Articles

ABORTION AND ORIGINAL MEANING

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I. ORIGINALISM VERSUS LIVING CONSTITUTIONALISM: A FALSE DICHOTOMY

In his famous critique of *Roe v. Wade*,[1] John Hart Ely remarked that if a principle that purportedly justifies a constitutional right "lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."[2] Criticisms of *Roe* have generally proceeded precisely on this ground: the right to sexual privacy is not specifically mentioned in the Constitution, and there is no evidence that the framers and adopters of the 1787 Constitution or of any later amendments expected or intended the Constitution to protect a woman's right to abortion. It has become a commonly held assumption among *Roe*'s critics that there is no constitutional basis for abortion rights or for a right of "privacy"; the right is completely made up out of whole cloth and therefore supporters of abortion rights have cut themselves adrift from the Constitution's text, history and structure. Even some defenders of abortion rights have bought into these criticisms; they view *Roe v. Wade* and privacy jurisprudence as a compelling reason to

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

2. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973).

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accept a version of living constitutionalism that grows and changes with the times.

The conventional wisdom about *Roe*, however, is wrong. The right to abortion (although not the precise reasoning in *Roe* itself) actually passes the test that Ely set out. It is in fact based on the constitutional text of the Fourteenth Amendment and the principles that underlie it. That is so even though the framers and adopters of the Fourteenth Amendment did not expect or intend that it would apply to abortion. In this essay I offer an argument for the right to abortion based on the *original meaning* of the constitutional text as opposed to its *original expected application.*

I argue, among other things, that laws criminalizing abortion violate the Fourteenth Amendment's principle of equal citizenship and its prohibition against class legislation. A long history of commentators has argued that abortion rights are secured by constitutional guarantees of sex equality premised on some version of an antisubordination principle.[3] One of the goals of this article is to show that the arguments of these commentators are not novel or fanciful but have deep roots in the original meaning of the Fourteenth Amendment. Thus, the arguments I present here, although specifically directed to the abortion controversy, help underscore the constitutional and originalist pedigree of much of the antisubordination literature.

A second, and larger purpose of my argument is to demonstrate why the debate between originalism and living constitutionalism rests on a false dichotomy. Originalists generally assume that if we do not apply the constitutional text in the way it was originally understood at the time of its adoption we are not following what the words mean and so will not be faithful to the Constitution as law. But they have tended to conflate two differ-

3. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 270–85 (1993); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 276–77, 350, 371–79 (1992); Guido Calabresi, *The Supreme Court, 1990 Term, Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–08 (1991); Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1308–27 (1991); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 782 (1989); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 189–94 (1989); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1354 (2d ed. 1988); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984); Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); *see also* WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (opinions of Jack M. Balkin, Reva Siegel, Jed Rubenfeld, Robin West and Akhil Amar).

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ent ideas—the expected application of constitutional texts, which is not binding law, and the original meaning, which is. Indeed, many originalists who claim to be interested only in original meaning, like Justice Antonin Scalia, have encouraged this conflation of original meaning and original expected application in their practices of argument.[4] Living constitutionalists too have mostly accepted this conflation without question. Hence they have assumed that the constitutional text and the principles it was designed to enact cannot account for some of the most valuable aspects of our constitutional tradition. They object to being bound by the dead hand of the past. They fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation's future. By accepting mistaken premises about interpretation—premises that they share with many originalists—living constitutionalists have unnecessarily left themselves open to the charge that they are not really serious about being faithful to the Constitution's text, history and structure.

The choice between original meaning and living constitutionalism, however, is a false choice. I reject the assumption that fidelity to the text means fidelity to original expected application. I maintain instead that constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text. The task of interpretation is to look to original meaning and underlying principle and decide how best to apply them in current circumstances. I call this the method of *text and principle*. This approach, elaborated in Part II, is faithful to the original meaning of the constitutional text, and the purposes of those who adopted it. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles. Although the constitutional text and principles do not change without subsequent amendment, their application and implementation can. That is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political

4. *See infra* text accompanying notes 9–15. During the 1980s and 1990s most conservative originalists moved from a theory based on original intentions or original understanding to one focused on original meaning. They assumed that this would defend originalist methodology from various theoretical criticisms while preserving originalism's critique of liberal judicial decisions. However, as I describe later in this symposium, the shift to original meaning had unanticipated consequences, some of which my own work tries to draw out. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 441–51 (2007).

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and social movements that have transformed our understandings of the Constitution's guarantees.

The right to abortion is a good test case for this approach to constitutional interpretation. *Roe v. Wade* is one of the canonical decisions of the present era, as *Brown v. Board of Education*[5] was for an earlier day, raising some of the most difficult and controversial constitutional questions. If the method of text and principle can give a reasonable account of the constitutional right to abortion, then it is likely to have considerable explanatory power in other contexts as well. In Parts III-VI, I offer the case for abortion rights based on the original meaning of the constitutional text and its underlying principles. Of course people can also use the same interpretive method to argue against the right to abortion. That is not a weakness of the approach—it shows how arguments from text and principle structure debate about constitutional rights over time between people who disagree in good faith about the best way to interpret the Constitution. Nevertheless, I shall try to show why the arguments for the abortion right are the most powerful and convincing.

Of course, demonstrating that the right to abortion flows from the Constitution's original meaning does not end the matter. It does not tell us, for example, how to reconcile this right with the state's legitimate interests in potential human life. The Constitution's original meaning does not require either *Roe*'s trimester system[6] or the later framework announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[7] These are judicial constructions that attempt to vindicate the purposes behind the right and balance the relevant considerations. In Part VII of this essay, I offer a better way of approaching these questions, one that the Supreme Court did not adopt. The key, I shall argue, is to recognize that there are not one, but two different rights to abortion. The first right is a woman's right not to be forced by the state to bear children at risk to her life or health. The second right is a woman's right not to be forced by the state to become a mother and thus to take on the responsibilities of parenthood, which, in our society are far more burdensome for women than for men. As I shall explain, although the first right to abortion continues throughout pregnancy, the second right need not. It only requires that women have a reasonable time to

5. 347 U.S. 483 (1954).

6. 410 U.S. 113, 163–64 (1973) (outlining trimester system).

7. 505 U.S. 833, 878–79 (1992) (replacing trimester system with line drawn at viability and undue burden test).

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decide whether or not to become mothers and a fair and realistic opportunity to make that choice. Hence the second right to abortion is consistent with the view that the state's interests grow progressively stronger as the pregnancy proceeds.

II. THE METHOD OF TEXT AND PRINCIPLE

A. ORIGINAL MEANING VERSUS ORIGINAL EXPECTED APPLICATION

Constitutional interpretation by judges requires fidelity to the Constitution as law. Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text. It follows from these premises that constitutional interpretation is not limited to those applications specifically intended or expected by the framers and adopters of the constitutional text. Thus, for example, the Eighth Amendment's prohibitions on "cruel and unusual punishments" bans punishments that are cruel and unusual as judged by contemporary application of these concepts (and underlying principles), not by how people living in 1791 would have applied those concepts and principles.[8]

This marks the major difference between my focus on original meaning and the form of originalism that has been popularized by Justice Antonin Scalia and others.[9] Justice Scalia agrees

8. Many different scholars from different political perspectives have embraced the idea that constitutional interpretation should be grounded in the text's original meaning. See, e.g., RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Akhil Reed Amar, *The Supreme Court, 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28–29, 31 (2000); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 116–19 (Amy Gutman ed., 1997) [hereinafter Dworkin, *Comment*]; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249 (1997); KERMIT ROOSEVELT, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS (2006).

9. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989) [hereinafter Scalia, *Originalism*]; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144, 159 (1989); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Guttman ed., 1997) [hereinafter Scalia, *Courts*]; RAOUL BERGER, FEDERALISM: THE FRAMERS' DESIGN (1987); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996). Although Justice Thomas also emphasizes that he looks to original meaning, he too tends to conflate original meaning and original expected application. *See, e.g.* Morse v. Frederick, 127 S. Ct. 2618, 2629, 2630 (2007) (Thomas, J., concurring) (deciding if First Amendment protects student speech by looking to

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that constitutional fidelity requires fidelity to the original meaning of the constitutional text, and the meanings that words had at the time they were adopted.[10] He also agrees that the original meaning of the text should be read in light of its underlying principles. But he insists that the concepts and principles underlying those words must be *applied* in the same way that they would have been applied when they were adopted. As he puts it, the principle underlying the Eighth Amendment "is not a moral principle of 'cruelty' that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. It means not . . . 'whatever may be considered cruel from one generation to the next,' but 'what we consider cruel today [i.e., in 1791]'; otherwise it would be no protection against the moral perceptions of a future, more brutal generation. It is, in other words, rooted in the moral perceptions *of the time*."[11] Scalia's version of "original meaning" is not original meaning in my sense, but actually a more limited interpretive principle, what I call *original expected application*.[12] Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art). When people use the term "original understanding," and sometimes even "original meaning"—as Scalia does—they are actually talking about original expected application. Expecta-

practices of public schools in early 1800s and concluding that:"If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 359 (Thomas, J., concurring) (attempting to determine original meaning of First Amendment by looking to "whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafleting.")

