federal or state governments control the enforcement of abortion law. But the experience of the twentieth century is that the states are best able to conduct such enforcement.[126] Prior to *Roe*, the states treated the woman as the second victim of abortion, not as a principal involved in a crime, and it is almost certain that the states would continue to do so if *Roe* were overturned.[127] The states are in the best position to experiment and create the optimal policy with regard to abortion, and until thirty-three years ago, the states had the clear constitutional authority to do so.

Knowledge of what the states did before *Roe* can shed some light on what the states might do if the abortion issue is returned to them.[128] But sound policy must compare the impact on

much the same. Judicial deference to legislative judgments on matters of economics and health are required.").

123. 197 U.S. 11 (1905).

124. *Id.* at 26.

125. *Id.* at 35.

126. *See* Forsythe, *supra* note 16.

127. *See* DELLAPENNA, *supra* note 16 at 298–302; Paul D. Wohlers, *Women and Abortion: Prospects of Criminal Charges*, THE AMERICAN CENTER FOR BIOETHICS (1982), *reprinted in Legal Ramifications of the Human Life Amendment: Hearings Before the Subcomm. on the Constitution of the Senate Comm. On Judiciary*, 98th Cong. (1983) [hereinafter *Hearings*] (surveying the case law in the fifty states relating to liability of women for abortion).

128. *See generally* Forsythe, *supra* note 16.

women before *Roe* with the impact on women from legal abortion since *Roe*. Sound policy must also take into account changes in technology, medicine, and culture since 1973, so that the passage and enforcement of abortion legislation can be understood to have a different impact than it would have had forty years ago. Finally, when we seek to understand the impact of reversing *Roe*, we must take into consideration the benefits as well as the costs. As we have indicated, with the proliferation of abortion as birth control has come a variety of physical and psychological harm, including broken relationships, and an attendant increase in sexually transmitted diseases.[129] With the increase in pre-marital sex has also come an increase in out-of-wedlock births, in child abuse, and in other socially-deleterious behavior. States might well consider whether lessening the availability of abortion would help in the amelioration of these problems.

In any event, this kind of thoughtful weighing of costs and benefits—which the Supreme Court has shown it is unable and unwilling to do—ought to be the task of the people's representatives in the state legislatures. Since the Supreme Court refuses to undo the social damage done by *Roe* and its progeny, that task should now be undertaken by the American people through the passage of a federalism amendment.

IV. THE INTENT OF THE PROPOSED AMENDMENT

"The authority of the people to protect human life and health being fundamental, no right of abortion is conferred by the Federal Constitution." — Proposed Federalism Amendment

Congress has voted on an amendment to overturn *Roe v. Wade* on one and only one occasion. That was in June 1983, when the Senate failed to approve the Hatch-Eagleton Amendment by a

129. Paige Cunningham, *The Supreme Court and the Creation of the Two-Dimensional Woman*, *in* THE COST OF "CHOICE" 118–19 (Erika Bachiochi ed., 2004) (quoting K. MCDONNELL, NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION 59 (1984) ("Studies of abortion and its aftermath reveal that, more often than not, relationships do not survive an abortion: the majority of unmarried couples break up either before or soon after an abortion."). *See also* Cunningham & Forsythe, *Is Abortion the 'First Right' for Women?*, *in* ABORTION, MEDICINE AND THE LAW (Butler & Walbert, ed., 1992); SUE NATHANSON, SOUL CRISIS: ONE WOMAN'S JOURNEY THROUGH ABORTION TO RENEWAL (1989); M. ZIMMERMAN, PASSAGE THROUGH ABORTION: THE PERSONAL AND SOCIAL REALITY OF WOMEN'S EXPERIENCES (1978).

49-50 vote.[130] At that time, *Roe* was barely ten years old. The long-term medical and sociological evidence of the impact of abortion on women was only beginning to be examined. Twenty-three more years have passed, and more than thirty million more abortions have been performed. The Court has decided a dozen more abortion cases. The experience of the people in enacting common sense regulations at the state level has been more clearly developed, and the legal landscape has changed.

