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# An Equal Protection Analysis of Restrictive Abortion Laws: Affirmative Steps to Protect Woman's Liberty

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# An Equal Protection Analysis of Restrictive Abortion Laws: Affirmative Steps to Protect Women's Liberty

by Beth Morrow*

## Introduction

This Note is a response to the United States Supreme Court's continuing erosion of the fundamental right to privacy, which was held in *Roe v. Wade*[1] to encompass a woman's decision to terminate her pregnancy. *Roe v. Wade* focused solely on the fourteenth amendment's due process clause[2] as the source of the abortion right. This Note will argue that this important right should also be grounded in the fourteenth amendment's equal protection clause.[3]

Part I sets out an equal protection argument for abortion rights that both follows the Supreme Court's established line of analysis and probes some of the trends indicated in its adjudication of equal protection questions. Part II then sets out an equal protection argument for the right to choose that takes equal protection one step further than the Supreme Court has yet done, in an appropriate direction given the goals of our Constitution and of equal protection in particular. Finally, Part III discusses the advantages these equal protection arguments bring to abortion rights and to women's rights in general.

## I.

## Restrictive Abortion Laws Should be Invalidated as Violative of the Equal Protection Clause.

A. Equal protection, generally, protects individuals from discrimination that is based on their membership in a disadvantaged group.

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1. 410 U.S. 113 (1973) (holding limited by Webster v. Reproductive Health Svcs., 109 S.Ct. 3040 (1989)).

2. 410 U.S. 113, 153 (1973).

3. The abortion right should be articulated as evolving from a number of constitutional protections, including privacy, equal protection, and freedom of religion. However, this paper will only discuss the equal protection clause as a basis for the right.

The goals underlying the equal protection clause of the fourteenth amendment involve various permutations on a central theme: the Constitution aims to restrain state lawmakers from imposing any laws on their people that have the effect of making one group inferior to another. Laws that restrict women's access to abortion have exactly that impact on women; they place women in an inferior position to men within this society. The fourteenth amendment provides, in relevant part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[4] Such equal protection applies to the federal government as well as to states through the due process clause of the fifth amendment.[5]

The fourteenth amendment was enacted in an effort to validate the Civil Rights Act of 1866. Therefore, its purpose was to promote a position of equal citizenship for emancipated slaves and Black Americans, specifically through an extension of the fundamental rights to contract and to purchase property.[6] The equal protection clause, according to the Court of 1879, has a broad goal of removing "legal discriminations [which have the effect of] implying inferiority in civil society . . . ."[7] The fourteenth amendment was initially enacted to address only race discrimination, but the Court quickly conceded that it had a broader scope: "We do not say that no one else but the negro can share in this protection . . . [I]f other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent."[8]

Equal protection today requires courts to examine laws with varying levels of scrutiny, depending on the degree to which their subject matter implicates possible discriminatory intent. The Court has expanded the umbrella of equal protection beyond race discrimination, designating both alienage and national origin as "suspect classifications."[9] Suspect classifications are those that are based on factors "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . [and therefore] are subjected to strict scrutiny . . . ."[10] Strict scrutiny

4 . U.S. CONST. amend. XIV, § 1.

5. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

6. *See* R. BERGER, FEDERALISM: THE FOUNDER'S DESIGN 158-63 (1987).

7. Strauder v. W. Va., 100 U.S. 303, 308 (1879) (law denying blacks the right to be jurors held to violate equal protection).

8. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873).

9. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971); Oyama v. Cal., 332 U.S. 633, 644-46 (1948).

10. Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

requires that only the most compelling interests will justify state interference with fundamental rights, and only where such interference is narrowly tailored to serve those interests.[11]

B. Restrictive abortion laws fail at a heightened level of scrutiny.

Gender has not been designated as a suspect classification. However, the Court has set out an intermediate level of scrutiny which requires that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[12] The Court first applied equal protection to prevent sex discrimination in the 1971 case of *Reed v. Reed*.[13] In that case, a state law was struck down because its objective, administrative convenience, was not considered sufficiently important to justify a gender-based classification.[14] *Reed* established that classifications on the basis of gender would be treated less deferentially by reviewing courts, but the Court did not explain why or how this would be accomplished in the wider application of equal protection law.[15]

