THE PRIVACY PARADOX: THE DIVERGENT PATHS OF THE UNITED STATES SUPREME COURT AND STATE COURTS ON ISSUES OF SEXUALITY

MELANIE D. PRICE*

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.[1]

INTRODUCTION

As the Warren Court evolved into the Rehnquist Court, individuals seeking constitutional redress and expanded privacy protections became increasingly frustrated with the United States Supreme Court. The Warren Court provided a high water mark for expanded privacy protections which continued to some degree during the Burger Court. However, the Reagan appointees, now with Chief Justice William Rehnquist at the helm, used the winds to sail in a different direction, retreating from the expansive constitutional interpretations used to protect individual privacy in the Warren Court era. Sensing the change in course, commentators began calling for state court judges to seek out independent meaning from their individual state constitutions.[2] A handful of states responded by amending their constitutions to expand protections, while other state courts used expansive interpretations of long-standing constitutional provisions of their individual charters. The array of protections varies dramatically based on the individual state constitutional framework. For instance, Oregon looked to its constitution to find that obscenity, while unprotected under the First Amendment of the U.S. Constitution, is protected under its constitution;[3] and Vermont more recently found that school vouchers violate the compelled support clause of its state constitution,[4] while the issue is unresolved under the Federal Constitution.

Earlier this century, the U.S. Supreme Court began a privacy revolution when it gave meaning to the Fourteenth Amendment's due process clause, finding that there were some fundamental rights not enumerated by the U.S. Constitution which were nonetheless constitutionally protected. In the ensuing years, privacy

---

* Judicial Clerk to the Honorable Robert D. Rucker, Associate Justice of the Indiana Supreme Court. B.A., 1985, Indiana University; J.D., 1999, Indiana University School of Law—Indianapolis. I would like to thank Professor Ronald J. Krotoszynski, Jr. for his insights on the topic of this Article as well as his friendship and mentoring during his tenure at Indiana University School of Law—Indianapolis (1995-2000)

1. U.S. CONST. amend X.

2. *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Randall T. Shepherd, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1988).

3. *See* State v. Henry, 732 P.2d 9 (Or. 1987).

4. *See* Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539 (applying VT. CONST. ch. 1, art. 3), *cert. denied*, 120 S. Ct. 626 (1999).

concerns became increasingly important and the judiciary responded to calls for more protection. Although the revolution began on the federal level, the battles are now more often waged at the state level.[5]

This Article focuses on the evolution of constitutional protections of privacy rights as it has moved from a nationalized movement in the U.S. Supreme Court to a localized one in state courts around the country. Specifically, this Article focuses on two areas of privacy rights: (1) reproductive decisions, where the U.S. Supreme Court has established well-defined boundaries, and (2) protections for gays and lesbians, where the states are venturing into unchartered waters because of the void left by the U.S. Supreme Court. Part I will trace the U.S. Supreme Court's decisions as it dipped its toe into the privacy waters, muddied them and then began its retreat. Part II will look at the parallel universe of state constitutions and privacy protections. Part III will address reproductive rights jurisprudence, first under federal jurisprudence, then as the states responded to the U.S. Supreme Court's mandate. Part IV will contrast the U.S. Supreme Court's mandate as to reproductive decisionmaking with its lack of guidance in protecting gays and lesbians and examine state's responses to the lack of guidance.

I. THE FEDERAL MOVEMENT: THE BIRTH AND DEVELOPMENT OF THE PRIVACY MOVEMENT

Prior to the adoption of the Fourteenth Amendment in 1868, the citizens of the United States operated under a concept of dual citizenship, governed and protected separately under federal and state constitutions. Although the U.S. Constitution constrained federal action, that same constitution was not found to constrain the actions of individual states.[6] Not until the Supreme Court began incorporating federal constitutional protections to individual state actions did citizens have a mechanism to seek protection from the individual states when they sought to enact legislation or take action in direct contravention to the United States Constitution.

As the Court began to incorporate federal constitutional provisions into a body of law that likewise restrained states from acting, it also began finding

---

5. During the 1998-99 Supreme Court term, the Court issued three decisions that curtailed the power of Congress to provide a forum for the judicial redress of state infringement upon federal rights: *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), *College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board*, 527 U.S. 666 (1999), and *Alden v. Maine*, 527 U.S. 706 (1999). This current term, the Supreme Court struck down two federal laws as an impermissible use of Congress's Commerce Power: *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down the civil remedy provision of the Violence Against Women Act of 1994) and *Jones v. United States*, 120 S. Ct. 1904 (2000) (finding that owner-occupied residences are not "property" subject to federal prosecution for arson under 18 U.S.C. § 844 (1994 & Supp. IV 1998)).

6. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). *But cf.* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

protections that were not specifically enumerated. Slowly, the Court began to find certain fundamental and privacy rights woven in the fabric of the Constitution. However, it was not until the Twentieth Century that the Court actively extended constitutional protections for privacy and personal autonomy rights.

The adoption of the Fourteenth Amendment, coupled with the enactment of § 1983,[7] forever altered constitutional jurisprudence because citizens now had a private enforcement mechanism to protect individual liberties. The Fourteenth Amendment provided a wealth of opportunity for able attorneys to argue against unjust governmental intrusions and discriminations. Ultimately, the Fourteenth Amendment's Due Process Clause became the mechanism for the nationalization of individual privacy and autonomy rights. For example, the Due Process Clause has been interpreted to contain a substantive component that guarantees some of the rights we hold most dear: to raise children without unnecessary governmental intrusion,[8] workers' right to negotiate their employment terms,[9] women's right to control reproductive decisions,[10] and individuals to determine end of life issues.[11]

Congress passed the Fourteenth Amendment, along with the Thirteenth and Fifteenth Amendments, in response to the end of the Civil War and Reconstruction. Against this historical backdrop, the Court initially refused to find any substantive rights in the Fourteenth Amendment's language, other than the emancipation and liberation of the former slave population.[12] A full twenty

---

7. 42 U.S.C. §1983 (1994) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

8. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1922).

9. *See* Lochner v. New York, 198 U.S. 45 (1905). *But see* Rust v. Sullivan, 500 U.S. 173 (1991) (medical providers in a government funded facility prohibited from counseling regarding abortion).

10. *See* Roe v. Wade, 410 U.S. 113 (1973).

11. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).

12. *See Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), where the Court found that

> the one pervading purpose found in them all [Thirteenth, Fourteenth, and Fifteenth Amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm

years after the ratification of the Fourteenth Amendment, the Court indicated a willingness to examine the reasonableness of state regulation and "look at the substance of things."[13] The Court also found that when a state claimed the legitimate use of its police power as a justification, if it "has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge. . . ." [14]

The Court gradually began to find substantive rights embedded in the Fourteenth Amendment, with early cases focusing on a strand of fundamental economic rights.[15] In these early cases the Court scrutinized restraints on economic activity. This movement, however, was short-lived, and the Great Depression and New Deal reforms quashed any expansion of economic substantive due process.

In the non-economic sphere, the Court began expanding individual rights as included in the concept of "liberty" and looked to the Fourteenth Amendment's Due Process Clause as the source of that expansion. Most notable were two cases from the 1920s in which the Court defined liberty to include the parental right to raise children. In *Myer v. Nebraska*,[16] the Court gave a broad interpretation to the concept of liberty, which

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness. . . .[17]

Likewise, in *Pierce v. Society of Sisters*,[18] the Court struck down an Oregon law that required all children be educated in the public school system because the state did not have the right to "standardize its children by forcing them to accept instruction from public teachers only."[19]

The Court marched on, finding the Equal Protection Clause of the Fourteenth Amendment[20] as a source of protection for individual rights. Beginning with

---

> establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.

13. Muglar v. Kansas, 123 U.S. 623, 661 (1887).

14. *Id.*

15. A discussion of economic due process is beyond the ambit of this Article. For a good review of economic due process, see Cass Sunstein, *Lochner's Legacy*, 87 COLUM.L.REV. 873 (1987).

16. 262 U.S. 390 (1923).

17. *Id.* at 399.

18. 268 U.S. 510 (1925).

19. *Id.* at 535.

20. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Skinner v. Oklahoma,[21] the Court invalidated the Habitual Criminal Sterilization Act, which provided for compulsory sterilization after a third conviction for felonies involving "moral turpitude." Justice Douglas, relying on the Equal Protection Clause, opined that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[22] Justice Douglas used the term "strict scrutiny," a term that would come to define modern day Fourteenth Amendment jurisprudence.[23] Thus, the die was cast and for the next forty or so years, the Court would continue to find unenumerated individual privacy and autonomy rights embedded in the Fourteenth Amendment.

II. OVERVIEW OF PRIVACY RIGHTS UNDER STATE CONSTITUTIONS

Although the U.S. Constitution does not explicitly provide for privacy protections, aside from the Fourth Amendment's prohibition against unreasonable searches and seizures, people became accustomed to looking to the U.S. Constitution for the protection of privacy rights, especially during the mid-Twentieth Century when judicial activism was at its zenith. However, a handful of states predated the federal movement, and a number of states have since picked up the cause abandoned by the U.S. Supreme Court.

At the close of Nineteenth Century, Washington state entered the union with a constitutional provision specifically protecting privacy rights.[24] The next year Warren and Brandeis published the seminal article which expounded on the American "right to be let alone."[25] Thirty years later, Arizona, upon its admission to the union, followed Washington's lead and incorporated a verbatim statement of Washington's protection into its bill of rights.[26] Both Washington and Arizona preceded any federal notion of expressed personal privacy by almost fifty years.[27]

Almost a century later, Alaska, California, and Montana amended their constitutions to give their citizens privacy rights.[28] In the next ten years, Florida

---

21. 316 U.S. 535 (1942)

22. *Id.* at 541.

23. Contrast *Skinner* with *Buck v. Bell*, 274 U.S. 200 (1927), where the Supreme Court upheld a Kansas state law which authorized sterilization for its institutionalized "mental defective." In what was perhaps Justice Holmes darkest moment, he found "Three generations of imbeciles are enough."

24. *See* WASH. CONST. art. I, § 7: "No person shall be disturbed in his private affairs, or his home invaded without authority of law." (1889)

25. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

26. *See* ARIZ. CONST. art. II, §8 (1910).

27. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

28. *See* ALASKA CONST. art. I, § 22: "The right of the people to privacy was recognized and shall not be infringed. The legislature shall implement this section."

CAL. CONST. art. I, §1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and

and Hawaii followed suit.[29] Both Montana and Hawaii took their cues from federal constitutional jurisprudence and included language requiring a "compelling state interest" to compromise privacy rights. Five other states and Hawaii include protections for some form of privacy rights within their search and seizure prohibitions.[30]

Increasingly, states have been willing to find privacy rights implicit in their state constitutions in seemingly disparate texts. For example, New Jersey locates privacy rights in a section of its constitution that sounds in natural rights [31] and Connecticut finds privacy rights in the preamble of its constitution.[32] Other state courts have found a variety of privacy and autonomy rights within their own constitutions. The most interesting of these cases are those that find laws and governmental practices violate their state constitutions even though the United States Supreme Court found that the exact same law or regulation did not violate the federal constitution. Perhaps most noteworthy is *Powell v. State*,[33] in which the Georgia Supreme Court found the anti-sodomy statute upheld in *Bowers v. Hardwick*[34] violated the Georgia constitution. Although the U.S. Supreme Court refused the invitation to find that the right to engage in consensual homosexual sodomy between adults as a constitutionally protected privacy right, the Georgia Supreme Court looked at the same statute a decade later and found that it violated its constitution.[35]

---

protecting property, and pursuing and obtaining safety, happiness and privacy."

MONT. CONST. art I, § 6: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

29. *See* FLA. CONST. art. I, § 23: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public records and meetings as provided by law."

HAW. CONST. art. I, § 6: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."

30. *See* ARIZ.. CONST. art. II, § 8; HAW. CONST. art. I § 7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

31. *See* Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982). N.J. CONST. art. 1, § 1 provides: "All person are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring and possessing, and protecting property, and of pursuing and obtaining safety and happiness."

32. *See* Doe v. Maher, 515 A.2d 134, 148 (Conn. Super. Ct. 1986).

33. 510 S.E.2d 18 (Ga.1998)

34. 478 U.S. 186 (1986).

35. Note that the challenge before the U.S. Supreme Court was brought by homosexuals, the challenge before the Georgia Supreme Court was brought by a heterosexual man. Although the Georgia Supreme Court did not explicitly find that the sodomy statute violated the rights of gays and lesbians, the statute was nonetheless struck down. In finding that private sexual acts fell within the protective ambit of the right to privacy, the court stated, "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Powell*, 510 S.E.2d at 24.

III. REPRODUCTIVE FREEDOMS

From *Meyer*, *Pierce*, and *Skinner*, a theme emerged: that intrusive governmental regulations into family affairs would not be tolerated absent compelling reasons. From the loins of these cases sprang landmark cases that placed reproductive decisions at the pinnacle of constitutional jurisprudence. The U.S. Supreme Court has tinkered with its abortion jurisprudence, almost from the moment of its birth, creating well defined boundaries which states have been hesitant to expand, except for the notable area of public funding.

In a series of landmark decisions, the U.S. Supreme Court found that a woman has a fundamental right to privacy in making reproductive decisions. Beginning with *Griswold v. Connecticut*,[36] the Court held that married couples had a right to privacy in obtaining contraceptives and struck down a Connecticut law which prohibited the counseling for or use of contraceptive devices. The plaintiffs were the executive director of a Planned Parenthood affiliate and a physician. The issue was framed as the right of the marital relationship to be protected by the zone of privacy. Justice Douglas, writing for the majority, found the right to privacy in emanations of the First,[37] Third,[38] Fourth,[39] Fifth,[40] and Ninth Amendments.[41]

In 1972, the Supreme Court extended *Griswold* to protect the use of contraceptives for unmarried women. *Eisenstadt v. Baird's*[42] expansion of *Griswold* six years later facilitated the Court's subsequent decision in *Roe v. Wade*[43] because the decision focused on sexual liberty as opposed to *Griswold's* more narrow holding protecting the privacy rights of married couples. Justice Brennan took the step of extending the line of reproductive decisions, as applied to contraceptive decisions, to all women regardless of marital status. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear of beget a child."[44]

On *Eisenstadt*'s heels, the Supreme Court upheld a woman's right to procure an abortion. Relying heavily on *Eisenstadt*'s rhetoric, the Court, utilizing the trimester frameworks balanced the pregnant woman's privacy interests with the

---

36. 381 U.S. 479 (1965).

37. The right of Association.

38. The prohibition against quartering troops in peace-time without consent.

39. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

40. The privilege against self-incrimination.

41. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

42. 405 U.S. 438 (1972).

43. 410 U.S. 113 (1973).

44. *Eisenstadt*, 405 U.S. at 453 (emphasis added).

state's interests in the health of the mother and the potential life of the fetus.[45] Essentially, the Court determined that during the first trimester, a woman has a fundamental right to seek an abortion, without state interference. During the second trimester, the state can regulate abortion as long as the restrictions are reasonably related to the "preservation and protection of maternal health,"[46] and at the end of the second trimester, the state can regulate abortions, including prohibiting the procedure, because the fetus can presumably have a "meaningful life outside of the mother's womb."[47] *Roe* left intact the right to procure therapeutic abortions when the mother's life or health is at stake, even after viability, a right that remains intact today.

Legal scholars immediately criticized *Roe* for its activist interpretation of the Constitution[48] and has remained under near constant attack from all levels of government as municipalities, states, and Congress have sought to enact regulations that chip away at a women's right to procure an abortion. In *Roe*'s immediate afterglow, the Supreme Court also struck down state laws that made access to abortion more difficult. For example, the Court struck down requirements for spousal consent,[49] parental consent that unduly burdens the right to seek an abortion,[50] a requirement that post-first trimester abortions be performed in a hospital,[51] burdensome requirements that medical providers give women detailed information about the development and viability of the fetus,[52] and a twenty-four hour waiting period.[53] Although the Supreme Court has consistently refused the invitation to overrule *Roe*, abortion rights' proponents live in constant fear that a change in the Court's composition could dramatically alter the landscape affecting reproductive decision making.

Even with the right to procure an abortion intact, poor women have not fared so well. An early area of diminished protections addressed public funding for abortions. Four years after deciding *Roe*, the Court upheld a Connecticut regulation that denied Medicare funding for non-medically necessary abortions while granting Medicare benefits for childbirth.[54] In a substantial departure from

---

45. *See Roe*, 410 U.S. at 113.