The purpose of the proposed amendment is simply to overturn the Supreme Court's decisions in *Roe*, *Doe*, and their progeny by making clear that those decisions wrongly created a federal constitutional right to abortion. There are several precedents for using a constitutional amendment for this purpose. Four of the fourteen amendments to the Federal Constitution approved after the Bill of Rights were similarly intended to correct perceived errors made by the Court.[131] If this amendment is ratified, the making of abortion policy will be returned, as it was before 1973, to state and local control. Instead of interfering with the enactment, enforcement, and implementation of state legislation regulating or prohibiting abortion, the federal courts will simply be removed from this area. While the intention, purpose, and benefits of the amendment should now be clear, perhaps some remarks are still in order addressing its specific language.

A. *Effect of the Precatory Language of the First Clause*

The first clause of the proposed amendment, "The authority of the people to protect human life and health being fundamental," is precatory. It expresses a reason for the amendment and thus explains the amendment, but is not itself operative or operational.[132] The Second Amendment also

130. *Hearings*, *supra* note 127; Human Life Federalism Amendment, S. Rep. No. 98-149 (1983).

131. The Eleventh Amendment was designed to overturn *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Fourteenth Amendment was designed to overturn *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). The Sixteenth Amendment was designed to overturn *Pollock v. Farmer's Loan and Trust Co.*, 158 U.S. 601 (1895). The Twenty-Sixth Amendment was designed to overturn *Oregon v. Mitchell*, 400 U.S. 112 (1970).

132. *Cf.* Webster v. Reprod. Health Servs., 492 U.S. 490, 504–06 (1989) (concluding that a Missouri statutory preamble was not "operative"). "Precatory" means "[h]aving the nature of prayer, request or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction." BLACK'S LAW DICTIONARY 1176 (6th ed. 1990). Thus, for example, "[m]ere precatory words or

contains a precatory first clause: "*A well regulated Militia, being necessary to the security of a free State*, the right of the people to keep and bear Arms, shall not be infringed."[133]

The precatory clause of the Second Amendment has been referred to as "the introductory formula" and distinguished from "the operative statement" of the second clause.[134] The first clause is "a clarifying preamble."[135] This precatory language has been used to help interpret the nature of the right to bear arms. Indeed, some who have understood the precatory language to refer to a right that inheres in the community rather than individuals have argued that as the need to keep a well regulated militia has altered the right to bear arms might also be subject to similar alteration—the right itself being grounded in the needs of the people. The precatory language in our proposed amendment similarly emphasizes the primacy of the right of the sovereign people, in their states, to determine public policy. While the precatory language of the Second Amendment is admittedly a bit obscure, leading to debates over whether the right conferred is individual or collective in nature, no such obscurity is found in our precatory language, which simply restates the most basic principle of republican self-governance.

B. *Purpose of the Operative Language*

"No right to abortion" is intended to make clear that no alternative concept of such a right would be protected under any provision of the Constitution or its amendments.[136] There is some confusion in the Supreme Court's cases as to whether any "right to abortion" comes from the Fourteenth Amendment's protection of liberty in its "due process" clause, from some elusive "right to privacy" found in the penumbras or emanations from various provisions of the Bill of Rights, or, as the plurality in *Casey* would have it, from some primal need to figure out for oneself the mystery of human existence. Whatever the

expressions in a trust or will are ineffective to dispose of property. There must be a command or order as to the disposition of property." *Id.*

133. U.S. CONST. amend. II (emphasis added).

134. Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, *in* THE SECOND AMENDMENT IN LAW AND HISTORY 83 (Carl T. Bogus, ed., 2000).

135. Michael A. Bellesiles, *The Second Amendment in Action*, *in* THE SECOND AMENDMENT IN LAW AND HISTORY 55 (Carl T. Bogus, ed., 2000).

136. James Bopp, Jr., *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade, 15 J. CONTEMP. LAW 131 (1989).

derivation, our use of the singular term "abortion" is intended to indicate that no right to terminate a pregnancy is conferred by the Federal Constitution.

"Abortion" itself is undefined in the proposed amendment, but it is not generally the practice to clutter constitutional amendments with definitions, and, in any event, abortion has been sufficiently defined in federal case law since *Roe* as "terminating a pregnancy."[137] This is consistent with general legal use of the term. *Black's Law Dictionary*, for example, defines abortion as "the spontaneous or artificially induced expulsion of an embryo or fetus."[138] Of course, further clarity of the definition can be supplied by congressional committee reports that would accompany the passage of any amendment.[139] In any event, there should be no ambiguity in understanding that just as *Roe* regards a right to abortion as a right to terminate a pregnancy, this amendment should be similarly understood as overturning *Roe*.