The Court has used the intermediate level of scrutiny to probe the actual impact of a policy as compared to the state's articulated goals. If the means chosen do not serve the ends sought by a law, the classification may have resulted from "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[16] In *Mississippi University for Women v. Hogan*, the Court found that the school's single-sex admissions policy did not serve the stated goal of educational affirmative action.[17] The Court found that:

11. City of Richmond v. J.A. Croson Co., 109 S.Ct. 706, 721 (1989). A strong argument can be made, as was done in *Roe v. Wade*, that restrictive abortion laws tread on a woman's fundamental rights. (410 U.S. 113 (1973) (fundamental right to privacy)). A woman's right to control her own body can also be read as a fundamental right stemming from the liberty guarantees of the due process clause: "Liberty means more than freedom from servitude, and the constitutional guarantee [of due process] is an assurance that the citizen shall be protected in the right to use [her] powers of mind or body in any lawful calling." Smith v. Texas, 233 U.S. 630, 636 (1914). Strict scrutiny is applied both to laws that create suspect classifications and laws that tread on fundamental rights. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). This Note will not explore the "fundamental rights" line of inquiry.

12. Craig v. Boren, 429 U.S. 190, 197 (1976).

13. 404 U.S. 71 (1971).

14. *Id.* at 76-77.

15. Law, *Rethinking Sex and The Constitution*, 132 U. PENN L. REV. 955, 975 (1984).

16. Miss. University for Women v. Hogan, 458 U.S. 718, 726 (1982).

17. *Id.* at 727.

"Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[18] As a result, the Court would not defer to the state's choice of means to serve a permissible end.

The intermediate level of scrutiny, as applied to discrimination on the basis of gender, has become more rigorous than was indicated in *Reed v. Reed*.[19] In *Mississippi University for Women*,[20] Justice O'Connor wrote for the majority that a party seeking to uphold a statute that classifies individuals on the basis of their gender carries "the burden of showing an 'exceedingly persuasive justification' for the classification".[21] O'Connor's opinion explains that this "burden is met only by showing *at least* that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'."[22] Use of the modifier "at least" suggests that the Court seeks more than the justifications required by its intermediate level of scrutiny.[23] In *Mississippi University for Women*, the Court showed a willingness to reconsider whether classifications based upon gender are inherently suspect, but did not reach this question, finding the statute invalid at the established standard of scrutiny.[24]

In applying an intermediate level of scrutiny to restrictive abortion laws, the Court should find such laws invalid because they do not serve their purported objectives. Restrictive abortion laws do not advance the interests asserted by states in their defense — those being the protection of potential life and, occasionally, the promotion of maternal health. Historically, statutes making abortion illegal did not end abortion but sent women underground to obtain their abortions illegally.[25] So, neither was the potential life of the fetus saved, nor was the health of the mother promoted. Restrictive abortion laws have one certain effect: they render the options available to women exclusively dependent on

18. *Id.* at 729.
19. 404 U.S. 71 (1971).
20. Miss. University for Women, 458 U.S. at 729.
21. *Id.* at 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).
22. *Id.* at 724 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)) (emphasis added).
23. *Id.*
24. *Id.* at 724 n.9.
25. *See generally*, J. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 254 (1978) (citing Alfred Kinsey Report, *Medical Abortion Practices in the United States*, in ABORTION AND THE LAW 37-38 (D. Smith ed. 1967)).

their financial status — a legislative goal which would be impermissible if articulated.

C. The Supreme Court should apply a strict scrutiny standard to laws which classify on the basis of gender and, specifically, to restrictive abortion laws.

Though restrictive abortion laws could be struck down at an intermediate level of scrutiny, it is more appropriate to analyze them under a strict scrutiny standard. Although the Court has not yet held gender to be a suspect classification, it came very close to doing so in *Frontiero v. Richardson*[26] in which a plurality ruled that sex-based classifications should be regarded as constitutionally suspect.[27] There, Justice Brennan wrote for the plurality: "[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[28] The strict scrutiny aspect of this plurality opinion, however, did not hold up through time.[29]

The originalist argument[30] that classifications on the basis of gender were not intended for strict scrutiny has been weakened by the Court's expansion of the equal protection doctrine to ethnicity and alienage.[31] From an originalist perspective, there is no greater support for defining these categories as suspect than there is for finding gender suspect. Gender too is a congenital and basically unalterable trait; it has been used as a basis for discrimination throughout the history of this country.[32] Women have long been seen as persons whose "paramount destiny and mission . . . [is] to fulfil the noble and benign offices of wife and mother."[33] Restrictive abortion laws have as their premise this limited view of womanhood.