46. *Id.* at 163.

47. *Id.*

48. *See, e.g.*, Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (criticizing Court's failure to justify the trimester approach by dividing pregnancy into several segments with lines that clearly identify the limits of governmental power); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (criticizing Court's departure from balancing State and individual interests by requiring State to put forth at least some articulated rationale).

49. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

50. *See* Bellotti v. Baird, 428 U.S. 132 (1976).

51. *See* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (Akron I), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

52. *See id.*

53. *See id.*

54. *See* Maher v. Roe, 432 U.S. 464 (1977).

its preceding reproductive decisions, the Court applied an equal protection analysis as opposed to a substantive due process analysis. Indeed, Justice Powell rejected outright that the funding scheme interfered with a fundamental right. Foreshadowing the current standard for evaluating restrictions on abortion rights, Justice Powell noted that the "right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy,"[55] and not a wholesale right. Further chipping away at poor womens' rights to procure an abortion, the Court next upheld the Hyde Amendment, which placed federal funding limitations on medically necessary abortions.[56]

This wall of protection, already suffering from cracks, developed a major fissure when the Court upheld Title X of the Public Health Service Act, which provided that any health clinic receiving federal funds was prohibited from counseling clients because abortion was a family planning option.[57] Chief Justice Rehnquist, for the first time writing a majority opinion in the abortion debate, wrote that "[t]he government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and implement that judgment by the allocation of public funds for medical services relating to child birth but not to those relating to abortion."[58] The Chief Justice did not look to the Fourteenth Amendment for support, but rather relied on Congress's Spending Power.[59]

Current direct regulations on abortion rights are protected under the Federal Constitution applying an "unduly burdensome" analysis. If a law is unduly burdensome, that is "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"[60] then it will be struck down. Applying a balancing-type test more typically found in First Amendment jurisprudence, the Court stuck down a requirement that a married woman seeking an abortion must obtain her husband's consent.[61] However, the Court has upheld requirements of parental consent (so long as the opportunity for a judicial bypass exists),[62] that a medical provider must provide a woman with information that is truthful and non misleading,[63] a twenty-four hour waiting period,[64] and facility reporting requirements that

---

55. *Id.* at 473-74.

56. *See* Harris v. McRae, 448 U.S. 297, 315 (1980) (finding that the Amendment, which severely limited the use of federal funds to reimburse the cost of abortion, placed no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, the Amendment encouraged "alternative activity deemed in the public interest").

57. *See* Rust v. Sullivan, 500 U.S. 173 (1991).

58. *Id.* at 201 (quotations omitted).

59. U.S. CONST. art. I, § 8.

60. Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992).

61. *See id.* at 898.

62. *See id.* at 899.

63. *See id.* at 882.

64. *See id.* at 887.

provide general information.[65]

On June 28, 2000, the U.S. Supreme Court struck down Nebraska's partial birth abortion statute.[66] In a highly technical opinion, the Court found that the statute[67] failed because it lacked a maternal health exception and that it created an undue burden on a woman's right to choose an abortion because the statutory language covers a broader category of procedures than those commonly known as a partial birth abortion.[68]

Another contentious area in the abortion debate is regulating access for minors. As the U.S. Supreme Court has guaranteed minors the right to procure an abortion, states are not free to deny that right. In a series of cases,[69] the Court defined the acceptable parameters of parental notification. Essentially, a regulation may require parental notification for a minor, so long as she has the ability to demonstrate that she is a mature minor capable of making such a choice without securing parental consent. The Court also has upheld a "best interest" test, which allows a minor to demonstrate, maturity notwithstanding, procuring an abortion is in her best interests. Courts must provide an expeditious judicial decision so as not to deprive the young woman of her right to choose an abortion but the Court has thus far left the decision to the states to impose procedural

---

65. *See id.* at 901.

66. Stenberg v. Carhart, No. 99-830, 2000 WL 825889 (U.S. June 28, 2000).

67. NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999) provided: "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."

Section 28-326(9) defines partial birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing delivery."

Section 28-326(9) further defines "partially delivers vaginally a living unborn child before killing the unborn child" as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such a procedure knows will kill the unborn child and does kill the unborn child." *Id.*

68. The statute sought to prohibit a procedure known as "D & X," which is described as

1. Deliberate dilation of the cervix, usually over a sequence of days;
2. Instrumental conversion of the fetus to a footling breech;
3. Breech extraction of the body excepting the head; and
4. Partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

Stenberg, 2000 WL 825889, at *8 (quoting American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilation and Extraction (Jan. 12. 1997)).

69. Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

requirements for minors seeking an abortion.[70]

A. Protecting Reproductive Rights Independently Under State Constitutions

> "Government is not free to achieve with carrots what is forbidden to achieve with sticks."[71]

Reproductive rights is an area where litigants have actively sought additional protections from their state constitutions. Although a number of state courts have addressed abortion rights, U.S. Supreme Court jurisprudence has largely defined the parameters of what constitutes acceptable restrictions. Indeed, there has been little need to determine whether individual constitutions protect the basic right to obtain an abortion because "[i]n *Roe v. Wade*, sweeping aside previous prohibitions, the Supreme Court bottomed the right to expel an unwanted pregnancy on the choice of the private uses of one's body."[72] Even so, California, Connecticut, Florida, Massachusetts, Minnesota, Mississippi and Ohio have explicitly found an independent right to abortion embedded in their constitutions.

Florida's explicit privacy protection confers an independent right to abortion.[73] Likewise, in California the privacy provision of its constitution,[74] coupled with a provision that the rights "guaranteed by this Constitution are not dependent of those guaranteed by the U.S. Constitution,"[75] provide "the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our Constitution is at least as broad as that described in *Roe v. Wade*."[76]

---

70. *See Bellotti II*, 443 U.S. at 644 (plurality) (statute could involve parent in minor's abortion decision only so long as the statute contained an alternative procedure to prevent an absolute parental veto). *But see* H.L. v. Matheson, 450 U.S. 398 (1981) (parental notification law passes constitutional muster so long as there is a judicial bypass procedure).

71. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-10, at 933 n.77 (1978), *quoted in* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 799 (Cal. 1981); Doe v. Maher, 515 A.2d 134, 153 (Conn. Super. Ct. 1986); Women's Health Center v. Panepinto, 446 S.E.2d 658, 666 (W. Va. 1993).

72. Fischer v. Department of Public Welfare, 502 A.2d 114, 116 (Pa. 1985).

73. *See In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989) ("The Florida constitution embodies the principle that few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice is freely fundamental.") (internal quotation marks and citations omitted).

74. CAL. CONST. art. I § 1 provides: "All people are by nature free and independent and have certain inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing a protecting property and pursuing and obtaining safety, happiness and *privacy*." (emphasis added).

75. *Id.* § 24 (adopted 1972).

76. *Committee to Defend Reproductive Rights*, 625 P.2d at796.

Connecticut looked to the preamble of its constitution[77] and its due process clause[78] to find "the state constitutional right to privacy includes a woman's guaranty of freedom of procreative choice."[79] Minnesota looked to *Skinner v. Oklahoma* for guidance and noted that it had previously located privacy rights in three of its constitutional provisions,[80] concluding that "the right to privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy" because

> [w]e can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities.[81]

The Minnesota court made clear that, unlike the federal Constitution which protects the right to abortion, the Minnesota constitution "protects the women's *decision to abort*; [and] any legislation infringing on the decision-making process, then, violates this fundamental right."[82] Therefore, while the U.S. Supreme Court has permitted states to create hurdles such as waiting periods and incentives for a woman to choose birth over abortion, presumably these obstacles would violate Minnesota's constitution.

Mississippi found article I, section 32[83] of its constitution—which mirrors the Ninth Amendment—instructive: "While we do not interpret our Constitution as

---

77.

> The preamble of the constitution makes clear that it reserves to the people "the liberties rights and privileges which they have derived from their ancestors'; and the preface clause to the declaration of rights, article first, broadly incorporates the concept of ordered liberty by stating, "[t]hat the great and essential principles of liberty and free government may be recognized and established . . . ," which clause is followed by a declaration of specific rights.

Doe v. Maher, 515 A.2d 134, 148 (Conn. Super. Ct. 1986).

78. "Every person for an injury done to him in his person, property or reputation, shall have remedy by due course of law." CONN. CONST., art. I, § 10.