10. Scalia, *Courts*, *supra* note 9, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

11. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 140 (Amy Guttman ed., 1997) [hereinafter Scalia, *Response*].

12. *See* Jack M. Balkin, Original Meaning and Original Application, http://balkin.blogspot.com/2005/06/original-meaning-and-original.html (last visited Aug. 11, 2006). Ronald Dworkin similarly distinguishes between "semantic originalism" and "expectations originalism": "the crucial distinction between what some officials intended to say in enacting the language they used, and what they intended—or expected, or hoped—would be the consequence of their saying it." Dworkin, *Comment*, supra note 8, at 116. Randy Barnett endorses a similar idea. *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 8, at 93–94. Mark Greenberg and Harry Littman have shown how original meaning and what I am calling original expected application may come apart over time. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998). As we will see *infra*, however, although "expectations originalism" provides a useful shorthand, "semantic originalism" is a bit of a misnomer, because we are interested in more than semantics, i.e., the dictionary definitions of words.

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tion-focused originalists can accommodate new phenomena and new technologies—like television or radio—by analogical extension with phenomena and technologies that existed at the time of adoption. But this does not mean, Scalia insists, that "the *very acts* that were perfectly constitutional in 1791 (political patronage in government contracting and employment, for example) may be *un*constitutional today."[13]

B. MISTAKES AND ACHIEVEMENTS

Scalia realizes that his approach would allow many politically unacceptable results, including punishments that would shock the conscience of people today. So he often allows deviations from his interpretive principles, making him what he calls a "faint-hearted originalist."[14] For example, Scalia accepts the New Deal settlement that gave the federal government vast powers to regulate the economy that most people in 1787 would never have dreamed of and would probably have strongly rejected.[15]

Scalia's originalism must be "faint-hearted" precisely because he has chosen a unrealistic and impractical principle of interpretation, which he must repeatedly leaven with respect for *stare decisis* and other prudential considerations. The basic problem with looking to original expected application for guidance is that it is inconsistent with so much of our existing constitutional traditions.[16] Many federal laws securing the environment, protecting workers and consumers—even central aspects of Social Security—go beyond original expectations about federal power, not to mention independent federal agencies like the Federal Reserve Board and the Federal Communications Commission, and federal civil rights laws that protect women and the disabled from private discrimination. Even the federal government's power to make paper money legal tender probably violates the expectations of the founding generation.[17] The original expected application is also inconsistent with constitutional guarantees of

13. *See* Scalia, *Response*, *supra* note 11, at 140–41. (emphasis in original).

14. Scalia, *Originalism*, *supra* note 9, at 861–64.

15. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 17 (2005) (Scalia, J., concurring).

16. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 15–17 (2001); Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723–24, 727–39 (1988).

17. *See* Kenneth Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 ("difficult to escape the conclusion that the Framers intended to prohibit" use of paper money as legal tender); Hearings Before Senate Comm. on the Judiciary 100th Cong., 1st Sess. Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Part 1 at 84–85 (1987).

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sex equality for married women,[18] with constitutional protection of interracial marriage,[19] with the constitutional right to use contraceptives,[20] and with the modern scope of free speech rights under the First Amendment.[21]

The standard response to this difficulty is that courts should retain nonoriginalist precedents (i.e., those inconsistent with original expectation) if those precedents are well established, if they promote stability, and if people have justifiably come to rely on them. Interpretive mistakes, even though constitutionally illegitimate when first made, can become acceptable because we respect precedent. As Scalia explains, "[t]he whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held true, all in the interests of stability."[22]

There are four major problems with this solution. First, it undercuts the claim that legitimacy comes from adhering to the original meaning of the text adopted by framers and that decisions inconsistent with the original expected application are illegitimate. It suggests that legitimacy can come from public acceptance of the Supreme Court's decisions, or from considerations of stability or economic cost.

Second, under this approach, not all of the incorrect precedents receive equal deference. Judges will inevitably pick and choose which decisions they will retain and which they will discard based on pragmatic judgments about when reliance is real, substantial, justified or otherwise appropriate. These characterizations are likely to conflate considerations of stability and potential economic expense with considerations of political acceptability—which decisions would be too embarrassing now to discard—and political preference—which decisions particularly rankle the jurist's sensibilities. Thus, one might argue that it is

18. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). *See infra* text at notes 66–70.

19. Loving v. Virginia, 388 U.S. 1 (1967).

20. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1971).

21. *E.g.*, Cohen v. California, 403 U.S. 15 (1971) (protecting public expressions of profanity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (protecting advocacy of sedition and law violation); New York Times v. Sullivan, 376 U.S. 254 (1964) (holding unconstitutional aspects of common law of defamation); Miller v. California 413 U.S. 15 (1973) (protecting pornography that does not fall within a narrowly defined three part test); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (protecting truthful nonmisleading commercial speech from paternalistic regulation); Scalia, *Response*, *supra* note 11, at 138 (contemporary First Amendment protections are "irreversible" "whether or not they were constitutionally required as an original matter").

22. SCALIA, *Response*, *supra* note 11, at 139.

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too late to deny Congress's power to pass the Civil Rights Act of 1964 under the Commerce Clause but express doubts about the Endangered Species Act. One might accept that states may not engage in sex discrimination but vigorously oppose the constitutional right to abortion or the unconstitutionality of anti-sodomy statutes. This play in the joints allows expectations-based originalism to track particular political agendas and allows judges to impose their political ideology on the law—the very thing that the methodology purports to avoid.

Third, allowing deviations from original expected application out of respect for precedent does not explain why these mistakes should not be read as narrowly as possible to avoid compounding the error, with the idea of gradually weakening and overturning them, so as to return to more legitimate decisionmaking. If the sex equality decisions of the 1970's were mistakes, courts should try to distinguish them in every subsequent case with the goal of eventually ridding us of the blunder of recognizing equal constitutional rights for women.

This point leads naturally to the final, and more basic problem: Our political tradition does not regard decisions that have secured equal rights for women, greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws as mistakes that we must unhappily retain; it regards them as genuine achievements of American constitutionalism and sources of pride. These decisions are part of how and why we understand ourselves to be a nation that has grown freer and more democratic over time. No interpretive theory that regards equal constitutional rights for women as an unfortunate blunder that we are now simply stuck with because of respect for precedent can be adequate to our history as a people. It confuses achievements with mistakes, and it maintains them out of a grudging acceptance. Indeed, those who argue for limiting constitutional interpretation to the original expected application are in some ways fortunate that previous judges rejected their theory of interpretation; this allows them to accept as a starting point nonoriginalist precedents that would now be far too embarrassing for them to disavow.

By contrast, a focus on text and principle views most, if not all of these achievements as plausible constructions of constitutional principles that underlie the constitutional text and that must be fleshed out in doctrine.[23] As I shall describe later on,

23. For a related argument, see ROOSEVELT, *supra* note 8; FALLON, *supra* note 16.

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equal rights for women are fully consistent with the original meaning of the Fourteenth Amendment and its underlying principles of equal citizenship and opposition to caste and class legislation.[24] We need not regard decisions recognizing women's equal rights as mistakes: quite the contrary, they are our generation's attempt to make sense of and implement the Constitution's text and its underlying principles. These decisions—and others like them—do not sacrifice constitutional fidelity on the altar of precedent; they demonstrate how development of judicial doctrine over time can implement and maintain constitutional fidelity. It is rather those who would retreat from the achievements of our constitutional tradition or accept them only grudgingly who lack fidelity, because they lack faith in the ability and the authority of succeeding generations to accept the Constitution as their Constitution and to make constitutional text and constitutional principles their own.

A central difference between expectations-based originalism and the method I advocate is that my approach recognizes the great achievements of our country's constitutional tradition as achievements and as signs of progress rather than as deviations and mistakes that sacrifice legitimacy and legality for the sake of stability and respect for precedent. A second important difference concerns how these two theories understand post-enactment history and the work of social movements. Original expectation originalism holds that social movements and political mobilizations can change constitutional law through the amendment process of Article V. They can also pass new legislation, as long as that legislation does not violate the original expected application—as much federal post-New Deal legislation might. But no matter how significant social movements like the civil rights movement and the women's movement might have been in our nation's history, no matter how much they may have changed Americans' notion of what civil rights and civil liberties belong to them, they cannot legitimately alter the correct interpretation of the Constitution beyond the original expected application. For example, no matter how profoundly the second wave of American feminism altered our sense of what equality between men and women requires, it cannot change the original

Randy Barnett achieves a similar result through a combination of what he calls constitutional interpretation and constitutional construction. *See* BARNETT, *supra* note 8, at 118–27. The latter term is borrowed from KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

24. *See infra* text at notes 66–76.

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expected application of the Constitution, under which married women did not have equal civil rights.[25] The federal government can pass civil rights laws (assuming that these do not run afoul of the original expected application of the Commerce Power). But judges are not authorized to subject sex discrimination to constitutional scrutiny. At best we might maintain the mistaken decisions of the 1970s that found sex equality guarantees in the Constitution because it would be politically impossible to reject them and because women have come to rely on them.