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26. 411 U.S. 677 (1973).

27. *Id.* at 682.

28. *Id.* at 688.

29. This is best illustrated by the Court's return to the *Reed v. Reed* (404 U.S. 71 (1971)) level of scrutiny in later significant cases like *Craig v. Boren* (429 U.S. 190, 197-200 (1976)).

30. As Raoul Berger defines his perspective, speaking from what is here referred to as the originalist position: "[I]t is established learning that what the Constitution meant when it left the hands of the Founders it means today." R. BERGER, *supra* note 6, at 18-19.

31. Graham v. Richardson, 403 U.S. 365, 372 (1971).

32. *See* Brest, *Affirmative Action and the Constitution: Three Theories,* 72 IOWA L. REV. 281, 284 (1987).

33. Bradwell v. Ill., 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (upholding law denying women the ability to practice law in Illinois).

The goals underlying the expansion of equal protection to ethnicity and alienage apply readily to gender. In *Yick Wo v. Hopkins*,[34] the fourteenth amendment was found to apply to a class of people not originally considered to deserve protection: "[T]he very idea that one man may be compelled to hold his life, or the means of living, . . . at the mere will of another, seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."[35] This same clear goal presents a basis upon which the Court should apply strict scrutiny to restrictive abortion laws and find them "intolerable . . . as being the essence of slavery."[36] Ironically, a woman's lack of reproductive self-determination stands in direct contrast to the high value individual liberty enjoys in American society.[37]

> "[W]hile physical love enervates man, as being his favorite recreation, he will endeavor to enslave woman -- and, who can tell how many generations may be necessary to give vigor to the virtue and talents of the freed posterity of abject slaves?"
>
> Mary Wollstonecraft, 1792 [38]

D. Under a strict scrutiny standard of review, restrictive abortion laws are invalid.

1. Restrictive abortion laws classify on the basis of gender.

Restrictive abortion laws classify on the basis of sex; the burden of abortion restrictions falls exclusively on women. As Chief Justice Rehnquist noted in *Michael M. v. Superior Court*[39]: "[V]irtually all of the significant harmful and inescapably identifiable consequences of

34. 118 U.S. 356, 370 (1885).

35. *Id.* at 370.

36. *Id.*

37. The importance of John Locke's theories in the development of American democracy underscores this point. In his influential TREATISE OF CIVIL GOVERNMENT of 1689 (C. Sherman ed. 1937), he wrote that while government is necessary, the liberty of the citizen should be its most important goal. *Id.* Similarly, theories as to the importance of autonomy in the development of a healthy psyche inform an understanding of the American personality. *See* E. ERICKSON, CHILDHOOD AND SOCIETY 254 (1963) ("[T]he sense of autonomy fostered in the child and modified as life progresses, serves (and is served by) the preservation in economic and political life of a sense of justice."). Note also that, as Professor Robin West points out, this focus on freedom and individuality presents a very masculine framework, but one on which our jurisprudential structure is defined. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

38. M. WOLLSTONECRAFT, *A Vindication of the Rights of Woman*, in A MARY WOLLSTONECRAFT READER 322 (B. Solomon & P. Berggren eds. 1983).

39. 450 U.S. 464 (1981).

teenage pregnancy fall on the young female . . . ."[40] There, the Court observed that teenage boys do not bear any of these same "consequences."[41] It follows, then, that any restrictions on choices regarding pregnancy affect only those upon whom their burdens fall: "young females" and adult women.