79. *Maher*, 515 A.2d at 150.

80. MINN. CONST. art. I, § 1, which provides: "Government is instituted for the security, benefit and protection of the peoples . . . ."; art. I, § 2 which provides: "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers . . . ."; and art. I, § 10 which provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . ." It is noteworthy that the court also found an additional source of privacy in Art. I, § 10 which provides "No person shall be . . . deprived of life, liberty or property without due process of law."

81. Women of the State of Minnesota v. Gomez, 542 N.W.2d 17, 27 (Minn. 1995).

82. *Id.* at 31 (emphasis added).

83. "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by, and inherent in, the people." MISS. CONST. art. III, § 32.

recognizing an explicit right to abortion, we believe that autonomous bodily integrity is protected under the right to privacy . . . [which includes] an implicit right to have an abortion."[84] And the Ohio Court of Appeals relied on its natural rights provision,[85] to declare "it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection."[86]

Notwithstanding the need to determine whether an particular state constitution provides an independent basis for abortion rights, states have sometimes granted more protections than those found in the federal constitution.

B. State Funding

"The rich get richer and the poor get . . . children."[87]

The most litigated area of state abortion jurisprudence concerns state funding for indigent women to procure an abortion. California, Connecticut, Massachusetts, Minnesota, New Jersey, New Mexico, and West Virginia have utilized various provisions of their state constitutions to invalidate funding schemes which provide funding for childbirth expenses of indigent women but not for abortions, or some variation thereof. The constitutional provisions employed as well as the statutory schemes restrictions vary. As established in *Harris v. McRae*, a woman cannot be deprived the right to procure an abortion if her life is at risk.[88] However, she has no constitutionally protected right to public funding. Abortions not performed for medical reasons are commonly referred to as therapeutic abortions and likewise have no right to public funding. Therefore, litigants seeking public funding for abortions must look to state constitutions for redress. Some states have carved out exceptions in the case of rape, incest, and medical emergency, but deny abortions to all other indigent women.

In some states, litigants have successfully challenged funding schemes under their due process clause. California, Connecticut, Massachusetts, Minnesota, and West Virginia have all found that the right of indigent women to obtain state funding for abortions rises to the level of a fundamental right and, therefore, to discriminate between medical reasons violates a woman's substantive due process rights. California relied on its privacy text to strike down restrictions that exclude potential recipients of government entitlements solely on their desire to exercise their constitutional rights. Under a three part analysis, the court

---

84. Pro-Choice Mississippi v. Fordice, 716 So.2d 645, 653 (Miss. 1998).

85. "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." OHIO CONST. art. I, § 1 (1802).

86. Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 575 (Ohio Ct. App. 1993).

87. Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 799 n.32 (Cal. 1981) (quoting RICHARD WHITNEY, *Ain't We Got Fun*).

88. 448 U.S. 297 (1980).

cautioned "the government bears a heavy burden of demonstrating the practical necessity for such unequal treatment."[89]

Likewise, Connecticut looked to its preamble and due process clause to find that "once the state has chosen to [pay for medical treatment of the poor] . . . it must preserve neutrality,"[90] and therefore the state must fund medically necessary or therapeutic abortions. Minnesota found that its privacy and due process clauses[91] mandated that the "State cannot refuse to provide abortions to [state funded] eligible women when the procedure is necessary for therapeutic reasons."[92] Finally, Massachusetts invalidated a restrictive funding scheme because "the challenged restriction impermissibly burdens a right protected by our constitutional guarantee of due process."[93]

The most successful challenges to these regulations, however, invoke the state constitutional equivalent of the equal protection clause, arguing that providing funds for some classes of indigent women but not all indigent women is an impermissible burden. For instance, New Jersey declared a funding scheme unconstitutional that provided no funding beyond that guaranteed under federal analysis, while funding the costs of medically necessary procedures pertaining to childbirth.[94] The New Jersey Supreme Court found that article I, part 1 of its constitution presumes equal protection of the laws.[95] Although the court claimed to apply an analysis different from that used under the federal constitution,[96] it actually applied federal equal protection analysis and found the right to choose to have an abortion is a fundamental right that requires the state to put forth a compelling state interest. Under this analysis, providing funding "when life is

---

89. *Committee to Defend Reproductive Rights*, 675 P.2d at 786 (citations omitted).

90. Doe v. Maher, 515 A.2d 134, 152 (Conn. Super. Ct. 1986).

91. MINN. CONST. art. I, § 1 ("Government is instituted for the security, benefit and protection of the people. . . ."); art. I, §2 ("No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peer. . . .:); art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . ."); art. I, § 7 ("No person shall be held to answer for a criminal offense without due process of law . . . nor be deprived of life, liberty or property without due process of law.").

92. Women of the State of Minnesota v. Gomez, 542 N.W.2d 17, 32 (Minn. 1995).

93. Moe v. Secretary of Administration and Finance, 417 N.E.2d 387, 397 (Mass. 1981).

94. *See* Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).

95. "All persons are by nature free and independent, and have certain natural and unalienable rights, among which those are not enjoying and defending life and liberty, of acquiring, possessing, and protecting property , and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, par. 1.

96.

> Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or denial.

Byrne, 450 A.2d at 936 (quoting Robinson v. Cahill, 303 A.2d 273, 282 (N.J.1973)).

at risk, but withholding them when health is endangered . . . denies equal protection to those women entitled to necessary medical services under Medicaid."[97]

Similarly, West Virginia relied on its Common Benefits Clause[98] to find that "when state government seeks to act 'for the common benefit, protection and security of the people' in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens."[99] Because the Common Benefits clause imposes an "obligation upon state government to preserve its neutrality when it provides a vehicle for the exercise of constitutional rights,"[100] the court struck down a scheme that provided funds for childbirth but only for abortion in the limited circumstances provided under federal standards. The West Virginian Supreme Court found it impermissible to cover abortions when the mother's life is in danger but not for other health reasons.

Connecticut also looked to their equal protection clause to deem funding schemes unconstitutional. Connecticut's Equal Protection Clause[101] requires analysis independent of that found under the federal constitution.[102] Applying an "unreasonable benefits" analysis, the court deemed unconstitutional a regulation that restricted funding to those abortions "necessary because the life of the mother would be endangered if the fetus were carried to term,"[103] because "the regulation discriminates by funding all medically necessary procedures and services except therapeutic abortions."[104]

However, state constitutional provisions analogous to the federal Equal Protection Clause are not always a panacea for funding challenges. Restrictive funding schemes in Michigan, New York, North Carolina, and Pennsylvania have survived equal protection challenges under their respective state constitutions.

The voters of Michigan passed a referendum that prohibited state funding for all abortions except those necessary to save the mother's life. Plaintiffs

---

97. *Id.* at 934.

98. W. VA. CONST. art. III, § 3 provides: "Government is instituted for the common benefit, protection and security of the people, nation or community."

99. Women's Health Center v. Panepinto, 446 S.E.2d 658, 667 (W. Va. 1993).

100. *Id.* at 666 (quoting United Mine Workers v. Parsons, 305 S.E.2d 343, 354 (W. Va. 1983)).

101. CONN. CONST. art. I, § 20 provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, sex or physical or mental disabilities." (as amended, 1974).

102. "The Connecticut equal protection clauses require the state when extending benefits to keep them 'free of unreasoned distinctions that can only impede the open and equal' exercise of fundamental rights." Doe v. Maher, 515 A.2d 134, 158 (Conn. Super. Ct. 1986) (quoting D'Amico v. Manson, 476 A.2d 543 (Conn. 1984)).

103. *Id.* (quoting Policy 275 of 3 Manual, Department of Income Maintenance Medical Assistance Program, c. III (1981)).