A similar effort to ours, the proposed Hatch-Eagleton Amendment of 1983—rejected by the Senate on June 28, 1983—used the term "secured."[140] During congressional hearings, the alternative use of the term "conferred"[141] was proposed, and it is adopted here. Generally, "confer" means "to grant or bestow" or "to give or yield."[142] "Secured" implies that a right or interest preexisted the Constitution or written law; while "conferred" is synonymous with "given," without implying that a right or interest was preexisting. Generally, "secure" means "to shield or make secure" or "to safeguard against."[143] In the context of the debate over the constitutional provision granting copyright, for

137. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992); Stenberg v. Carhart, 530 U.S. 914, 951 (2000); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976).

138. BLACK'S LAW DICTIONARY 7 (6th ed. 1990).

139. 2A C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION § 43.06 (4th ed. 1973).

140. "A right to abortion is not secured by this Constitution." S.J. Res. 3, 98th Cong. (1983) (Approved by a 4-0 vote of a Senate Judiciary Subcommittee on March 24, 1983. Approval failed by a 9-9 vote of the Senate Judiciary Committee on April 19, 1983, without recommendation to the Senate. The Senate itself voted on the Amendment, and it was defeated by a vote of forty-nine "Yes," fifty "No," and one not voting. Approval by two-thirds of the Senate is necessary for approval.).

141. *Hearings*, *supra* note 127.

142. WEBSTER'S THIRD NEW INTER'L DICTIONARY 475 (1981). *See* Bachrach v. Salzman, 981 P.2d 219, 222 (Colo. Ct. App. 1999) ("A person confers a benefit upon another if he or she gives to the other . . . .").

143. WEBSTER'S THIRD NEW INTER'L DICTIONARY 2053 (1981).

example, the difference between "secure" and "grant" was significant. "Secure" meant to affirm and protect a right already in existence, not to create one. "Grant" (similar to "confer") meant the government's bestowal of a newly created right. In other words, "secure" implies a natural law or perhaps a common law right affirmed by the Constitution; "grant" implies a right created by the government.

Given our reading of constitutional and legal history which indicates that there was no intention ever to "secure" such a right, if one existed it was "conferred" by the Supreme Court and not by the Constitution. Had we chosen to use the language, "A right to abortion is not *secured* by this Constitution," we might simply have been saying that the federal government does not recognize any common law right to abortion, while leaving open the possibility of finding other abortion rights in the document. The language chosen makes clear that the Federal Constitution has nothing to do with abortion.

C. *The Legal Impact of a Federalism Amendment*

During testimony in 1983 in support of the Hatch-Eagleton Amendment, legal scholars outlined ten results of the Hatch-Eagleton Amendment.[144] Those ten outcomes may also be effected by our proposed amendment because of the similarity between the language of the proposed amendment and the Hatch-Eagleton Amendment.

1. It Would Repeal the Supreme Court's Holding That the Constitution Confers a "Right" to Abortion

The obvious effect of the proposed amendment is simply to overturn *Roe, Doe,* and the other Supreme Court cases that have purported to find a right to abortion in the Federal Constitution. The Court's case law frequently refers to abortion as a "right." This is clear in *Roe*, *Casey*, and *Carhart.*[145] The phrase "a right to abortion" has been used in over one hundred federal court decisions as a description of the constitutional right

144. *Hearings*, *supra* note 127, at 61–63 (testimony of Professor Lynn Wardle). *See also* James Bopp, Jr., *An Examination of Proposals for a Human Life Amendment*, 15 CAP. U. L. REV. 417, 447 (1986).

145. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992); Stenberg v. Carhart, 530 U.S. 914, 951 (2000).

created in *Roe v. Wade* and its progeny.[146] That the Supreme Court thought it was dealing with a constitutional "right" is manifest in the standard of review and the requirement of a "compelling state interest." Since *Casey*, the Court has expressly applied an "intermediate," "undue burden" analysis. Whatever the nature of the Supreme Court's created abortion right—and there is some debate among scholars and Justices whether the created right is "fundamental" or not—our simple text makes clear that whatever right to abortion the Justices purported to find in *Roe* and subsequent cases does not exist.