Discrimination on the basis of pregnancy constitutes discrimination on the basis of gender. However, in *Geduldig v. Aiello*,[42] the Court attempted to define pregnancy as a gender-neutral phenomenon and upheld a California disability insurance program that denied coverage for work loss resulting from pregnancy. The Court found that the law did not "discriminate against any definable group or class," since there was a "lack of identity between the excluded disability and gender."[43] But, the Court's resolution of this issue in *Geduldig* had many flaws[44] and the Court has since stepped back from its early position. In *Nashville Gas Co. v. Satty*,[45] *City of Los Angeles v. Manhart*,[46] and *Arizona Governing Committee v. Norris*,[47] the Court recognized that discrimination on the basis of pregnancy might be linked to sex discrimination.[48]

Moreover, the classification created in restrictive abortion laws includes virtually all women: adult women who might some day get pregnant and girls who will some day become women.[49] All might

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40. *Id.* at 473.

41. *Id.*

42. 417 U.S. 484 (1974).

43. *Id.* at 496 n.20.

44. In *Geduldig*, the Court found no classification on the basis of gender. It did, however, find that the law established two classes: "pregnant women and nonpregnant persons." 417 U.S. at 496 n.20. But, the characteristic "nonpregnant" is simply not applicable to men, since men are incapable of becoming "pregnant". Logicians would classify the application of "nonpregnant" to men as a vacuous quantifier, devoid of real meaning. Professor Tribe called this reference "the 'pregnant persons' fantasy," entertained by the never-to-be-pregnant men on the Supreme Court. L. TRIBE, CONSTITUTIONAL CHOICES 239 (1985).

45. 434 U.S. 136, 138-43 (1977).

46. 435 U.S. 702, 716-17 (1978).

47. 463 U.S. 1073, 1084 n.14 (1983).

48. The evolution of the Court's opinion is credited, in part, to Congress, which passed a law establishing that discrimination on the basis of sex includes discrimination on the basis of pregnancy: The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1981)).

49. Since the Court has held that the choice whether or not to go through with a pregnancy is not a man's choice to make, it is only a woman's choice that is limited by restrictive abortion laws. *See* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 71 (1976). A law that limits women's access to abortion is limiting the choices available to women without affecting the choices open to men. Some men may choose to share the burden imposed by a woman's inability to terminate her pregnancy due to the absence of a

potentially be faced with an unwanted pregnancy and thus have a stake in the existence or absence of choice.

2. The dissimilar situation of men and women as regards pregnancy does not provide a state a compelling interest in the dissimilar treatment of restrictive abortion laws.

When a court begins its analysis of a law which creates a classification on the basis of gender, *Reed* directs the court to examine whether the law commands dissimilar treatment for men and women who are similarly situated; and, if so, whether that dissimilar treatment is a result of an arbitrary legislative choice.[50] This question of similar situation opens the equal protection analysis under the strict scrutiny standard, as well. The state has a credible interest in treating two groups differently only when the two groups are in dissimilar situations.[51]

Men and women are similarly situated in that they both have some measure of control of their reproductive capacities, but for the laws which deprive only women of that control.[52] Abortion has existed since time immemorial as one birth control technique in a spectrum of techniques. Some birth control methods were and are controlled by men; abortion was and is a method controlled by women.[53] Abortions were effected or attempted by means ranging from homeopathic potions and strenuous exercise to medical procedures performed by a midwife or doctor.[54] Men and women are differently situated in this process of reproductive control only because the methods they use are different. And, more recently, a difference in situation was created when laws were imposed that restrict women's access to the safest, most effective

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choice. Arguably, those men too are affected by restrictive abortion laws. But, men can easily abdicate their responsibility for child-rearing; and, men never have, nor can they choose, the responsibility for child-bearing.

50. 404 U.S. 71, 76-77 (1971).

51. *Id.* at 75.

52. "If people have been treated differently in society they will appear in dissimilar positions when they are compared. Therefore, they cannot be similarly situated for purposes of equal protection review." Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 268 (1984).

53. *See* R. PETCHESKY, ABORTION AND WOMAN'S CHOICE 27-34 (1984).