The model of text and principle views the work of social movements and post-enactment history quite differently. The constitutional text does not change without Article V amendment. But each generation of Americans can seek to persuade each other about how the text and its underlying principles should apply to their circumstances, their problems, and their grievances. And because conditions are always changing, new problems are always arising, and new forms of social conflict and grievance are always being generated and discovered, the process of argument and persuasion about how to apply the Constitution's principles in new contexts is never-ending.

When people try to persuade each other about how the Constitution and its principles apply to their circumstances, they naturally identify with the generation that framed the constitutional text and they claim that they are being true to its principles. They can and do draw analogies between the problems, grievances and injustices the adopters feared or faced and the problems, grievances, and injustices of our own day. They also can and do draw on the experiences and interpretive glosses of previous generations—like the generation that produced the New Deal or the civil rights movement—and argue that they are also following in their footsteps.

Most successful political and social movements in America's history have claimed authority for change in just this way: either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles. Thus, the key tropes of constitutional interpretation by social movements and political parties are restoration on the one hand, and redemption on the other. Constitutional understandings change by arguing about what we already believe, what we are already committed to, what we have promised ourselves, what we must return to and what commitments remain to be fulfilled.

25. *See infra* text at notes 66–70.

When political and social movements succeed in persuading other people in the country that their interpretation is the right one, they replace an older set of implementing constructions and doctrines with a new one.[26] These constructions and implementations may not be just or correct judged from the standpoint of later generations, and they can be challenged later on. But that is precisely the point. Each generation makes the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time. Interpreting the Constitution's text and principles is how each generation connects back to the past and forward to the future.

Thus, it matters greatly, from the standpoint of text and principle, that there was a women's movement in the early 1960's and 1970's that convinced Americans that both married and single women were entitled to equal rights and that the best way to make sense of the Fourteenth Amendment's principle of equal citizenship was to apply it to women as well as men, despite the original expected application of the adopters. The equal protection decisions of the 1970's that gave heightened scrutiny to sex-based classifications are not "mistakes" that we must grudgingly live with. They are *applications* of text and principle that have become part of our constitutional tradition through the work of social movements and popular mobilizations. They might be good or bad applications; they might be incorrect or incomplete. That is for later generations to judge. But when people accept them, as Americans accept the notion of equality for women today, they are not simply doing so on the basis of reliance interests—i.e. that we gave women equal rights mistakenly in the 1970's, and now it's just too late to turn back. They are doing so in the belief that this is what the Constitution *actually means*, that this is the best, most faithful interpretation of constitutional text and principles.

26. I have explained how change in constitutional understandings operates through social movement mobilization and the party system in Jack M. Balkin & Sanford Levinson, *From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006); Jack M. Balkin, *How Social Movements Change (Or Fail To Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). Judges have no obligation to pay attention to social movements, and interpretations of the Constitution are not good ones simply because social movements have adopted them. Nevertheless, waves of social and political mobilizations have shaped the development and understanding of our Constitution, and contributed to some of its most admirable features. A theory of constitutional interpretation should be able to explain why these changes in understanding are faithful to the Constitution rather than just mistakes. For further discussion of this point, see Balkin, *supra* note 4, at 470–78, 507–11.

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Originalism based on original expected application fails because it cannot comprehend this feature of constitutional development except as a series of errors that it would now be too embarrassing to correct. Justice Scalia correctly and appropriately notes that his reliance on nonoriginalist precedents is not consistent with originalism, but rather a "pragmatic exception."[27] And that is precisely the problem with his view: The work of social movements in our country's history is not a "pragmatic exception" to fidelity to the Constitution. It is the lifeblood of fidelity to our Constitution—an ongoing project of vindicating text and principle in history.

In this way, the theory of text and principle explains—in a way that original expectation originalism cannot—why the Constitution is more than the dead hand of the past, but is a continuing project that each generation takes on. It is a great work that spans many lifetimes, a vibrant multi-generational undertaking, in which succeeding generations pledge faith in the constitutional project and exercise fidelity to the Constitution by making the Constitution their own.

None of this means that the original expected application is irrelevant or unimportant. It helps us understand the original meaning of the text and the general principles that animated the text. But it is important not as binding law but rather as an aid to interpretation, one among many others. It does not control how we should apply the Constitution's guarantees today, especially as our world becomes increasingly distant from the expectations and assumptions of the adopters' era. The concepts embodied by the words of constitutional text and the principles underlying the text, and not their original expected application, are the central concern of constitutional interpretation.

C. IMPLEMENTING TEXT AND PRINCIPLES

Although the original expected application is not binding, the constitutional text is. That is because we have a written Constitution that is also enforceable law. We treat the Constitution as law by viewing its text and the principles that underlie the text as legal rules and legal principles. To do this we must ask what the people who drafted the text were trying to achieve in choosing the words they chose, and, where their words presume underlying principles, what principles they sought to endorse.

27. Scalia, *Response*, *supra* note 11, at 140.

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We look to the original meaning of the words because if the meaning of the words changed over time, then the words will embrace different concepts than those who had the authority to create the text sought to refer to. We look to underlying principles because when the text uses relatively abstract and general concepts, we must know which principles the text presumes or is attempting to embrace. If we read the text to presume or embrace other principles, then we may be engaged in a play on words and we will not be faithful to the Constitution's purposes. Just as we look to the public meaning of words of the text at the time of enactment, we discover underlying constitutional principles by looking to the events leading up to the enactment of the constitutional text and roughly contemporaneous with it.[28] Sometimes the text refers to terms of art or uses figurative or non-literal language. For example, the Copyright Clause in Article I, Section 8 speaks of "writings," which is a non-literal use. It refers to more than written marks on a page but also includes printing and (probably) sculpture, motion pictures, and other media of artistic and scientific communication.[29] The term "due process of law" in the Fifth and Fourteenth Amendments is a term of art; it has a specialized legal meaning over and above the concatenation of the words in the phrase. In cases like these we must try to figure out what principles underlie the term of art or the use of figurative or non-literal language.[30]

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28. Enactment history, however, is not the only thing we might look at to assess underlying principles. See Balkin, *supra* note 4, at 486–503.

29. *See also* Scalia, *Courts*, *supra* note 9, at 37–38 (the text of the First Amendment must be construed as a synecdoche in which "speech" and "press" stand for a whole range of different forms of expression, including handwritten letters).

30. Ronald Dworkin's distinction between "semantic originalism" and "expectations originalism," Dworkin, *Comment*, *supra* note 8, at 116, may be a little misleading here. The term "semantic originalism" might suggest that Dworkin is making a distinction between semantics—the dictionary definitions of words—and pragmatics—the meanings of words in use or context. The problem is that original meaning—either in Dworkin's sense or mine—cannot be limited to semantics. It is clearly also about pragmatics, that is, meaning in use and context. For example, Dworkin agrees that if we discover that certain words like "bill of attainder" were employed as terms of art, we must use that specialized meaning and not the dictionary definition of the individual words employed. Dworkin, *Reflections on Fidelity*, 65 FORDHAM L. REV. 1799, 1806–08 (1997). That is a claim about pragmatics, not semantics. In like fashion, we need to know whether, in context of use, what seems to be abstract language in the constitutional text (say of the Fourteenth Amendment's Equal Protection Clause) is attempting to embrace an abstract principle, or whether it was understood in context at the time to refer to a laundry list of relatively specific applications. That too, is a question of pragmatics rather than semantics. Some parts of the constitutional text were intended and expected in ordinary usage to embrace relatively abstract principles, while others were not, because—for example—they were generally understood to be terms of art. The language used is a clue, but learning more about the surrounding history might change our minds on this

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Underlying principles are necessary to constitutional interpretation when we face a relatively abstract constitutional command rather than language that offers a fairly concrete rule, like the requirement that there are two houses of Congress or that the President must be 35 years of age. When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command. For example, the underlying goal of promoting maturity in a President does not mean that we can dispense with the 35 year age requirement.[31] But where the text is abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it.[32] Because the text points to general and abstract concepts, these underlying principles will usually also be general and abstract. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be fleshed out later on by later generations. Nevertheless recourse to underlying principles limits the direction and application of the text and therefore is essential to fidelity to the Constitution.

Some principles are directly connected to particular texts and help us understand how to apply those texts. Other principles are inferred from the constitutional structure as a whole.[33]

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score. *See* Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610–11 (2004).

In the case of the Fourteenth Amendment, we know that its language was written to please both Moderates and Radicals. Precisely for this reason the language chosen was about citizenship in general and not specifically about race discrimination, and its future scope was left deliberately ambiguous, as a delegation to future generations. Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59–63 (1955) (Moderates and Radicals chose "language capable of growth" that would paper over differences between them); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 143–45 (1988) (language of Section One deliberately chosen to invoke broad statements of principle, leaving applications unsettled). See the discussion in Balkin, *supra* note 4, at 456–61. Hence if we are concerned with pragmatics—use in context—there is no good reason to treat the Fourteenth Amendment's general clauses as limited to a laundry list of specific applications.