2. It Would Prevent the Creation of Any Other "Right" to Abortion in Any Other Provision of the Constitution

The use of the article "No" makes comprehensive the scope of the declaration that there is no federal constitutional right to abortion. This is essential effectively to return the issue to the states, because the Supreme Court itself suggested that the "right" to abortion might be protected under one or more provisions of the Constitution.[147] Had we used the term "The," it might have been construed as limiting the intention of the amendment to "the" particular Fourteenth Amendment doctrine developed in *Roe v. Wade* and its progeny. Use of the article "no" makes it clear that no other "right to abortion" can be extracted from any other part of the Constitution. This proposed language, and its comprehensive effect, is the same as was intended by the Hatch-Eagleton Amendment in 1982–1983,[148] and there should be no difficulty in the construction of our amendment proposal, which, if anything, is even clearer than Hatch-Eagleton.[149]

146. LYNN WARDLE, THE ABORTION PRIVACY DOCTRINE (1980).

147. *Roe*, 410 U.S. at 153. *See* Bopp, *supra* note 136.

148. For the construction of the Hatch-Eagleton Amendment, see Wilfred Caron, *Human Life Federalism Amendment*, 28 CATH. LAW. 111, 112 (1983). In reviewing the legal impact of the Hatch Amendment ("A right to abortion is not secured by this Constitution") several scholars concluded:

> [It] is broad and covers every aspect of the Constitution so that a right to abortion could not receive support from any portion of the Constitution, neither the fifth, ninth, tenth, fourteenth, nor any other amendment, or any portion of the Constitution. . . . In effect, then, once the first sentence has taken away the substantive rule of the law, all those cases that flow from the creation of the right to abortion under *Roe v. Wade* would be undercut.

Dennis J. Horan, *Human Life Federalism Amendment*, 28 CATH. LAW. 115, 116 (1983).

149. In the text of Hatch-Eagleton ("A right to abortion is not secured by this Constitution"),

3. It Would Leave Untouched the Broader Constitutional Doctrine of Privacy

The use of the carefully-crafted phrase "right to abortion" makes it clear that the amendment repeals only the abortion decisions. Other constitutional interpretations of a Constitutional right to privacy, such as in contraception cases, family privacy cases, the consensual sodomy case, or even any cases involving same-sex marriages are outside the purview of our proposed amendment, and would be unaffected. In *Roe,* the Supreme Court held that the "right of privacy…is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[150] This language of the Court indicates the majority's belief that the "right to privacy" is so broad as to encompass many possible rights, and thus if "the right to abortion" were taken away, other rights within the scope of the "right to privacy" might still exist.

4. State or Federal Laws Regulating or Prohibiting Abortion Would be Examined Under the Rational Basis Standard of Review

The first clause of the amendment makes clear that the protection of human life is a rational objective. If the proposed amendment were adopted it would not necessarily mean that any law affecting the termination of pregnancy would be immune from constitutional review. The effect of the amendment would simply be that laws impinging upon the abortion decision would be examined under the rational basis standard of review unless they infringe other constitutional rights which do not constitute a "right to abortion." For example, a law prohibiting women of a certain race from obtaining abortions would still be examined under a strict

> The modifier "a" rather than "the" is intended to clarify . . . that the "right to abortion" referred to in the [Hatch-Eagleton Amendment] does not simply refer to the precise "right" as originally introduced in *Roe* but any alternative concept of such a right emanating from the Fourteenth Amendment or any other provision of the Constitution.

See Bopp, *supra* note 136; JAMES BOPP, JR., RESTORING THE RIGHT TO LIFE: THE HUMAN LIFE AMENDMENT (BYU Press 1984). By using "No right" rather than "a right" we have sought to eliminate any ambiguity between "a" and "the."

150. *Roe*, 410 U.S. at 153.

scrutiny test because of the clear violation of the Fourteenth Amendment's Equal Protection Clause.[151]

5. It Would Repudiate the Doctrines and Holdings of *Roe v. Wade* and *Doe v. Bolton* and Their Progeny

The Supreme Court's holdings in cases from *Roe* to *Stenberg*, such as those prohibiting the mandating of parental participation in the abortion decision, or those prohibiting post-viability abortion restrictions—indeed all of the more than twenty-eight cases stemming from *Roe*'s "right to abortion"—would become dead letters as far as federal constitutional law on the "right to abortion" was concerned, since that part of constitutional law would cease to exist. The extent to which fetal life would be protected, or partial birth abortion might be banned, or parental or spousal notice might be required would be questions for state legislatures, and possibly state courts, but not for federal judges.[152]

6. By Overturning a Right to Abortion Under the Due Process Clause, the Amendment Would Overturn *Roe*'s "State Interest" Analysis and the Notion That the Protection of Women's and Children's Lives Are Only "State Interests"

The Declaration of Independence and the constitutional traditions of the American people make clear that the right to life was a natural right that preceded government and was not created or conferred by government. In *Roe*, the Supreme Court held that the protection of human life was merely a "state interest" which the Court depreciated. By overturning *Roe*, this "state interest" analysis of *Roe* would be repudiated.