54. *See* J. MOHR, *supra* note 25, at 3-19.

type of reproductive control (besides sterilization), the therapeutic abortion.[55]

> this is how to make a good medicine for a cold; this is how to make a good medicine to throw away a child before it even becomes a child; this is how to catch a fish . . .
>
> Jamaica Kincaid, *Girl*[56]

A finding of a dissimilar situation between men and women should not end an inquiry into whether a law violates the principles of equal protection. A model of law which does not allow for difference in its definition of equality will never view men and women as equals.[57]

3. The political process is inadequate to protect women's right to choice.

Since every U.S. legislature up to this point in time has had a male majority, usually by quite an extreme margin,[58] the political process has proved inadequate in protecting women's right to choice. Male majorities in state legislatures have passed restrictive abortion laws that do not affect themselves. In the past, the Court has given strict scrutiny to cases in which legislative action clearly reflects only the interests of the parties in power.[59] The Court has even invalidated laws on the ground that the legislature could not be relied upon to rectify an inequality that it imposed.[60]

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55. The existence of this one guaranteed form of control has been a particularly important option for those women who are unable to control the act of intercourse in situations in which men take over that control. Abortion puts women on a similar footing with men in the realm of reproductive control.

56. J. KINCAID, *Girl*, in AT THE BOTTOM OF THE RIVER 5 (1985).

57. The model that views women as differently situated than men in the area of pregnancy is preferable to one that emphasizes their similarity, though similar situation makes for an easier equal protection argument. *See* C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987). The analytical problem arises from the fact that the normative model for the law is the male; it does not arise from the lack of similarity in men's and women's situations. This bias is evident in the language used to frame the dissimilarity: "only women can become pregnant," rather than: men do not have the ability to get pregnant. *See e.g.*, Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

58. Women comprised 5% of the members of Congress and 16.9% of state legislators in 1989. 2 FUND FOR THE FEMINIST MAJORITY, *The Feminist Majority Report* 2, 5 (July 1989).

59. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152-53 (1980).

60. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (state legislature enacted an unconstitutional redistricting plan which deprived blacks of their right to vote).

Male legislatures do not pass laws which would impose a burden on themselves similar to the burden placed on women by restrictive abortion laws. Specifically, legislatures rarely pass Good Samaritan Laws, which impose criminal liability on any person who knows that a crime is being committed which exposes another to bodily harm and who fails to summon help or provide assistance. [61] Given that only women get pregnant, abortion restrictions have the effect of compelling women, and only women, to be Good Samaritans.[62] As Judith Jarvis Thompson so aptly framed the dilemma before *Roe*: "[There is a] gross injustice in the existing state of the law" that compels women alone to be Good Samaritans to the unborn fetus inside themselves, compelled by their "nature" or their biology, not by support for Good Samaritan laws in the United States.[63]

> He hoped that he had not made love to the woman, but if he had, it really didn't matter. He certainly had not meant to.
>
> *The Real World*, 1988 [64]

4. A strict scrutiny analysis of state interests places limits on the restrictions a state might impose on a woman's ability to obtain an abortion.

The strict scrutiny standard requires that the state's interests justifying a law be compelling[65] and that the law be narrowly tailored to satisfy those interests.[66] The majority's analysis of the compelling state interests present in abortion restrictions should apply here, in the equal protection context. In *Roe*, the Court found that a state's interest lies in "protecting the health of a pregnant woman" as well as in "protecting the potentiality of human life".[67] The trimester framework was developed to clarify what restrictions would satisfy this state's interest. As long as abortion poses a smaller risk to a woman's health than does childbirth, a

61. *See* State v. Williquette, 129 Wis.2d 239, 261 (1986).

62. States have begun to enact laws which penalize pregnant women for harm to their fetuses -- the clearest example of legislative readiness to enact Good Samaritan laws when only women will be affected. *See* Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. J. 599 (1986).

63. J. THOMPSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 16 (1986).

64. KANDI BROOKS, THE REAL WORLD 137 (N.Y.: Silhouette - America's Publisher of Contemporary Romance, 1988).

65. Kramer v. Union Free School District, 395 U.S. 621, 627 (1969).

66. Griswold v. Conn., 381 U.S. 479, 485 (1965).

67. 410 U.S. at 162.

state cannot impose an abortion restriction which claims to be narrowly tailored to protect its interest in women's health.[68] And, until the fetus reaches "viability" and might survive unassisted outside the womb, a state's interest in protecting potential life is not sufficiently compelling to justify abortion restrictions.[69]

## II.

### An Appropriate Equal Protection Review of Restrictive Abortion Laws Would Include an Analysis of State's Interests That Goes Beyond a Conventional Analysis.