104. *Id.* at 159.

challenged the law as violative of the equal protection clause, alleging that it "accords unequal treatment between two classes of Medicaid-qualified pregnant women—those who choose childbirth and those who choose abortion."[105] Noting that the language of its equal protection clause is almost identical to that of the federal constitution, the court applied rationality review and found that the Medicaid funding scheme did not impede the woman's right to *choose* abortion, but rather has merely made "childbirth a more attractive option by paying for it, but has imposed no restriction on abortion that was not already there."[106]

Likewise, North Carolina tersely dismissed all state constitutional challenges, including an equal protection claim, to its funding scheme because "[i]t is not necessary that State action be rationally related to all State objectives. It is enough that it is related to some legitimate State objective."[107] The court found that, in North Carolina, the encouragement of childbirth is a legitimate governmental objective. While the court declined to address the equal protection challenge, Justice Parker's dissent indicated that a scheme that withheld state funding for abortions except when the pregnancy is a result of rape or incest or the woman's life is in danger would violate the state's equal protection clause.[108]

Pennsylvania and New York also found that their respective equal protection clauses did not extend abortion funding beyond federal parameters. The Supreme Court of Pennsylvania looked to its equal protection clauses,[109] noted that it was guided by federal equal protection analysis, and applied an intermediate level of scrutiny to a regulation that granted state funds for abortions that are a result of rape or incest, or where necessary to avert the death of the mother. The court upheld the regulations because "to say that the Commonwealth's interest in attempting to preserve a potential life is not important is to fly in the face of our own existence."[110]

New York applied its Equal Protection Clause to uphold a program that offered medical services to indigent women, but withheld funds for medically necessary abortions. New York's scheme was unique because its Medicaid program funded all medically necessary abortions. The program challenged was the Public Health Assistance Program (PCAP), which was a federal program providing reimbursement to states which paid for prenatal care and related services. The court found this program did not violate any constitutional

---

105. Doe v. Department of Social Servs., 487 N.W.2d 166, 170 (Mich. 1992).

106. *Id.* at 178.

107. Rosie J. v. Department of Human Resources, 491 S.E.2d 535, 537-38 (N.C. 1997).

108. *See id.* at 538 (Parker, J., dissenting).

109. Pennsylvania's constitution has two clauses that have been interpreted to guarantee equal protection of the laws: Art. I, § 21 provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Art. III, § 32 provides: "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law. . .Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law."

110. Fischer v. Department of Pub. Welfare, 502 A.2d 114, 122 (Pa. 1985).

provision because the eligible woman "[u]nlike an indigent woman, whose option to choose an abortion is arguably foreclosed by her lack of resources, the PCAP-eligible woman . . . presumptively has the financial means to exercise her fundamental right of choice."[111]

Those litigants in states that have adopted an Equal Rights Amendment have also challenged funding restrictions with varying success.[112] Finally, the voters of Arkansas took the funding determination from the court's purview by adopting a constitutional amendment prohibiting state funding.[113]

C. Other Restrictions

Finally, states have imposed parental and informed consent restrictions, consistent with those upheld in *Casey*.[114] Florida is the only state that has found broader protections in its constitution. Applying language sounding in federal substantive due process analysis, the Florida court found the state's expressed interests, protection of the minor and preservation of the family unit, were not sufficiently compelling to override the minor's privacy interests throughout the

---

111. Hope v. Perales, 634 N.E.2d 183, 188 (N.Y. 1994).

112. *See* Doe v. Maher, 135 A.2d 134, 159 (Conn. Super. Ct. 1986) ("Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.") (footnote omitted); New Mexico Right to Choose/ NARAL v. Johnson, 975 P.2d 841 (N.M. 1998) ("[T]he New Mexico Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious discrimination that prevailed under the common law and civil law traditions that preceded it."), *cert. denied*, Klecan v. New Mexico Right to Choose/NARAL, 526 U.S. 1020 (1999). *Cf. Fischer*, 502 A.2d at 125 (in upholding funding restrictions, the court opined "the basis for the distinction here is not sex but abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women.") (footnote omitted).

113. ARK. CONST. amend. 68, §1 ("No public funds will be used to pay for any abortion, except to save the mother's life."). This Amendment was subsequently declared unconstitutional. This amendment has an interesting history. An Arkansas Chancery Court permanently issued a permanent injunction against a state university which performed abortions for reasons other than to save the mother's life. Subsequently, the federal district court of Arkansas found this amendment void because it conflicted with the supremacy clause of the Federal Constitution and permanently enjoined enforcement of the amendment. *See* Little Rock Family Planning Servs. v. Dalton, 860 F. Supp. 609, 627 (E.D. Ark. 1994), *aff'd* 60 F.3d 497 (1995), *cert granted in part, judgment rev'd in part per curiam*, 516 U.S. 474 (1996).

114. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Court held that it is not an undue burden to require parental consent for minors seeking an abortion so long as there is an opportunity for a minor to seek a judicial bypass. Similarly, it does not impose an undue burden to require a woman to be fully informed of the abortion process and require a waiting period of limited duration.

pregnancy.[115] The court also found defects in the procedures in the judicial bypass hearing; specifically, the Florida constitution required both appointed counsel and a record of the hearing for meaningful appellate review.[116]

Both Ohio and Mississippi, although recognizing an independent right to abortion, nonetheless applied an undue burden analysis to uphold challenges to waiting periods and parental consent consistent with *Casey*. Mississippi relied entirely on federal precedent and found that its parental consent law and twenty-four hour waiting period passed constitutional muster.[117] Litigants in Ohio were more creative in their challenge to its informed consent requirement, raising challenges under their constitution's natural rights provision,[118] its free exercise clause,[119] free speech Amendment,[120] and its equal protection clause.[121] The Ohio Supreme Court, while finding an independent right to abortion, upheld the regulation because "[w]e are unable to distinguish the Ohio statutes from the Pennsylvania statutes involved in [*Casey*] and find no basis for determining . . . [the] Ohio Constitution imposes greater restrictions upon the state than are imposed by the United States Constitution. . . ."[122]

Thus far, Indiana has not had the opportunity to determine whether the Indiana Constitution protects a woman's right to abortion independent of the U.S. Constitution. In 1996, Indiana passed restrictive abortion impediments requiring, inter alia, mandatory disclosure eighteen hours before the abortion is to be performed on a variety of non-medical information from the medical provider in order to procure informed consent.[123] Abortion providers, consisting of health

---

115. *See In re* T.W., 551 So.2d 1186, 1195 (Fla. 1989).

116. *See id.* at 1196.

117. *See* Pro-Choice Mississippi v. Fordice, 716 So.2d 645 (Miss. 1998).

118. *See* OHIO CONST. art I, § 1 ("All men are by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and seeking and obtaining safety and happiness.").

119. OHIO CONST. art. I, § 7.

120. OHIO CONST. art. I, § 11.

121. OHIO CONST. art. I, § 2.

122. Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 578 (Ohio Ct. App. 1993).

123. At least 18 hours before the abortion and in the presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IND. CODE § 25-27.5-2-10), an advanced practice nurse (as defined in *id.* § 25-23-1-1(b)), or a midwife (as defined in *id.* § 27-12-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:

(A) The name of the physician performing the abortion.

(B) The nature of the proposed procedure or treatment.

(C) The risks of and alternatives to the procedure or treatment.

(D) The probable gestational age of the fetus, including an offer to provide:

(I) a picture of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus;

clinics and a medical doctor, sought a preliminary injunction in federal court, challenging the law as unduly burdensome under *Casey*, raising only federal constitutional claims. The plaintiffs also challenged a medical emergency exception allowing women to forego the eighteen-hour waiting period as being too narrowly drawn,[124] and the federal court certified this question of statutory interpretation to the Indiana Supreme Court.[125] In carefully crafted opinion,[126] the Indiana Supreme Court only looked to principles of statutory interpretation to decide the certified questions before it.[127] It is therefore uncertain as to whether the right to choose an abortion is protected under the Indiana constitution.

---

at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care from the county office of family and children.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

(3) The pregnant woman certifies in writing, before the abortion is performed, that the information required by subdivisions (1) and (2) has been provided.

IND. CODE § 16-34-2-1.1 (1998).

124. Public Law 187 defines medical emergency as:

"Medical emergency," for purposes of IC 16-34, means a condition that, on the basis of the attending physician's good faith clinical judgment, complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

IND. CODE § 16-18-2-223.5 (1998).

125. *See* A Woman's Choice-East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (1995).

126. A Woman's Choice-East Side Women's Clinic v. Newman, 671 N.E.2d 104 (Ind. 1996).

127.

(A) Does the definition except a woman from compliance with Ind. Code § 16- 34-2-1.1 when such compliance would in any way pose a significant threat to the life or health of the woman?

(B) Does the definition except a woman from compliance with Ind. Code § 16- 34-2-1.1 when such compliance threatens to cause severe but temporary physical health problems for the woman?

(C) Does the definition except a woman from compliance with Ind. Code § 16- 34-2-1.1 when such compliance threatens to cause severe psychological harm to the woman?