31. In this example I assume that all the evidence we have suggests that the words "attained to the age of thirty-five years" in Article II, section 4, were chosen to serve as a rule, not a principle or standard, and, similarly, that there is no evidence that the words should be understood in a non-literal sense, as in the case of the word "writings" in the Copyright Clause.

32. As Randy Barnett reminds us, these underlying principles cannot override the textual command but must be articulated and applied consistent with it. Randy Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405 (2007). *See also* Balkin, *supra* note 4, at 481–86.

33. John Hart Ely famously criticized the notion of a "clause bound interpretivism,"

For example, there is no single separation of powers clause in the Constitution; rather we must derive the principle of separation of powers from how the various institutions and structures outlined in the constitutional text relate to each other. The principle of democracy—which includes the subprinciple that courts should generally defer to majoritarian decision-making—is nowhere specifically mentioned in the constitutional text, and yet it may be the most frequently articulated principle in constitutional argument. It is, ironically, the principle that people most often use to object to courts inferring constitutional principles not specifically mentioned in the text.[34] Although the principle of democracy does not directly appear in the text, it is inferred from various textual features which presume democracy, and from the basic character of our government as a representative and democratic republic.

Finally, many other materials gloss text and principles and help apply them to concrete circumstances. These include not only the original expected application but also post-enactment history, including the work of social movements that have changed our constitutional common sense, and judicial and non-judicial precedents. These materials offer interpretations about how to understand and apply the Constitution's structures and guarantees. They are entitled to considerable weight. Precedents in particular not only implement and concretize principles, they also help settle difficult legal questions where reasonable people can and do disagree.[35] Precedents also help promote stability and rule of law values. However, because glosses and precedents accumulate and change over time, and because they often point in contrasting directions, they are not always dispositive of constitutional meaning.

Constitutional doctrines created by courts, and institutions and practices created by the political branches, flesh out and im-

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JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 11–41 (1980) while Charles Black emphasized reading the Constitution in terms of its larger structural themes. CHARLES BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

34. In fact, Ely argued that the principle justified courts inferring certain rights and liberties against majorities because they were necessary to democracy and to republican government. ELY, DEMOCRACY AND DISTRUST, *supra* note 33. The principle of democracy is not the same thing as simple majoritarianism; it does not automatically assume the legitimacy of whatever procedures for decision-making happen to be in place.

35. For a useful discussion of how judicial and non-judicial precedents can serve the goals of text and principle without displacing them, see Amar, *supra* note 8, at 43–44, 78-89 (2000); *see also* FALLON, *supra* note 16; ROOSEVELT, *supra* note 8 (offering theories for implementing constitutional meaning in doctrine).

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plement the constitutional text and underlying principles. But they are not supposed to replace them. Doctrines, institutions and practices can do the work of implementation well or poorly depending on the circumstances, and some implementations that seem perfectly adequate at one point may come to seem quite inadequate or even perverse later on. But the Constitution, and not interpretations of the Constitution, is the supreme law of the land. Therefore it is always available to later generations to assert—and to try to convince others—that the best interpretation of text and principle differs from previous implementing glosses, and that we should return to the correct interpretation, creating new implementing rules, practices and doctrines that will best achieve this end. The tradition of continuous arguments about how best to implement constitutional meaning in our own time produces changes in constitutional doctrines, practices, and law. That is why, ultimately, there is no conflict between fidelity to text and principle and practices of constitutionalism that evolve over time. Indeed, if each generation is to be faithful to the Constitution and adopt the Constitution's text and principles as its own, it must take responsibility for interpreting and implementing the Constitution in its own era.

D. FIDELITY AND INSTITUTIONAL CONSTRAINTS

Expectations-based originalists may object that the text-and-principle approach is indeterminate when the text refers to abstract standards like "equal protection" rather than concrete rules. Therefore it does not sufficiently constrain judges. That might be so if text and principle were all that judges consulted when they interpreted the Constitution. But in practice judges (and other constitutional interpreters) draw on a rich tradition of sources that guide and constrain interpretation, including pre- and post-enactment history, original expected application, previous constitutional constructions and implementations, structural and inter-textual arguments, and judicial and non-judicial precedents, to name only a few. In practice, judges who look to text and principle face constraints much like those faced by judges who purport to rely on original expected application. As we have seen, the latter cannot and do not use original expected applications for a very large part of their work, because a very large part of modern doctrine is not consistent with original expected application. So even judges who claim to follow the original understanding are, in most cases, guided and constrained by essentially

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the same sources and modalities of argument as judges employing the method of text and principle.

I think there is a deeper problem with the objection that the method of text and principle does not sufficiently constrain judges. Many theories of constitutional interpretation conflate two different questions. The first is the question of what the Constitution means and how to be faithful to it. The second asks how a person in a particular institutional setting—like an unelected judge with life tenure—should interpret the Constitution and implement it through doctrinal constructions and applications. The first is the question of *fidelity*; the second is the question of *institutional responsibility*.

Theories about constitutional interpretation that conflate these two questions tend to view constitutional interpretation from the perspective of judges and the judicial role; they view constitutional interpretation as primarily a task of judges and they assess theories of interpretation largely in terms of how well they guide and limit judges. For example, one of the standard arguments for expectations-based originalism is that it will help constrain judges in a democracy. Alexander Bickel's theory of the passive virtues and Cass Sunstein's idea of "minimalism," although often described as theories of constitutional interpretation, are actually theories about the judicial role and how judges should interpret the Constitution. So, too, obviously, are other theories of "judicial restraint." From the perspective of these theories, nonjudicial interpreters are marginal or exceptional cases that we explain in terms of the standard case of judicial interpretation.

I reject this approach. Theories of constitutional interpretation should start with interpretation by citizens as the standard case; they should view interpretation by judges as a special case with special considerations created by the judicial role. In like fashion, constitutional interpretations by executive officials and members of legislatures are special cases that are structured by their particular institutional roles. Instead of viewing constitutional interpretation by citizens as parasitic on judicial interpretation, we should view it the other way around.

Why emphasize the citizen's perspective? Each generation must figure out what the Constitution's promises mean for themselves. Many of the most significant changes in constitutional understandings (e.g., the New Deal, the civil rights movement, the second wave of American feminism) occurred through mobilizations and counter-mobilizations by social and political movements who offered competing interpretations of what the

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Constitution really means. Social and political movements often understand their grievances and their demands in constitutional terms—they argue for either a restoration of constitutional principles or a redemption of constitutional commitments. They make claims about how the Constitution's text and principles should be cashed out in present-day circumstances. Social and political movements argue that the way that Constitution has been interpreted and implemented before—for example, by judges or other political actors—is wrong and that we need to return to the Constitution's correct meaning and redeem the Constitution's promises in our own day.

Often people do not make these claims in lawyerly ways, and usually they are not constrained by existing understandings and existing doctrine in the way that we want judges to be constrained. In fact, when social movements initially offer their constitutional claims, many people regard them as quite radical or "off the wall." There was a time, for example, when the notion that the Constitution prohibited what we now call sex discrimination seemed quite absurd. Yet it is from these protestant interpretations of the Constitution that later constitutional doctrines emerge. Many of the proudest achievements of our constitutional tradition came from constitutional interpretations that were at one point regarded as crackpot and "off the wall."

I hasten to add that most of these arguments go nowhere. Only a few have significantly changed how we look at the Constitution. Successful social and political movements must persuade other citizens that their views are correct, or, at the very least, they must convince people to compromise and modify their views. If movements are successful, they change the minds of the general public, politicians and courts. This influence eventually gets reflected in new laws, in new constitutional doctrines, and in new constitutional constructions. Successful social and political mobilization changes political culture, which changes constitutional culture, which, in turn, changes constitutional practices outside of the courts and constitutional doctrine within them.

The causal influences, of course, do not run in only one direction. Judicial interpretations like those in *Brown v. Board of Education* or *Miranda v. Arizona*[36] can become important parts of our constitutional culture; they can be absorbed into ordinary citizens' understandings of what the Constitution means, and they can act as focal points for citizen reaction. Nevertheless, we

36. 384 U.S. 486 (1966).

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cannot understand how constitutional understandings change over time unless we recognize how social movements and political parties articulate new constitutional claims, create new constitutional regimes and influence judicial constructions.

To understand how these changes could be faithful to the Constitution, we must have a theory that makes the citizen's perspective primary. I do not claim that all social mobilizations that produce changes in doctrine are equally legitimate or equally admirable. But some are both legitimate and admirable, and a theory of constitutional interpretation—which is also a theory of constitutional fidelity—must account for them. The text-and-principle approach can offer a much better explanation of how successful social and political movements make claims that are faithful to the Constitution than expectations-based originalism can. Indeed, as we have seen, expectations-based originalism is virtually useless for this purpose, because it views many of the most laudatory changes in our understandings of the Constitution as not faithful to the Constitution and therefore illegitimate.