151. *See* Greenville Women's Clinic v. Bryant, 222 F.3d 157, 172 (4th Cir. 2000) ("If . . . a regulation 'impinges upon a fundamental right protected by the Constitution,' Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983), or 'operates to the peculiar disadvantage of a suspect class,' Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976), then the classification will be strictly scrutinized. While classifications in legislation ordinarily will be upheld against an equal protection challenge if 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification,' FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993), a regulation subject to strict scrutiny will be upheld only if it is justified by a compelling state interest . . . .").

152. "Once the first sentence has taken away the substantive rule of the law, all those cases that flow from the creation of the right to abortion under *Roe v. Wade* would be undercut." Horan, *supra* note 148, at 116.

7. It Would Restore to the States Their General Police Power to Restrict and Prohibit Abortion That Existed Before *Roe*

The proposed amendment would permit the states and localities to formulate public policy regarding abortion to the same extent that they could prior to *Roe*. The right of the people to protect human life before birth would be revived. Prior to *Roe* and *Doe*, the states had virtually plenary power over abortion and treated abortion as a crime. Once again it would become a choice for state governments whether or not to exercise their general police power to restrict or prohibit abortion.

8. It Would Restore Congress's Limited Power to Restrict and Prohibit Abortion as Necessary and Appropriate to Perform Its Constitutional Responsibilities to Control Interstate Commerce, Federal Lands, Federal Taxation, and Spending

Prior to *Roe* and *Doe*, the federal government exercised limited power over abortion, where there was a nexus with interstate commerce, or where the practice was performed in areas under federal jurisdiction.[153] That same jurisdiction would be revived by the proposed amendment.

9. It Would Disestablish a Class or Type of Constitutional Right, but Allow State Creation of Such Rights

Because the proposed amendment seeks only to restore the power to set public policy in the abortion area to the states, it makes no move to suggest what balance between the interests of the unborn and the interests of the pregnant woman ought to be struck. There would be no federal constitutional right to abortion, but it would become a question for the states whether—and to what extent—to create such a state right, or to create or protect the rights of the unborn.

10. It Would Restore the Constitutional Balance of Power Between the States and the Federal Government and Between the Legislative and Judicial Branches of Government

As the preamble to the proposed amendment makes clear, it would restore the *status quo ante Roe* insofar as the power and responsibility to resolve public policy regarding abortion or the

153. *See* Wellington, *supra* note 71.

protection of human life is concerned. It would place that important public policy question where the Tenth Amendment put it: with the sovereign people of the states.[154]

D. *The Immediate Legal Impact of Overturning* Roe

With the ratification of the proposed amendment, the American people would once again be free to choose their own approach to abortion policy in their states. The people would be free to retain, repeal, or amend the state laws currently in effect, through the normal legislative and judicial processes of the states.

What would the state of the law be the day after *Roe*? As Appendix 1 makes clear, abortion would still be legal in forty-three states if *Roe* was immediately overturned, possibly in all fifty, depending on what the states might do between now and then.[155]

Some states have maintained their pre-*Roe* laws. Some states have repealed their pre-*Roe* laws. And several state courts, since 1973, have created state constitutional rights to abortion that have invalidated state abortion laws or would limit what state legislatures could enact in the future.[156] In that context, the

154. *See Hearings*, *supra* note 127; Lynn D. Wardle, *The Quandary of Pro-life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 871 (1999).

155. David M. Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without* Roe*: Applying the Doctrine of Implied Repeal to Abortion*, 13 ST. LOUIS U. PUB. L. REV. 385 (1992); Linton, *supra* note 16.