Id.

IV. DISCRIMINATION AND PROTECTIONS FOR HOMOSEXUALS

Although the Court has expanded privacy protections to familial and reproductive decisions, the Court has not been as friendly to challenges by members of groups that do not resemble traditional notions of family, particularly members of the homosexual community. The initial challenges attempted to utilize the Due Process Clause of the Fourteenth Amendment to afford protections for gays and lesbians. When this tactic proved unsuccessful, litigants invoked the Equal Protection Clause, with marginal success. State courts, unguided by federal jurisprudence, have found protections within their constitutions; a stark contrast to reproductive jurisprudence.

The Supreme Court first passed on an opportunity to decide the constitutionality of criminalizing homosexual sodomy when a majority of the Court summarily affirmed a federal court's dismissal of a suit brought by male homosexuals challenging Virginia's sodomy law.[128] It took another decade for the Court to address the validity of sodomy laws.

In *Bowers v. Hardwick*,[129] the Court reversed the Fifth Circuit Court of Appeals holding that the Georgia sodomy statute unconstitutional. The circuit court had looked to *Griswold*, *Eisenstadt*, and *Roe* to find the statute unconstitutional, as it "violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation."[130] Justice White, writing for the majority, framed the question before the Court as: "[W]hether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal . . . ."[131] The Court looked at its previous privacy rights cases and determined that the it is "evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . ."[132] Finally, the Court articulated the current standard used under substantive due process analysis. To classify as a fundamental right, it must be either "implicit in the concept of ordered liberty"[133] or "deeply rooted in this Nation's history and tradition."[134] The Court's pronouncement was clear: protections for gays and lesbians would not be found in the Due Process Clause. In the aftermath of *Bowers*, commentators lamented the death of substantive due process.[135] Changing tactics, the next challenge came under the Equal Protection

---

128. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

129. 478 U.S. 186 (1986).

130. *Id.* at 189.

131. *Id.* at 190.

132. *Id.* at 190-91.

133. *Id.* at 191.

134. *Id.* at 192.

135. *See, e.g.*, Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987).

Clause.

A. The Equal Protection Clause

The Equal Protection Clause is most often invoked when disfavored groups seek legal redress for overt discrimination. Although the Equal Protection Clause has been used successfully to challenge racial classifications, and more recently gender classifications, gays and lesbians have had considerably less success than other groups. However, the Equal Protection Clause at least provides a modicum of protection, unlike the Due Process Clause.

The U.S. Supreme Court initially applied the Equal Protection Clause to guarantee "the political equality" of the newly freed African-American citizen. In *Plessy v. Ferguson*,[136] however, the Supreme Court found that separate but equal accommodations complied with the Fourteenth Amendment's mandate. The Court soon retreated from this stance, and subsequently applied strict scrutiny to challenges that laws and governmental action were racially discriminatory. While many of the challenges to racial discrimination affected access to public accommodations and benefits, there was a strand of equal protection jurisprudence that addressed fundamental rights, including privacy.

The Court decided a troika of cases that extended equal protection guarantees to African-Americans seeking privacy rights in family relations. Beginning with *McLaughlin v. Florida*,[137] the Court invalidated a criminal statute prohibiting cohabitation by interracial married couples. Applying strict scrutiny, the Court found that the racial classification amounted to nothing more than invidious discrimination.[138] *McLaughlin* overruled an earlier case in which the Court had upheld a statute which prohibited adultery or fornication between blacks and whites.[139]

Three years later, Chief Justice Warren penned *Loving v. Virginia,*[140] which sounded the death knell for miscegenation laws because "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."[141] It is important to note that at the time the Court decided *Loving*, it had already established privacy rights to raise a family and seek birth control, rights that were sought by majoritarian interests.

Lastly, the Court reversed a child custody determination that awarded the father custody even though the mother had initially been awarded custody because the mother had remarried an African-American.[142] The trial court had determined that the best interests of the child dictated the father have custody because "despite the strides that have been made in bettering relations between

---

136. 163 U.S. 537 (1896).

137. 379 U.S. 184 (1964).

138. *See id.* at 197.

139. *See* Pace v. Alabama, 106 U.S. (16 Otto) 583 (1883).

140. 388 U.S. 1 (1967).

141. *Id.* at 12.

142. *See* Palmore v. Sidoti, 466 U.S. 429 (1984).

the races in this country, it is inevitable that [the child] will, if allowed to remain in the present [custody], . . . suffer from the social stigmatization that is sure to come."[143] A unanimous Court struck down the lower court, noting "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[144]

Having firmly established that equal protection applied to racial classifications in the sphere of family privacy interests, litigants began looking to the Equal Protection Clause to afford more protections for disfavored groups. From the loins of the Equal Protection Clause also sprang fundamental rights, particularly in access to education[145] and the exercise of the franchise.[146] Of interest to this article is the Court's treatment of challenges to governmental action that discriminates against gays and lesbians.

Thus far, the Court has only spoken once regarding an Equal Protection challenge to discriminations against homosexuals. *Romer v. Evans*[147] addressed a challenge to an amendment to the Colorado constitution, that provided

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[148]

The trial court enjoined enforcement of this amendment and the Colorado Supreme Court, applying strict scrutiny under equal protection analysis, affirmed.[149] The U.S. Supreme Court, while affirming the enjoinment, refused to grant gays and lesbians suspect or quasi-suspect classification. However, the

---

143. *Id.* at 431 (citation omitted).

144. *Id.* at 433.

145. *Compare* Plyer v. Doe, 457 U.S. 202 (1982) (the exclusion of undocumented alien children from a free public education offends the Equal Protection Clause), *with* San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (Equal Protection Clause is not offended by a system of public school financing which produces substantial interdistrict disparities in per-pupil expenditures relating to property tax base disparities); Martinez v. Bynum, 461 U.S. 321 (1983) (rejecting Equal Protection challenge to law which denied tuition free education to minors not residing with parents and whose presence in school district was for primary purpose of attending public school tuition-free); and Kadrmas v. Dickinson Public Schs., 487 U.S. 450 (1988) (no Equal Protection violation to assess a user fee to transport students to and from public schools).

146. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

147. 517 U.S. 620 (1996).

148. *Id.* at 624 (quoting COLO. CONST. art. II, § 30(b)).

149. *See* Evans v. Romer, 854 P.2d 1270 (Colo. 1993), *aff'd*, 517 U.S. at 620.

Colorado constitutional amendment failed even the most deferential rationality review because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies,"[150] a blatant violation of the Equal Protection Clause.

Romer is the latest word from the U.S. Supreme Court on the status of gay rights.[151] There is wide speculation that *Romer* overrules *Bowers*.[152] At a minimum it is clear that *Romer* established that blanket discriminations against gays and lesbians, while not meriting fundamental right status, will be hard-pressed to survive rationality review.

B. States and Criminalized Same Sex Activity

While the Supreme Court has been reticent to establish more than an iota of protection for homosexuals, a handful of states have found greater protection for these groups under their constitutions. Specifically, citizens have been successful in either repealing sodomy laws through the legislative process, similar to the statute upheld in *Bowers*, relying on the judiciary to find such statutes unconstitutional.

There are currently sixteen states that still have sodomy or deviate sexual conduct laws.[153] Of these states, there are pending legal challenges in Arkansas, Louisiana, and Texas.[154] Georgia and New Jersey have disposed of sodomy statutes when faced with challenges from heterosexual litigants.[155] An Oklahoma

---

150. *Romer*, 517 U.S. at 627.

151. However, on the last day of the Supreme Court's current term, it handed down *Boys Scouts of America v. Dale*, No. 99-699, 2000 WL 826941 (U.S. June 28, 2000), in which the Court held that applying New Jersey's State's Public Accommodation Law to require the Boy Scouts to admit an avowed homosexual as an assistant scoutmaster violates the Boy Scouts' First Amendment right of expressive association. Mostly relying on the right of expressive association, the Court does find that the forced inclusion of an avowed homosexual"would significantly affect the Boy Scout's ability to advocate public or private viewpoints." *Id.* at *5. The Court relies on the Scout's Oath which pledges to "do my best. . . to keep myself . . .morally straight" and the Scout Law, which maintains that "A Scout is . . . Clean" to reach this conclusion. *Id.*

152. *See* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996); Katherine M. Hamill, Comment, Romer v. Evans*: Dulling the Equal Protection Gloss on* Bowers v. Hardwick, 77 B.U. L. REV. 655 (1997); Matthew Coles, *The Meaning of* Romer v. Evans, 48 HASTINGS L.J. 1343 (1997) (Symposium Issue: Intersexions: The Legal & Social Construction of Sexual Orientation).