For similar reasons, expectations-based originalism cannot really constrain judges because too many present-day doctrines are simply inconsistent with it; as a result judges must pick and choose based on pragmatic justifications that are exceptions to the theory. Because expectations-based originalism conflates the question of constitutional fidelity with the question of judicial constraint, it offers the wrong answer to both questions.

Constraining judges in a democracy is important. But in practice most of that constraint does not come from theories of constitutional interpretation. It comes from institutional features of the political and legal system. Some of these are internal to law and legal culture, like the various sources and modalities of legal argument listed above. Others are "external" to legal reasoning but nevertheless strongly influence what judges produce as a group.

First, judges are subject to the same cultural influences as everyone else—they are socialized both as members of the public and as members of particular legal elites. Second, the system of judicial appointments and the practices of partisan entrenchment determine and limit who gets to serve as a judge. Third, lower federal courts are bound to apply Supreme Court precedents. Fourth, the Supreme Court is a multi-member body whose decisions in contested cases are usually decided by the

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median or "swing" Justice. Over time, this keeps the Court's work near the center of public opinion.[37]

This combination of internal and external features constrains judicial interpretation in practice far more effectively than any single theory of interpretation ever could; it does much of the work in constructing which constitutional interpretations are reasonable and available to judges and which are "off the wall." Equally important, this combination of internal and external factors keeps judicial decisions in touch with popular understandings of our Constitution's basic commitments, continually translating, shaping and refining constitutional politics into constitutional law.

In short, we should not confuse the question of what it takes for actors in the system—including those actors who are not judges—to be faithful to the Constitution with the question of what features of the system constrain judicial interpretation. We must separate these questions to understand how constitutional fidelity occurs over time. When we do, we can also see why fidelity to original meaning and belief in a living Constitution are not at odds.

III. THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT

Even if the right to abortion was not specifically contemplated or intended by the framers and adopters of the Constitution, it might follow as a consequence of principles that underlie the constitutional text. What text and what principles would those be? In *Roe v. Wade* itself, Justice Blackmun, invoking a history of previous judicial precedents, argued that the right came from the Due Process Clause of the Fourteenth Amendment, which says that "[n]o state . . . shall . . . deprive any person of life, liberty, or property, without due process of law."[38] Many people doubt that the Due Process Clause regulates more than procedures, because the text refers to "due process of law."

In fact, the Due Process Clause, as originally understood, did have some substantive content. "Due process of law" was a term of art thought to be roughly synonymous with the idea of "law of the land" from Magna Carta.[39] It was designed not only

37. *See* sources cited *supra* note 26.

38. U.S. CONST. amend. XIV, § 1.

39. *See* James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999); Murray's Lessee v.

to prohibit unfair procedures but also to protect vested rights—for example, vested rights of property—from being destroyed by government or transferred from one private party to another.[40] Even under this reading, however, it is unclear whether the right to abortion is such a vested right. (Moreover, as I shall describe later on, the meaning of the term of art "due process of law" changed during the antebellum period. There is considerable evidence that the Due Process Clause of the Fourteenth Amendment may have been designed in part to enforce the Amendment's prohibition on so-called class legislation, which is also one of the underlying purposes of the Equal Protection Clause.[41])

Many people assume that the only possible source of the right to abortion would be a right to "privacy" found in the Due Process Clause, because that is where the Supreme Court found it in *Roe v. Wade*. Because they are unconvinced that the Due Process Clause offers substantive protections, or because they doubt that the right to privacy was intended to be one of those protections, they assume that the right to abortion has no constitutional basis.

Even if the right to abortion is not a vested right protected under the Due Process Clause, however, that does not mean that the right to abortion has no constitutional basis in the original meaning of the constitutional text or the principles underlying the text. The source of the right is the Fourteenth Amendment, but not necessarily the Due Process Clause. In fact, the other parts of the first section of the Fourteenth Amendment are far more relevant to this question. The first section of the Fourteenth Amendment contains a Citizenship Clause, which states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It contains a Privileges or Immunities Clause, which says that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." And it contains an Equal Protection Clause, which holds that "[n]o state . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws."[42]

Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

40. Ely, *supra* note 39, at 332–33.

41. *See infra* text accompanying notes 47–53.

42. U.S. CONST. amend. XIV, § 1.

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The reason why the courts look to the Due Process Clause today is because of the Supreme Court's initial misinterpretation of the Fourteenth Amendment in the *Slaughter-House Cases*[43] in 1873. The *Slaughter-House Cases* severely limited the Privileges or Immunities Clause, mangled the constitutional text and caused enormous mischief in subsequent years. Because the Privileges or Immunities Clause was effectively read out of the Constitution, litigators and courts turned instead to the Due Process Clause (and still later to the fundamental rights doctrines arising out of the Equal Protection Clause) to do much of the work that the Privileges or Immunities Clause should have performed.

The purpose of the Citizenship, Privileges or Immunities, and Equal Protection Clauses, and indeed of the entire Fourteenth Amendment, was to secure equal citizenship, equal civil rights, and civil equality for all citizens of the United States. (The Equal Protection Clause, which speaks of "person[s] within [the] jurisdiction" of states, extended basic rights to resident aliens as well.) The principle of civil equality meant that all persons were equal before the law with respect to basic civil rights, which were the privileges or immunities of citizens of the United States, and that the states could not make arbitrary or invidious discriminations among persons.

One of the best summaries of the principles underlying the text of the Fourteenth Amendment is the speech that Senator Jacob Howard of Michigan gave when he introduced the Fourteenth Amendment to the Senate on May 23, 1866. Howard was a member of the Joint House-Senate Committee on Reconstruction (the Committee of Fifteen) that drafted the Amendment, and he acted as the floor manager for the Amendment in the Senate, presenting it with a speech that stated the Committee's official views about the Amendment's purposes.[44]

Howard explained that the purpose of section one of the Fourteenth Amendment was to "disable [the states] from passing laws trenching upon those fundamental rights and liberties which belong to every citizen of the United States and to all persons who happen to be within their jurisdiction."[45] (Thus, Howard assumed that aliens as well as citizens would enjoy basic civil rights against state governments). The "great object" of the

43. 83 U.S. (16 Wall.) 36 (1873).

44. CONG. GLOBE, 39th Cong., 1st Sess. 2764-68 (1866) (statement of Sen. Howard).

45. *Id.* at 2766.

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Privileges or Immunities Clause was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[46] Howard emphasized that these privileges and immunities of citizenship "cannot be fully defined in their entire extent and precise nature."[47] Many of them were unenumerated. He offered as a preliminary sampling the list produced by Justice Bushrod Washington in *Corfield v. Coryell*,[48] who was interpreting the Privileges and Immunities Clause of Article IV, section 2.[49] Washington himself noted that the privileges and immunities of citizenship could not be exhaustively enumerated, but that they included, among other things, the rights to "protection by the government, [to] enjoyment of life and liberty . . . to pass through, or to reside in any other state, . . . to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state [and] to take, hold and dispose of property."[50] "[T]o these," Howard, explained, "should be added the personal rights guaranteed and secured by the first eight amendments to the Constitution,"[51] that is, the individual rights guarantees of the Bill of Rights.[52]

The Equal Protection Clause, together with the Due Process Clause, Howard explained, was designed to "abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another."[53] Section one of the Fourteenth Amendment "establishes

46. *Id.*

47. *Id.* at 2765.

48. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

49. Note that for Howard, as for the many of the framers of the Fourteenth Amendment, the words "Privileges or Immunities of citizens of the United States" were deliberately chosen to mirror the phrase "Privileges and Immunities of Citizens of the Several States" in Article IV, Section 2. Just as states could not deny basic civil rights to non-citizens because of Article IV, Section 2, they now could not deny basic civil rights to their own citizens under the Fourteenth Amendment.

50. *Corfield*, 6 F. Cas. at 551–52.

51. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

52. Although the list of fundamental rights was not limited to those specifically mentioned in the Constitution, and although Justice Washington had included suffrage in his list, Howard cautioned that the Privileges or Immunities Clause did not guarantee the right to vote: "The right of suffrage, is not, in law, one of the privileges or immunities thus secured by the Constitution." *Id.* at 2766. Speaking in 1871, John Bingham also suggested that some of the rights listed in *Corfield* had a different status than the individual rights provisions of the Bill of Rights, which he viewed as central examples of substantive rights protected by the Privileges or Immunities Clause. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham). See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV 1, 70–71 (1996).

53. *Id.* Howard explained:

equality before the law, and it gives to the humblest, the poorest, and the most despised of the race the same rights and the same protection as it gives to the most powerful, the most wealthy, or the most haughty."[54]

The Fourteenth Amendment's guarantee of equality before the law prohibited several different types of unequal treatment, each of which overlapped with the others.[55] The first was legislation that made arbitrary and unreasonable distinctions between citizens or persons.[56] The second was "special" or "partial" legislation that picked out a group for special benefits or special burdens. This is generally what was meant by "class legislation," an idea that has its roots in Jacksonian ideology.[57] The third was "caste" legislation, that is, legislation that created or maintained

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> It prohibits, the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?