156. Planned Parenthood of Alaska, Inc. v. Perdue, 28 P.3d 904 (Alaska 2001) (creating a broader abortion right under the state constitution); Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779 (1981); Doe v. Maher, 515 A.2d 134 (Conn. 1986) (finding a right of privacy, including procreative choice, implicit in Connecticut's ordered liberty); *In re* T.W., 551 So. 2d 1186 (Fla. 1989) (holding a state parental consent statute unconstitutional under the state constitution); Roe v. Harris, 917 P.2d 403 (Idaho 1996) (affirming an invalidation of state abortion funding restrictions); Moe v. Sec'y of Admin. & Finance, 417 N.E.2d 387 (Mass. 1981) (holding that the Massachusetts Declaration of Rights affords a greater degree of protection to abortion); Women of Minn. v. Gomez, 542 N.W.2d 17 (Minn. 1995) (holding that state abortion funding restrictions violated the state constitution); Armstrong v. State, 989 P.2d 364 (Mont. 1999) (holding that the Montana constitution protects the right to seek pre-viability abortion); Right to Choose v. Byrne, 450 A.2d 925 (1982) (holding that under the New Jersey constitution, the state may not restrict funds for abortions required to preserve a woman's life, but could deny funds for elective non-therapeutic abortions); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000) (holding that an abortion is a fundamental right under the state constitution, requiring strict scrutiny); Women's Health Ctr. of W. Va v. Panepinto, 446 S.E.2d 658 (W. Va. 1993). *But see* Mahaffey v. Attorney General, 564 N.W.2d 104 (Mich. 1997) (holding that there is no separate constitutional right to abortion under the Michigan constitution); N.M. Right to Choose v. Johnson, 975 P.2d 841 (N.M. 1998); Hope v. Perales, 634 N.E.2d 183 (1994) (holding that a state assistance program did not violate the state constitution by

states would likely enact an array of policies in the aftermath of *Roe* with the goal of reducing abortions and teen pregnancies. As Harvard Law Professor Mary Ann Glendon has noted:

> If the issue were returned to the states today, it . . . seems likely that a very few states might return to strict abortion laws, a few more would endorse early abortion on demand, and the great majority would move to a position like that of the typical range of European countries, reflecting popular sentiment that early abortions should be treated more leniently, but that all abortion is a serious matter.[157]

The overturning of *Roe* would work little change in the fabric of American law outside of abortion. To determine the impact of overturning *Roe*, one scholar examined "more than 100 Supreme Court opinions and orders in which *Roe* was cited and more than 2,300 state and lower federal court decisions citing *Roe*."[158] He concluded:

> The Supreme Court's decision in *Roe v. Wade* has had a limited impact on the law outside of abortion. *Roe* has had no discernable effect on any of the three areas on which the Court in *Casey* relied in reaffirming *Roe*—personal autonomy, bodily integrity, and family decision-making. . . . [I]t would be difficult to identify a single legal doctrine or principle that is dependent upon *Roe*, other than the right to abortion itself.[159]

V. CONCLUSION

Our constitutional system provides only two ways to overturn a Supreme Court holding interpreting the Constitution: an overruling decision by the Court itself or a constitutional amendment. Obviously, constitutional amendments are among the most difficult political goals to achieve in our constitutional system. This article is unique in its explanation of the legal effect and implications of a federalism amendment on abortion. Because no previous legal analysis of this kind exists, this article is limited to evaluating the *legal* impact of a federalism

excluding coverage for "medically necessary abortions"); Rosie J. v. N.C. Dep't of Human Res., 491 S.E.2d 535 (N.C. 1997) (rejecting the state constitutional right to abortion funding and holding that abortion is not a fundamental right); Planned Parenthood v. Dep't of Human Resources, 663 P.2d 1247 (1983).

157. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 49 (1987).

158. Linton, *supra* note 21, at 77–102.

159. *Id.* at 101.

amendment. It is beyond the scope of this article to evaluate fully the political obstacles or implications involved in the passage of such an amendment. For those who believe, as we do, that *Roe* has poisoned our political and judicial discourse, the political obstacles facing such an amendment ought to be weighed against the political obstacles to changing the Court's membership in the coming years to accomplish the same goal. Given that these political obstacles have resulted in a situation where there are only two publicly-declared Justices remaining on the Supreme Court who advocate the overturning of *Roe* thirty-three years after *Roe*, the obstacles to a constitutional amendment, while severe, may be less formidable than attempting to overrule *Roe* by changing the membership of the Court. Even if an amendment is impossible to accomplish, we do believe that legal and strategic dialogue and debate on abortion is healthy for its own sake. It is also possible that the arguments, public education, and political support involved in advocating a federalism amendment, even if Congress fails to consider an amendment, might move future Justices closer to the point of finally overturning this tragic decision.