153. Alabama, Arizona, Arkansas, Florida, Idaho, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia. *See Lambda Legal Defense and Education Fund* (visited July 21, 2000) <http://www.lambdalegal.org>.

154. These states, along with Kansas, have statutes prohibiting same sex sodomy. *See id.*

155. *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998) (finding that sodomy statute at issue in *Bowers v. Hardwick* offends the Georgia constitution); State v. Saunders, 381 A.2d 333 (N.J. 1977) (holding that fornication statute, which prohibits sexual intercourse with unmarried women, violates

court, relying entirely on federal precedent, invalidated a statute prohibiting "crimes against nature" as applied where the defendant engaged in consensual, heterosexual anal and oral intercourse.[156] Likewise, the Court of Appeals of New York looked to Fourteenth Amendment precedent to invalidate its consensual sodomy statute.[157] The supreme courts of Kentucky, Montana, and Pennsylvania have struck down homosexual sodomy statutes, relying on the text of their constitutions. Lower court decisions in Michigan and Tennessee have done likewise.

Pennsylvania, which has not been inclined to find much protection in the abortion realm, was one of the first states to strike down its sodomy statute in *Commonwealth v Bonadio*,[158] even before the U.S. Supreme Court decided *Bowers*. In a carefully crafted opinion that avoided addressing the issue of same gender relations,[159] the court found that the statute exceeded

> the proper bounds of the police power . . . [and] offends the Constitution by creating a classification based on marital status (making deviate acts criminal only when performed between unmarried persons) where such differential treatment is not supported by a sufficient state interest and thereby denies equal protection of the laws.[160]

The court passed on determining whether the right to engage in deviate sexual conduct (as defined by statute), offends any fundamental right, and instead applied rationality review. The court struck the statute because the state's interest in forbidding certain non-marital sexual conduct does "not bear a substantial relation to a valid legislative objective."[161]

The Court of Appeals of New York did not even look to its constitution to invalidate its consensual sodomy statute, but rather looked to the Fourteenth Amendment's Due Process and Equal Protection clauses six years before the Supreme Court decided *Bowers*.[162] Although at least one of the litigants was a homosexual man[163] convicted under a New York statute which prohibited

---

state constitutional right to privacy).

156. Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986).

157. *See* People v. Onofre, 415 N.E.2d 936 (N.Y. Ct. App. 1980).

158. 415 A.2d 47 (Pa. 1980).

159. Indeed, the word homosexual never appears, and the statute itself applies to deviate sexual intercourse, defined as "Sexual intercourse per os or per anus between human beings who are not husband and wife . . . ." *Id.* at 49 n.1 (quoting 18 PA. CONST. STAT. § 301 (1973)). One is tipped off that the case addresses same sex relations from the listing of defendants (Michael Bonadio, Patrick Gagliano, Shane Wimbel) and a reference in *Commonwealth v. Wasson*, 842 S.W.2d 487, 498 (Ky. 1993), where the Kentucky Supreme Court notes "Two states by court decisions hold homosexual sodomy statutes of this nature unconstitutional for reasons similar to those stated here: [New York and Pennsylvania]."

160. *Id.* at 51.

161. *Id.*

162. *See Onofre*, 415 N.E.2d at 936.

163. "Defendant Onofre was convicted in County Court of Onondaga County of violating

consensual sodomy between all adults, the statute applied to all acts of sodomy, regardless of the gender of the participants.[164] Responding to the State's argument that U.S. Supreme Court extends privacy protections "to only two aspects of sexual behavior marital intimacy and procreative choice,"[165] the New York court looked to *Stanley v. Georgia*[166] and found :

> In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions such as those made by defendants before us to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting.[167]

The court then found the consensual sodomy statute unconstitutional.

The majority opinion in *Onofre* does not discuss the ramifications of its decision as to homosexual practices, but Judge Gabrielli's dissent cautions that

> [I]f the only criterion for determining when particular conduct should be deemed to be constitutionally protected is whether the conduct affects society in a direct and tangible way, then it is difficult to perceive how a State may lawfully interfere with such consensual practices as euthanasia, marihuana smoking, prostitution and homosexual marriage.[168]

The Kentucky Supreme Court relied heavily on *Bonadio* to find that its sodomy statute violated the privacy and equal protection provisions of the Kentucky constitution.[169] Struggling to break free of the grasp of *Bowers*, the court went to great lengths to establish that its case law had established a constitutional right to privacy long before the U.S. Supreme Court found similar protections in the U.S. Constitution. The court further found that the decision in

---

section 130.38 of the Penal Law (consensual sodomy) after his admission to having committed acts of deviate sexual intercourse with a 17- year-old male at defendant's home." *Id.* at 937-38.

164. N.Y. Penal Law, § 130.38 Consensual sodomy. A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

N.Y. Penal Law, § 130.00 Sex offenses; definitions of terms. The following definitions are applicable to this Article:

> 2. Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

165. *Onofre*, 415 N.E.2d at 939.

166. 394 U.S. 557 (1969).

167. *Onofre*, 415 N.E.2d at 940-41.

168. *Id.* at 505 n.3 (Gabrielli, J. dissenting).

169. Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

Bowers was "a misdirected application of the theory of original intent."[170] Finally, the court noted that *Bonadio* was instructive because Pennsylvania and Kentucky share a common constitutional heritage.

Although the court conducted a thorough analysis of privacy protections under the Kentucky constitution, it is somewhat unclear exactly what is protected within the ambit of "privacy." Rather, the court established that "[t]he clear implication is that immorality in private which does not operate to the detriment of others is placed beyond the reach of state action by the guarantee of liberty in the Kentucky Constitution."[171] More importantly, the statute violated the Kentucky Equal Protection Clause because "many of the claimed justifications are simply outrageous,"[172] including the expressed concerns of pedophilia, promiscuity and public displays of sexual activity.

The Montana Supreme Court also struck down a statute that criminalized consensual sexual relations between adults of the same gender.[173] Relying on its constitutional provision that explicitly protects privacy,[174] the court found that "consenting adults expect that neither the state nor their neighbors will be co-habitants of their bedrooms."[175] It is interesting to note that the majority did not invoke either the federal or state Equal Protection Clauses,[176] but rather relies exclusively on the right to privacy. Chief Justice Turnage, concurring in result, but dissenting in the analysis, arguing that the statute would fail rationality review under Montana's Equal Protection Clause.[177]

Lower courts in Michigan and Tennessee have likewise found their sodomy statutes unconstitutional. The Michigan district court did so in an unpublished decision.[178] Presumptively, because the attorney general did not appeal that ruling, it is now binding on all state prosecutors absent future litigation that might attempt to resuscitate the sodomy statute.

In Tennessee, litigants were successful in bringing a declaratory judgment action barring the enforcement of the Homosexual Practices Act.[179] The challenged statute made it a class C misdemeanor for any person to engage in sexual penetration with a person of the same gender.[180] Sexual penetration included intercourse, cunnilingus, fellatio, anal intercourse, or any other

---

170. *Id.* at 497.

171. *Id.* at 496 (citation omitted).

172. *Id.* at 501.

173. *See* Gryczan v. Montana, 942 P.2d 112 (Mont. 1997).

174. MONT. CONST. art. II, § 10 provides: Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

175. *Gryzcan*, 942 P.2d at 122.

176. MONT. CONST. art. II, § 4.

177. *See id.* at 127 (Turnage, C.J., concurring in part and dissenting in part).

178. *See* Michigan Organization for Human Rights v. Kelly, No. 88-815820 (CZ) (Wayne County Circuit Court, July 9, 1990).

179. *See* Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

180. *See* TENN. CODE ANN. § 39-13-510 (1991).

intrusion.[181] Once again, the court found itself shackled by *Bowers*, but looked to its constitution for increased protection of privacy rights. Unlike Kentucky, Tennessee courts did not have a long tradition of recognizing the right to privacy as embedded in their constitution. Rather, it was only four years before this challenge that the Tennessee Supreme Court recognized any right to privacy under its constitution, noting that "[a]s with other state constitutional rights having counterparts in the federal bill of rights, [ ] there is no reason to assume that there is a complete congruency."[182] Relying on its Due Process clause,[183] coupled with its Declaration of Rights,[184] the court found that the act could not withstand strict scrutiny as a permissible intrusion of a fundamental right.