Id. Although Howard began by referring to both the Equal Protection Clause and the Due Process Clause in his account; his reference to "equal protection of the law" suggests the Equal Protection Clause was expected to take the lead in securing equality. Nevertheless, the Due Process Clause was also relevant to the general prohibition against class legislation, because the antebellum idea of due process also included the notion that laws should be general and impartial and not for the benefit of any particular class. *See* Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination: One Small Cheer For Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1376 (1990) ("The idea that laws should be general and not tainted by considerations of class or caste was widely recognized and accepted before the fourteenth amendment was enacted. It was part-and-parcel of the presumed fairness of governmental processes, of due process of law."); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 258–59 & n.58 (1997); Ely, *supra* note 39, at 337–38.

54. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

55. The various strands are described in NELSON, *supra* note 30, at 115–47 and in Yudof, *supra* note 53 (reviewing Nelson).

56. *See* NELSON, *supra* note 30, at 115, 138–42.

57. *See* Yudof, *supra* note 53, at 1376–77; Saunders, *supra* note 53, at 289–90 & n.198 (1997); NELSON *supra* note 30, at 115, 149; HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE, 46–60, 62 (1993). In his 1832 veto message concerning the charter of the second national bank, Andrew Jackson gave a canonical account of the equal protection principle: The law should make no "artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful." "If [law] would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing." Andrew Jackson, Veto Message (July 10, 1832), *in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576–89 (Richardson ed., 1897).

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a disfavored caste or subordinated a group through law.[58] The fourth was legislation that selectively restricted or abridged basic rights of citizenship and that therefore treated people as second-class citizens.[59]

The job of doctrine in constitutional interpretation is to concretize and make applicable the abstract commitments of constitutional text and constitutional principle.[60] Where the text is concrete and determinate, no doctrinal gloss is necessary, and doctrine may not contradict it. Doctrine does most of its work when textual commitments are abstract and the principles that underlie them are also abstract. That is the case with the Fourteenth Amendment. When courts create doctrine to implement and actualize text and principle, they create tests that are presumably easier to manage and apply to concrete cases; but, in the process, they may create rules that are underinclusive and overinclusive with respect to the best understanding of constitutional text and principles. Moreover, over time, the doctrinal tests and tools that courts create to apply constitutional text and principle may become increasingly unwieldy and inadequate to enforce and implement the textual and principled commitments in the Constitution. Or courts may simply make initial mistakes

58. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (remarks of Sen. Howard) (Fourteenth Amendment "does away with the injustice of subjecting one caste of persons to a code not applicable to another"); *see also id.* at 674 (remarks of Sen. Sumner) (proposed joint resolution for Reconstruction—a predecessor of the Fourteenth Amendment—would abolish "oligarchy, aristocracy, caste, or monopoly with particular privileges and powers"); Adamson v. California, 332 U.S. 46, 51 n.8 (1947) (quoting Sumner's joint resolution as evidence of meaning of Fourteenth Amendment); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 74–75 (1992) (also quoting Sumner's joint resolution as evidence of meaning of Fourteenth Amendment).

59. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (remarks of Rep. Stevens) ("This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the law that operates upon one man shall operate *equally* upon all.") (emphasis in original). John Harrison and David Currie have argued that equality of treatment with respect to basic civil rights was guaranteed by the Privileges or Immunities Clause, and not the Equal Protection Clause, which applies to non-citizens as well. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387–88 (1992); DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 342–51 (1985). Harrison argues that the Equal Protection Clause was quite limited in its reach by modern day standards, and mostly protected against discriminatory remedies and protections or discriminatory enforcement by executive officials. Harrison, *supra*, at 1390, 1396, 1435–38. However, Senator Howard's speech suggests that the Equal Protection Clause was the text that embodied the principle against class, caste, and subordinating legislation. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (remarks of Sen. Howard).

60. For useful accounts of this process, see FALLON, *supra* note 16; *see also* ROOSEVELT, *supra* note 8; Amar, *The Document and The Doctrine*, *supra* note 8.

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that misapply or even undermine the constitutional text and principles.

The doctrinal implementation of the Fourteenth Amendment from Reconstruction onward bears all of these characteristics. The Court's initial construction of the text in the *Slaughter-House Cases* adopted a narrow construction of the Privileges or Immunities Clause that essentially made the clause irrelevant. The *Slaughter-House* Court was worried that a broad reading of the clause would take too much power from the states and place it in the hands of Congress, which had the power to protect privileges and immunities by federal legislation. However, the Court's crabbed reading was not faithful to the constitutional text and underlying constitutional principles because the Privilege or Immunities Clause was supposed to be the Amendment's major source for constitutional protection of both civil liberty and civil equality.

Because the Court made the clause practically irrelevant, lawyers offered arguments for fundamental rights during the 19th and 20th centuries in terms of the liberty protected by the Due Process Clause. Litigants argued, and the Court eventually agreed, that the Due Process Clause protected certain substantive rights from abridgement by the states. This created considerable resistance over the years because the Due Process Clause by its terms seems to refer to fair processes (and, as we have seen, historically, the protection of vested rights). Discovering fundamental rights in the Due Process Clause made far less sense than asking whether such rights were privileges or immunities of national citizenship. That is especially so given that the text of the Privileges or Immunities Clause clearly seems to refer to a series of unspecified substantive rights against government. In the middle of the 20th century, the Supreme Court briefly flirted with protecting fundamental rights through the Equal Protection Clause.[61] But the same criticism could apply here as well: why does a clause about equal protection guarantee particular substantive rights? Thus, the Court's decision in *Slaughter-House* helped delegitimate the protection of basic rights and liberties of citizenship that was one of the Fourteenth Amendment's central purposes.

To make matters worse, for many years the Supreme Court assumed that the individual rights provisions of the Bill of Rights

61. Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966).

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were not privileges or immunities of citizens of the United States, even though there is considerable evidence that the formulation "Privileges or Immunities of citizens of the United States" specifically referred to these rights.[62] Indeed, Senator Howard's speech introducing the Amendment in the Senate specifically noted that the Privileges or Immunities Clause protected "the personal rights guaranteed and secured by the first eight amendments to the Constitution,"[63] The Court slowly began to incorporate these rights into the Fourteenth Amendment many years later, arguing that they were part of the "liberty" protected by the Due Process Clause. By the late 1960's most (but not all) of the individual rights provisions of the Bill of Rights had been so incorporated. However, there is little reason to think that the Due Process Clause was the primary vehicle through which the provisions of the Bill of Rights applied against the states. Once again, the doctrinal structure bequeathed by the *Slaughter-House Cases* made the process of constitutional interpretation far more counterintuitive than it should have been.

During the twentieth century, the Court implemented the equal citizenship, caste legislation and class legislation principles by creating a set of doctrines of scrutiny for different types of classifications.[64] However, it is by no means clear that a focus on *classifications* is the same thing as a focus on equal citizenship, caste legislation, or class legislation. Governments need not engage in overt classification in order to subordinate a group or to impose special benefits or burdens. Rather, we know whether law subordinates by its social meanings and its effects within existing social and political structures. Focusing on classification sometimes does protect against legislation that promotes social subordination and the maintenance of caste, but at other times it does not. Hence the doctrinal focus on classification often under-

62. For a discussion, see AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998). *See also* Richard L. Aynes, *On Misreading John Bighman and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1985).

63. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

64. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (special scrutiny for laws that burden discrete and insular minorities); Loving v. Virginia, 388 U.S. 1 (1967) (strict scrutiny for racial classifications); Levy v. Louisiana, 391 U.S. 68 (1968) (strict scrutiny for classifications burdening illegitimacy); Graham v. Richardson, 403 U.S. 365 (1971) (strict scrutiny for state classifications burdening alienage); Craig v. Boren, 429 U.S. 190 (1976) (heightened scrutiny for sex classifications); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (heightened rational basis scrutiny for classifications based on prejudice or animus).

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protects. Sometimes the doctrine overprotects too, causing constitutional difficulties for laws and policies that do not maintain caste-relations or second class citizenship and may actually assist in relieving various forms of social subordination.[65]

In interpreting the Constitution, therefore, we should always understand doctrine as a means to an end, and not as an end in itself. We should understand it as a good faith attempt by courts, sometimes successful, and other times less so, to implement relatively abstract commitments we find in the original meaning of the constitutional text and its underlying principles. Sometimes the solutions that courts come up with to flesh out text and principle are good enough for the immediate purposes at hand, but prove increasingly unworkable or contrary to the text and its underlying principles as glosses are placed upon glosses and as time and circumstances change. When novel problems present themselves, revealing the limitations of previous implementations of text and principle, we must always be prepared to rethink the doctrinal structure in light of these more basic objects of constitutional fidelity. We should always attempt to develop and employ constitutional doctrine with text and principle in mind.

In *Roe v. Wade* the Supreme Court found the constitutional right to abortion in the substantive protections of the Due Process Clause. It is likely, however, that the real source of this right lies elsewhere. To determine whether rights to abortion are guaranteed by the Constitution, we must ask whether laws restricting abortion deny women equal citizenship. They might do so because these laws are class or caste legislation or because they help create or maintain second class citizenship or a subordinate status for women in American society. Or they might do so because they deny privileges or immunities of national citizenship. If the answer to either of these questions is yes, then we should interpret or extend constitutional doctrine to include and protect abortion rights.