In its analysis of restrictive abortion laws, the Supreme Court has not adequately scrutinized the states' interests behind such laws. As the Court proceeds through a strict scrutiny analysis, it asks whether the law in question is suitably tailored to serve a compelling state interest.[70] In the case of abortion, the Court has chosen to construct the trimester framework for analyzing a state's interest in regulating abortion.[71] In such a framework, the state's interests are asserted as being the protection of potential life and women's health.[72] These two interests become "compelling" at different points in a pregnancy.[73] Debate over the usefulness of the trimester framework continues to this day.[74] However, an important state interest emerges when abortion is analyzed as an equal protection issue, one that exists throughout pregnancy and that heavily favors preserving abortion rights.

Since every state is part of a union in which there exists a national, constitutional mandate to preserve liberty and promote equality, it should be assumed that all state laws are enacted with the preservation of liberty and equality as an underlying interest, whether or not such is explicitly articulated as a state interest. Therefore, whenever an equal protection analysis is necessary because a law threatens to encroach on

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68. *Id.* at 163.

69. *Id.* at 163-164. Note, however, that the holding of *Roe* has been limited by Webster v. Reproductive Health Svcs., 109 S.Ct. 3040 (1989). The Court is wary of this trimester framework, which relies so heavily on external achievements of science. *Id.* at 3055. Part II of this Note expands the features of the trimester analysis to include a third state interest, thus diffusing the precarious scientific balance between maternal health and fetal life.

70. *See* Graham v. Richardson, 403 U.S. 365, 375 (1971).

71. *See* Roe v. Wade, 410 U.S. at 163.

72. *Id.* at 163-64.

73. *Id.*

74. *See, e.g.*, Webster v. Reproductive Health Servs., 109 S.Ct. 3040, 3043-3046 (1989).

liberty or to compromise equality, the Court should read into the law a state's interest in promoting liberty and equality. Then, when the Court analyzes whether a law is carefully tailored to serve a compelling state interest, it will invalidate any law that does not serve this *implied*, compelling state interest.

Therefore, in an analysis of restrictive abortion laws, this implied state interest will figure in alongside the states' interests in protecting potential life and maternal health. And, since the ability to control her body and her reproduction is vital to a woman's liberty, in a society in which men enjoy such bodily integrity, the preservation of abortion rights serves this state interest in promoting liberty and equality. This reading of the equal protection clause requires that a state's interest in promoting equality is always compelling and can only be outweighed by a more compelling state interest to the contrary.

This review requires the Court to make a leap that might be seen as treading on traditional notions of federalism.[75] But, the Court has made such a leap before, though it has not made it part of its conventional equal protection analysis. In *Beal v. Doe*,[76] and *Maher v. Roe*,[77] "a state interest in support of childbirth was manufactured out of whole cloth."[78] The *Beal* Court took the state's interest in "protecting the potentiality of human life,"[79] and rephrased that interest so that it held a completely different meaning. The result: "[T]he State has a valid and important interest in encouraging childbirth."[80] Essentially, the Court here dictated a state interest that was not mandated by precedent nor raised in the parties' briefs.[81] And, the Court has since relied on its restatement of the interest to compromise its holding in *Roe v. Wade*.[82]

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75. Traditional deference to both legislative purpose and legislative choice of means create a presumption of constitutionality at lower levels of scrutiny. Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). But, the Court has designated some legislative motives unconstitutional. *See, e.g.*, Keyes v. School District No. 1, 413 U.S. 189, 208 (1973) (finding "unlawful segregative design" of the legislature). And, the Court also flushes out improper motives when it looks at whether a classification fits the goal asserted better than any alternate classification would. The process assumes that a classification does not serve the stated objective if the legislature's real objective was unacceptable and therefore was never made explicit. *See* J. ELY, *supra* note 59, at 146.

76. 432 U.S. 438, 445-46 (1977).

77. 432 U.S. 464, 478 (1977).

78. Wildman, *supra* note 52, at 303.

79. Roe v. Wade, 410 U.S. 113, 162 (1973).

80 . *Beal*, 432 U.S. at 445.

81. The state interests asserted revolved around the need to control limited public funds. Appellant's Opening Brief at 18, Beal v. Doe, 432 U.S. 438 (1977) (No. 75-554); Appellant's Opening Brief at 22, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).