C. State Recognition of Homosexual Unions

Perhaps more controversial, at least warranting Congressional intervention, is recognizing unions among gays and lesbians, akin to marriage in the heterosexual community. What started as a quiet case of state constitutional interpretation in Hawaii ended with a roar as Congress and individual states rushed to enact legislation that would bar any concept of reciprocity should a state recognize homosexual unions.

The Hawaii Supreme Court found that denying same sex couples the right to marry offended its Equal Protection Clause and therefore required the state to put forth a compelling interest.[185] In May 1991, three same sex couples applied for a marriage license and were denied. They took their challenge to the trial court, which dismissed it for failure to state a claim upon which relief could be granted. They then sought redress from the Hawaiian Supreme Court, which rejected the contention that the right to privacy includes a fundamental right to same-sex marriage, but looked to its Equal Protection clause,[186] which provided broader protections than its federal counterpart against discrimination based on sex. The court distinguished decisions of other jurisdictions that had refused to find the right to homosexual unions embedded in a concept of privacy and instead looked to *Loving v. Virginia* and applied equal protection analysis. Under this rubric, the state was required to put forth a compelling state interest to justify the ban

---

181. *See id.* § 39-13-501(7).

182. Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992).

183. TENN. CONST. art. I, § 8 provides:

> No man to be disturbed but by law. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

184. TENN. CONST. art. I, § 1 ("All power inherent in the people—Government under their control"), and Art. I, § 2 ("Doctrine of nonresistance condemned").

185. *See* Baehr v. Lewin, 852 P.2d 33 (Haw. 1993).

186. HAW. CONST. art. I, § 5, which provides in relevant part: "No person shall . . . be denied the equal protection of the laws, or be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religions, sex, or ancestry."

against same sex unions. Because the lower court dismissed the case on a motion for failure to state a claim, the state had not provided any justification for its statutory scheme. The Hawaiian Supreme therefore remanded the case to the trial court, asking the State to demonstrate a compelling state interest to justify its sex discrimination.

In the meantime, Congress, fearing that the Hawaiian Supreme Court would find a right to same sex marriage embedded in the Hawaiian constitution, passed the Defense of Marriage Act (DOMA),[187] which would deny gay marriages the full faith and credit protections guaranteed under the Federal Constitution. Therefore, even if gays and lesbians were given the right to marry in Hawaii, their unions would not have to be recognized in other American jurisdictions. Soon after Congress passed DOMA, the Hawaiian Circuit Court found that the State has failed in its burden to establish a compelling State interest. Once again, the State appealed to the Hawaii Supreme Court. While awaiting the Court's disposition, Hawaiian voters passed a constitutional amendment that prohibited same sex marriages, thereby rendering moot the original challenge. Since that time, thirty four states[188] have passed their own version of DOMA, providing that their states will not recognize same sex unions, even if those unions are performed legally in another jurisdiction.

The latest battleground is Vermont, where its supreme court found that the statutory definition of marriage as the "union of one man and one woman"[189] was offensive to the Common Benefits Clause of the Vermont Constitution.[190] The court looked at cases interpreting that clause and found that the court approaches challenges as "broadly deferential to the legislative prerogative to define and advance governmental ends, while vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective."[191] The court was somewhat dismissive of the state's expressed argument that marriage is

---

187. 1 U.S.C. 1, n.7 Definition of "marriage" and "spouse**."** In determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person who is opposite sex who is a husband or a wife. (Added Sept. 21, 1996, P.L. 104-109, § 3(a), 110 Stat. 2419).

188. Alabama, Alaska, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia. *See Lambda Legal Defense and Education Fund*, *supra* note 153.

189. Baker v. State, 744 A.2d 864, 868 (Ut. 1999) (relying on WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1955) and BLACK'S LAW DICTIONARY (7th ed. 1999)).

190. VT. CONST. ch. 1, art. 7 provides: That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part of that community.

191. *Baker*, 744 A.2d at 871.

intended solely for procreation, because

> child rearing in a setting that provides both male and female role models, minimizing the legal complications of surrogacy contracts and sperm donors, bridging differences between the sexes, discouraging marriages of convenience for tax, housing or other benefits, maintaining uniformity with marriage laws in other states, and generally protecting marriage from destabilizing changes.[192]

Finding that none of these reasons passed constitutional muster, the court held "that plaintiffs are entitled under Chapter I, Article 7 of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."[193] The court then retained jurisdiction to permit the legislature to "consider and enact legislation consistent with the constitutional mandate described herein."[194] As this Article is written, the state of Vermont is holding town meetings to determine how best to effectuate the court's ruling.

Indiana has not looked to its constitution to determine whether gays and lesbians are warranted protection from discrimination. The legislature repealed Indiana's sodomy statute in 1995 and passed its own defense of marriage act in 1997.[195] The court has on occasion looked at child custody or marital asset awards where one party was gay or lesbian, but the court has refused to determine the constitutionality of such determinations, instead relying on principles of statutory interpretation to overrule trial courts. A review of Indiana case law reveals that there have been no state constitutional challenges to such discriminations, and in the rare case where a federal constitutional claim has been raised, the court has resolved the case on other grounds.[196] Although the Indiana appellate courts have repeatedly ruled that child custody determinations cannot be based solely on the homosexuality of one parent, they have done so avoiding constitutional analysis.[197] Similarly, these same courts have avoided constitutional analysis when striking down restrictions upon activity during

---

192. *Id.* at 884 (quotations omitted).

193. *Id.* at 886.

194. *Id.* at 889.

195. *See* IND. CODE § 31-11-1-1 (1998). Same sex marriage prohibited

Sec. 1. (A) Only a female may marry a male. Only a male may marry a female.

(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

196. *See, e.g.*, Pryor v. Pryor, 709 N.E.2d 374 (Ind. Ct. App. 1999) (trial court is instructed to apply best interest of the child analysis which does not presume to favor either parent); Marlow v. Marlow, 702 N.E.2d 733 (Ind. Ct. App. 1998) (court relied on best interests of the child rather than reaching the merits of petitioner's Fourteenth Amendment equal protection challenge).

197. *See, e.g.*, Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (where non-custodial parent is infected with the HIV virus, termination of visitation rights is unsupported); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981) ("[W]e believe the proper rule to be that homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child.").

visitation..[198] The Indiana Supreme Court has not granted transfer to hear any of these cases; therefore, there is no indication as to how the Indiana Supreme Court would respond to such challenges.

CONCLUSION

The U.S. Supreme Court has taken widely divergent paths in ruling on privacy rights for reproductive decisionmaking and homosexual rights. This is largely due to the timing of the challenges and the political clout of the respective groups. Significant strides in reproductive decisionmaking were made during an activist era of the Court, whereas the only challenges to invidious discriminations against gays and lesbians women were decided by more conservative court. Likewise, reproductive decisions affect majoritarian interests, whereas discriminations against gays and lesbians have thus far not attained majoritarian status.

Fortunately, some state supreme courts have been increasingly willing to scour state constitutions to find greater privacy rights for disfavored groups. Indeed, as the U.S. Supreme Court is circumscribing federal action compelling the states to act, state courts are heeding the call to look to their own charters to increase privacy protections. It is likely that the next phase of the privacy revolution will take place on state battlegrounds. This creates obvious problems because disfavored groups will benefit more in some states than others. This in turn will provide an opportunity for the U.S. Supreme Court to breathe life into the Full Faith and Credit[199] and the Privileges and Immunities[200] Clauses of the Federal Constitution. And that, ironically, may usher in a new era of an activist court.

---

198. *Compare* Pennington v. Pennington, 596 N.E.2d 305 (Ind. Ct. App. 1992) (upholding court order that restricts father's adult male friend not be present during overnight visitation with children.), *with* Teegarden v. Teegarden, 642 N.E.2d 1007 (Ind. Ct. App. 1994) (trial court did not have authority to restrict mother's homosexual behavior as condition of custody of her two children in custody dispute with stepmother following father's death, absent evidence of behavior having adverse effect upon children)

199. U.S. CONST. art. IV, § 1.

200. U.S. CONST. amend. XIV, § 1, cl. 2.