IV. EQUAL PROTECTION AND EQUAL CITIZENSHIP

Laws that discriminate against women and keep them in conditions of dependency violate the Fourteenth Amendment's Equal Protection Clause because they violate the principles

65. *See* Jack M. Balkin & Reva B. Siegel. *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

against class legislation, caste legislation, and subordinating legislation. The Congress that drafted the Fourteenth Amendment assumed that its guarantees applied to all persons, men and women alike, and that men and women were civil equals; but they were complacent about a whole range of laws and practices that effectively kept women in a subordinate condition and economically dependent on men.[66] In particular, they did not expect that the new amendment would disturb the common law coverture rules, under which married women surrendered most of their common law rights under the fiction that they consented upon marriage to the merger of their legal identity into their husband's.[67] Although the framers of the Fourteenth Amendment asserted that women and men were civilly equal, they assumed that existing laws and practices—including coverture—did not deny women equal citizenship or subordinate them.[68] The effect of these rules was to place most women in positions of second-class citizenship, for most women moved fairly quickly from living in their father's house to that of their husband. As Justice Bradley explained in his 1873 concurrence in *Bradwell v. Illinois*,[69] which upheld a general prohibition on women becoming members of the Illinois Bar, "[i]t is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these

66. Thus, Akhil Amar notes that "[t]he Fourteenth Amendment, in some ways, was designed to give everyone - all persons, all citizens - certain civil rights. These rights were largely defined by the status of unmarried white women." Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 468 (1995). However, as Amar also notes, when women married, they lost most of these rights. *See id.* at 468 n.14. *See also* Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1241 (2000) ("Until she joined a family as a wife and mother, a femme sole [i.e., an unmarried woman] was a family of one and could hold property; but once she married, her property rights yielded to the order of the family circle. She then enjoyed vicariously the rights held by the men in the family.").

67. Similar reasoning was used to justify women's exclusion from the franchise. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–84 (2002) (noting that both common law coverture rules and theory of virtual representation of women by their husbands and fathers stemmed from republican theory of household as the unit of society, and the head of the household as the representative of its dependents).

68. See CONG. GLOBE, 39th Cong. 1st session, at 1089 (Feb. 28, 1866) (remarks of Rep. Bingham) (noting that states would retain ability to regulate married women's ownership of property because property rights were governed by local law while "[t]he rights of life and liberty are theirs [i.e., women's] whatever States may enact"); CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (remarks of Rep. Stevens) ("When a distinction is made between two married people or two femmes sole, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality.").

69. 83 U.S. 130 (1873).

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are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."[70]

Nevertheless, in interpreting the Constitution we must distinguish between the original meaning of the text and its original expected application. Fidelity to the Constitution requires only the first; not the second. We are interested in the text that the adopters wrote and the basic principles they sought to establish, not how they expected that text and those principles would be applied to concrete cases.

The first wave of American feminism challenged the sexist assumptions of the generation that formulated the Fourteenth Amendment; their efforts culminated in the Nineteenth Amendment, which bestowed political equality on women. The debate over and subsequent ratification of the Nineteenth Amendment fatally undermined the premise on which the common law rules of coverture had been based, namely, that men adequately represented women's interests.[71] If women had the right to vote because men did not adequately represent their interests in political life, it seemed to follow that men did not necessarily adequately represent all of their interests in economic and social life. If women were deemed competent to make the most important political decisions affecting the future of the republic through the franchise, it was hard to maintain that they lacked competence to make basic decisions about their own lives that involved entering into contracts and owning and disposing of property. Years later the second wave of American feminism convinced Americans that laws that discriminate against women violate basic principles of equal citizenship in our Constitution.[72]

The original meaning of the Fourteenth Amendment, which guarantees civil equality and equality before the law for all persons, therefore presents no bar to the conclusion that sex dis-

70. *Id.* at 141–42. *Bradwell* was decided the day after *Slaughter-House*, with all of the *Slaughter-House* dissenters joining the majority. Only Chief Justice Chase dissented in *Bradwell* without opinion.

71. Siegel, *supra* note 67, at 987–93, 1012–19; *id.* at 1019 ("[I]n the immediate aftermath of ratification, both the Supreme Court and Congress understood the Nineteenth Amendment to redefine citizenship for women in ways that broke with the marital status traditions of the common law. But neither the Court nor Congress acted consistently on this understanding.").

72. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

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crimination violates the Constitution. The text of section 1 does not exclude women from its protections, and the underlying principle of equal citizenship applies to men and women equally.[73] This fact exemplifies one of the major differences between an approach to constitutional interpretation based on original meaning and an approach based on original understanding or original intentions. While an approach grounded in original understanding or original intention has great difficulty justifying the Supreme Court's sex equality jurisprudence beginning with *Reed v. Reed*[74] and *Frontiero v. Richardson*,[75] an approach based on original meaning does not. The fact that Congress in 1972 had submitted the ERA to the states (which ultimately failed to gain ratification by three fourths of the states) does not by itself demonstrate that constitutional protection of sex equality is inconsistent with original meaning. Rather, it demonstrates only, as the Supreme Court noted in *Frontiero*, that by 1972 "Congress itself ha[d] concluded that classifications based upon sex are inherently invidious."[76]

Assuming then, that women as well as men are protected by the Fourteenth Amendment's equal citizenship principle, the next question is whether laws criminalizing abortion violate that principle.

One might argue that, because only women can become pregnant, laws restricting abortion do not violate sex equality, because they do not treat women differently from similarly situated men. There are no similarly situated men. The principle of equal citizenship, however, is not limited to the requirement that laws be formally equal in this way.[77] The relevant question is not whether men and women are different in their capacity to bear children, but the difference that this difference should be allowed to make in terms of women's status in society and their enjoyment of basic rights of citizenship. The text of the Fourteenth Amendment, and principles underlying the Amendment stand for the propositions that the state may not create or maintain a lower caste of citizens, impose second-class citizenship, or effect subordination of a social group through law. When the

73. That is not true of Section 2 of the Fourteenth Amendment, which presumes that women had no constitutional right to vote, but which was also superseded by the Nineteenth Amendment.

74. 404 U.S. 71 (1971).

75. 411 U.S. 677 (1973).

76. *Id.* at 687.

77. *See* Saunders, *supra* note 53, at 288–89, 287 n.189 (class legislation was legislation that was not general in its effects, but imposed special burdens.).

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state uses women's capacity to become pregnant as a lever to subordinate women, assign them a second class status in society, or deny them full and equal enjoyment of their rights of citizenship, it violates the equal citizenship principle. It may not use pregnancy as a device to deny women equal citizenship or subordinate women precisely because only women can get pregnant.

Traditionally, blacks have been relegated to second class status by separation, degredation, and the abuse of the criminal justice system. But the lower status of women in society has been produced through enforcing role differentiation between the sexes, usually justified by paternalism and repeated appeals to nature and biological differences between men and women. Women's inequality has come not from separating them from men, but by making sure that they are remitted to traditional occupations of home and family and through denying them opportunities beyond those activities socially marked as "women's work." We see this ideology clearly in Justice Bradley's argument that women could be excluded from the bar because "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."[78]

Laws that criminalize abortion impose special burdens on women not suffered by men. They force women to do two things. First, they require women to bear children against their will. They require a woman's body to undergo the strains of pregnancy and the difficulties of childbirth without her consent. In some cases, these may risk her health or even her life.

Second, laws that criminalize abortion require women, against their will, to become *mothers*, with all that this word implies. Motherhood is more than a purely biological relationship: it comes with a set of social and moral expectations and conventions. When a child comes into the world, social pressure, legal rules, and moral obligations demand that parents take care of the child until it is fully grown. These responsibilities are life-transforming. Moreover, in our society these responsibilities fall asymmetrically on women and men; that is to say, they fall more heavily on mothers than on fathers. Women still bear the most significant share of responsibility for child care; women have traditionally been and still are expected to subordinate their interests and ambitions for the purpose of raising children. They, and not men, are far more likely to be blamed for shirking the responsibilities of raising children or failing to care for them. So-

78. 83 U.S. 130, 141 (1873).

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ciety places shame and stigma on women who surrender their children for adoption. Such women are regarded as failures as mothers, not because they failed in their biological ability to give birth, but because they failed at the social role of caring for their children, which is the social meaning of motherhood. It is one thing if women freely choose to become mothers, assume the physical burdens and risks of pregnancy and childbirth, and take on the various social roles and expectations of motherhood in our society. It is quite another when the state forces them against their will to undergo these physical strains and dangers and to take on these life-altering responsibilities and obligations. Then it denies them their liberty in the most profound way.

The asymmetrical expectations about responsibility for parenting that our society places on men and women are part of a larger structure of sex role differentiation, and part of a larger system of economic and status relations between men and women that reproduces and maintains inequality between men and women both within families and across society. As noted above, historically the inequality of women in society has been achieved through laws, institutions and practices that either push or require women to devote themselves primarily to traditional uncompensated gendered roles as caregivers while making women dependent on the economic support of men or the state.