82. *See* Webster v. Reproductive Health Services, 109 S.Ct. 3040, 3051 (1989).

In *Brown v. Board of Education,*[83] the Court similarly dictated to states an interest that the states did not assert nor wish to assert. In *Brown*, social scientific evidence was introduced to show that segregation had a negative impact on black children, and particularly that it was harmful to the self-image of those children.[84] The adverse psychological impact of segregation was found to deny black children equal education.[85] Much controversy surrounded the use of social science data to determine this "legal" issue. Of note here: the Supreme Court *assumed* a state interest in promoting a healthy self-image among black children when it emphasized these new scientific findings. The states involved did not assert such an interest in defense of their segregationist policies. As expressed in *Bolling v. Sharpe*:[86] "Segregation in public education is not related to any proper governmental objective . . . ." In *Brown*, however, the Court went beyond an assessment of whether the governmental objectives were "proper." It posited a governmental objective -- promoting a positive self-image among black children -- and then found that the means chosen (segregation) did not serve the implied interest.[87] While this interest was present at a national level, it was not presented by the states as an interest in *Brown*[88]and was probably not a recognized objective in 1954 in the South. Nevertheless, the national interest was of such great significance that it could be inferred by the Supreme Court.

As the Court implied in its analysis of states' interests under equal protection in *Orr v. Orr,*[89]women may need "special solicitude" of the courts to temper past discrimination or particular disadvantage. Such "special solicitude" should come in the form of the analysis framed above, which imparts an interest in promoting liberty and equality to states because past discrimination and disadvantage have encroached on the liberty of women and have kept them from attaining a position of equality in society.

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83. 347 U.S. 483 (1954).

84. *See* Lightfoot, *Families as Educators*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 5-6 (D. Bell ed. 1980).

85. *Brown*, 347 U.S. at 493-94.

86. 347 U.S. 497, 500 (1954).

87. *Brown*, 347 U.S. at 494.

88. *Id.* at 486 n.1 (arguments by the states centered on their contention that the schools were equal, though separate).

89. 440 U.S. 268, 283 (1978).

## III.

## Equal Protection Provides Numerous Advantages Over Privacy as the Basis of a Woman's Right to Choose Whether to Terminate Her Pregnancy

Equal protection language would implicate restrictive abortion laws as a form of invidious sex discrimination. Such "discrimination" can be accepted, but only when it serves an important or compelling state interest, depending on the level of scrutiny applied. With equal protection as the basis for abortion rights, abortion is a tool available to women in their efforts to overcome sexual and economic domination, as individuals and as a group.

In contrast, the right to privacy is best expressed as the right to be left alone.[90] With the right to privacy as the basis for legalized abortion, women have the right to be left alone in the choices made in their own bedrooms and in their doctors' offices. The Court did not take a position in *Roe v. Wade* that validates any choice being made; to the contrary, "privacy" forces that choice to be made behind closed doors. Consequently, abortion rights have not served to unite women -- neither in the struggle to overcome sex discrimination nor in support of one another's choices. The language of *Roe v. Wade* focuses on the act as no-longer-criminal.[91] Under that label, every exercise of that act is haunted by the underlying criminality of the act as judged by society's moral standards.

Catherine MacKinnon discusses the problems with reliance on privacy as a fundamental right from which other rights, like abortion, ensue: "[I]f inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful. But the right to privacy is not thought to require social change."[92] The "privacy doctrine reaffirms and reinforces . . . the public/private split" that has put women at a political and social disadvantage for so long.[93] And, the privacy doctrine ignores the fact that many women's experiences include injuries that arise "within and by and because of" the private sphere of their lives, rather than because of governmental intrusion into that private sphere.[94]

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90. *See* Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 205 (1890). In this early form, privacy related only to tort law and was not developed as the substantive individual right it is today. *See* Griswold v. Conn., 381 U.S. 479 (1965).

91. *Roe*, 410 U.S. at 164.

92. C. MACKINNON, *supra* note 57, at 100.

93. *Id.* at 93.

94. *Id.* at 100.

Abortion involves the "intensely *public* question of the subordination of women to men . . . [and] of the poor to the rich," questions that are obfuscated by the categorization of abortion as a privacy right.[95] In *Roe v. Wade,* "women got abortion as a private privilege, not as a public right," which means that only "[w]omen with privileges get rights," in the end.[96] The doctrine of abstract personal privacy does not allow women to demand public funds for the exercise of the abortion right.[97]

The main disadvantage of the privacy right, however, is that the Supreme Court does not hold it in high regard. It is easier for the Court to strip privacy of its substantive guarantees because the right does not have a textual basis in the Constitution. Its insecure status is apparent in *Griswold v. Connecticut,*[98] in which the Court remarked that "the right of privacy which presses for recognition here is a legitimate one."[99] The majority in *Webster v. Reproductive Health Services*[100] mentions the right to privacy only in passing, belying its insignificance in the minds of the Justices.[101] The new majority views *Roe v. Wade* as having established a regulatory scheme, encapsulized in the trimester framework, rather than having expanded the components of a fundamental right to privacy to include abortion.[102]

Equal protection would inject into the legal dialogue the importance of abortion to women's self-determination and the importance of women's equality to the legal and political structures of the United States. But, equal protection as currently interpreted by the Supreme Court does not hold much more promise as the protector of abortion rights than does privacy, except that it has a textual foundation in the Constitution. Even if strict scrutiny is applied in the equal protection inquiry, the Court will still arrive at a point where it employs the trimester analysis to answer whether the law is narrowly tailored to serve a compelling interest, as it did in *Roe*. And, without an expanded inquiry into states' interests, the answer reached through strict scrutiny is likely to be the same.

The strength of the "interest analysis" explored in Part II of this Note[103] is that it combines the liberty strand of *Roe v. Wade* and the

95. L. TRIBE, *supra* note 44, at 243 (emphasis added).
96. C. MACKINNON, *supra* note 57, at 100.
97. *See* Harris v. McRae, 448 U.S. 297, 326 (1980).
98. 381 U.S. 479 (1965).
99. *Id.* at 485.
100. 109 S.Ct. 3040 (1989).
101. *See Id.* at 3057.
102. *Id.* at 3057-58.
103. *See supra* notes 70-89 and accompanying text.

equality strand of cases like *Mississippi University for Women v. Hogan*[104] to arrive at a fortified version of both those constitutional doctrines.[105] If the right to an abortion is a due process liberty interest (as conceded in *Webster*),[106] or a fundamental privacy interest (as established by *Roe*),[107] then its backing by a compelling state interest in promoting liberty and equality gives legislatures little remaining ground upon which to protect the fetus.[108]

Liberty and equality are both "neutral" principles, basic to the legal and political structures of this country. They are widely shared moral values, a fact which helps overwhelm apprehension as to their application to women's rights in the context of abortion. A state's interest in promoting liberty never diminishes through pregnancy. So, unlike the narrower trimester analysis of *Roe,* the "interest analysis" does not allow the state's interest in fetal life to gain undue importance as the interest in maternal health diminishes.

The "interest analysis" requires state governments to recognize and act in accordance with their role as protectors of liberty and equality.[109] Equal protection seeks to redress disadvantage, and herein lies its advantage over privacy. Equal protection takes affirmative steps to eliminate discrimination, whereas privacy aims only to leave individuals alone in their actions; equal protection works to change the status quo, whereas privacy seeks to maintain it. Equal protection invalidates restrictive abortion laws as impermissible legal and political efforts to relegate women to a subordinate position in society, an effort that has persisted throughout the history of this country.

> A model dairy and a hospital up here -- those two things she would have liked to do, herself. But how? With all these children? When they were older, then perhaps she would have time."
>
> Virginia Woolf, *To The Lighthouse*[110]

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104. 458 U.S. 718 (1982).

105. *See* Lupu, *Untangling the Strands of the Fourteenth Amendment,* 77 MICH. L. REV. 981, 983-84 (1979).

106. 109 S.Ct. at 3058.

107. 410 U.S. 113, 154 (1973).

108. *See* B. SIEGAN, THE SUPREME COURT'S CONSTITUTION 154 (1987).

109. Reluctance to recognize and enforce a government's role in redressing the disadvantages not created by the government is itself a form of "de facto discrimination." L. TRIBE, *supra* note 44, at 1439 n.21 (2d ed. 1988).

110. V. WOOLF, TO THE LIGHTHOUSE 89 (1955).