Laws that force women to become mothers against their will help maintain the unequal and subordinate status of women in society because they help commit women, against their will, to lives of domestic labor and economic dependency. Because criminalization of abortion helps place women in a socially dependent status and keep them there, such laws constitute class legislation. They force women either to devote themselves to traditional roles and responsibilities of childcare that lack both status and economic remuneration or else suffer the stigma and shame of admitting their inability to care for their own children by placing them up for adoption. Thus, they employ basic social expectations about the duties and responsibilities of motherhood as a lever to pressure women into traditional roles of child care and economic dependency. They make it more difficult for women to aspire to opportunities in the public world of work that are inconsistent with being the primary caregiver of a child (or a number of children). They push more women into low-status occupations and conditions of economic dependence and help keep them there. As a result, these laws deny women a significant choice in the direction of their lives, as well as control

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over their bodies. Because criminalization of abortion reinforces women's subordinate status in society, it denies them the equal citizenship guaranteed by the Fourteenth Amendment.

The argument I have just presented reasons about abortion quite differently from the Supreme Court's sex equality jurisprudence. That jurisprudence asks whether or not there is classification that makes distinctions based on sex and then asks whether the classification is closely tailored to a sufficiently important public interest, or is the relic of outmoded stereotypes about men and women.[79] Laws that discriminate against pregnant women are not even treated as sex discrimination;[80] laws that formally distinguish between men and women but are justified on women's ability to become pregnant are generally upheld based on natural or biological differences between the sexes.[81] Finally, laws that impose disproportionate burdens on women are constitutional unless it can be demonstrated that the burdens were imposed because of a desire to harm women.[82] Under these doctrines, abortion is simply not a question of sex equality; first, because it is directed at pregnant women; second, because even if it were a question of sex equality, pregnancy is a sufficient reason to treat women differently from men; and third, because it is difficult to prove that states have criminalized abortion out of a secret animus toward women.

Nevertheless, the Supreme Court's doctrines are merely attempts to instantiate and apply the Fourteenth Amendment's guarantees of equal citizenship; they are not the guarantees themselves. The fact that these doctrines fail utterly to recognize that abortion implicates questions of women's rights or women's equality is not a reason to think that abortion in unrelated to these concerns; rather, it is a reason to think that the existing doctrine underprotects the equal citizenship of women that is guaranteed by the constitutional text.

My argument also differs from existing doctrinal structures in that it combines elements of liberty and equality: Criminalization of abortion limits women's liberty because it denies them the liberty to choose whether or not to become mothers, and be-

79. United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren, 429 U.S. 190 (1976).

80. Geduldig v. Alleio, 417 U.S. 484 (1974). *But see* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

81. Nguyen v. INS, 533 U.S. 53 (2001); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

82. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

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cause it requires women to adopt life-altering obligations that will place them in conditions of economic and social dependence. It limits equality because it imposes special obligations on women to surrender their bodies to bear children, and because by withdrawing their choice whether or not to become mothers it helps place women in conditions of social and economic dependency, which helps maintain their subordinate status as citizens. Thus it limits their liberty profoundly and it is also class legislation that violates the equal citizenship principle.

This interconnection between liberty and equality is not surprising, because the two ideas are intertwined in the principles that underlie the text of the Fourteenth Amendment. To take only one example, the Privileges or Immunities Clause, as originally conceived, was both about liberty and equality. It did not treat tort, contract, and property rights as fundamental rights (in our modern sense) so that all state regulation of tort, contract and property rights would be regarded as immediately suspect. Rather, it allowed reasonable regulation of basic civil rights of tort, contract and property as long as it was within the state's police power, and not class legislation.[83]

After Emancipation, Southern States passed the infamous Black Codes that denied blacks almost all of their civil rights and sought to return them to a legal state little better than slavery. These Black Codes were a major impetus to the Civil Rights Act of 1866 and the Fourteenth Amendment. To use Jed Rubenfeld's expression, the Black Codes were the "paradigm

83. That is why the Fourteenth Amendment constitutionalized the 1866 Civil Rights Bill, which required that blacks enjoy the same contract, tort and property rights as enjoyed by white citizens. *See also* AMAR, *supra* note 62, at 178–79 (suggesting a distinction between full protection for fundamental rights in the Bill of Rights and protection against unreasonable discrimination in common law rights). Some scholars have contended that the Privileges or Immunities Clause is only a guarantee of equality among citizens. *See* Harrison, *supra* note 59, 1387–88; CURRIE, *supra* note 59, at 342–51. *See also* NELSON, *supra* note 30, at 115–18, 123 (evidence is inconclusive as to whether section one guaranteed substantive liberties as well as equal regulation of liberty). But I believe the better argument is that the Privileges or Immunities Clause also imposes substantive protections against state regulation; for example, the guarantees contained in the Bill of Rights. *See, e.g.*, AMAR, *supra* note 62, at 174–97; CURTIS, *supra* note 62, at 71–83; Curtis, *Resurrecting the Privileges or Immunities Clause*, *supra* note 50, at 56–65. As noted above, Senator Howard's statement introducing the Fourteenth Amendment in the Senate argued that protecting basic rights of citizenship—including the individual rights provisions of the Bill of Rights— was in fact one of the key purposes of the clause. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) ("The great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."). *See supra* text accompanying notes 44–59.

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case" of class legislation.[84] What made the Black Codes class legislation was not simply that they restricted common law rights, but that they severely restricted them for blacks but not for whites. Denying liberty unequally is a pretty standard method of subordinating a group and keeping persons in that group in their place.

Over the years we have erected a doctrinal structure that tries (unsuccessfully in many cases) to disaggregate questions of liberty (currently treated under the Due Process Clause and the fundamental rights branch of the Equal Protection Clause) from equality (currently treated under the suspect classification branch of the Equal Protection Clause). But the interconnections between liberty and equality remain. The Supreme Court's reformulation of *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[85] is nominally concerned with a question of liberty—whether the state has placed an undue burden on the right to abortion. But the basis of that liberty is a concern about equality—the equal status of women in society. The Court's 2003 decision in *Lawrence v. Texas*[86] was also based on the liberty protected by the Due Process Clause. But the Court's opinion referred to dignitary concerns that we would normally associate with values of equality and equal citizenship.[87] We might think of both *Lawrence* (decided under the Due Process Clause) and the earlier case of *Romer v. Evans*[88] (decided under the Equal Protection Clause) as concerned with whether the laws challenged in these cases constituted class legislation designed to subordinate homosexuals, keep them in their places, and treat them both as outlaws and as beyond the protection of the law.

I have argued that laws that criminalize abortion are class and subordinating legislation that helps maintain second-class citizenship for women. But I do not argue that the mere existence of an abortion right fully secures women's equal citizenship. Robin West has pointed out that if "[m]othering children, as we presently construct this work is incompatible with the basic rights and responsibilities of citizenship,"[89] then giving women a

84. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2000); JED RUBENFELD, REVOLUTION BY JUDICIARY (2006).

85. 505 U.S. 833 (1992).

86. 539 U.S. 558 (2003).

87. *See id.* at 567, 575–76. Justice O'Connor's concurrence is specifically based on the idea of equality. *Id.* at 579 (O'Connor, J., concurring in the judgment).

88. 517 U.S. 620 (1996).

89. Robin West, *Concurring in the Judgment*, *in* WHAT ROE V. WADE SHOULD

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right to choose abortions does not cure the larger structural problem. We cannot simply say that because a women could have had an abortion, she therefore has no right to complain about the way in which family and work structures help relegate women to conditions of economic and social dependency. The abortion right, West concludes, is at best "a pathetically inadequate remedy"[90] for a much larger problem, and constitutionally conscientious legislatures should try to assist mothers, equalize burdens and reform the workplace to help secure women's practical equality with men. Indeed, by easing the burdens on women, legislatures may make abortions less frequent and protect the interests and lives of children, both before and after birth, more effectively.

V. ABORTION AND THE PRIVILEGES OR IMMUNITIES OF NATIONAL CITIZENSHIP

A second location for the constitutional right to abortion might be the Privileges or Immunities Clause. As Senator Howard noted, that clause guarantees those "fundamental rights and liberties which belong to every citizen of the United States and to all persons who happen to be within their jurisdiction."[91] The Congress that drafted the Fourteenth Amendment understood that the list of such fundamental rights "cannot be fully defined in their entire extent and precise nature,"[92] so that it is no objection that some of them are not specifically mentioned in the Constitution. The language of and principles underlying the Privileges or Immunities Clause are a far better source of the right to abortion (and other fundamental rights) than the Due Process Clause (where courts currently locate them), and for a fairly simple reason: the Privileges and Immunities Clause was intended to serve precisely that function. Instead of asking whether an interest is a fundamental right or protected liberty under the Due Process Clause, the more natural and sensible question is whether it is a privilege or immunity that all citizens enjoy.

The argument for a constitutional right to abortion under the Privileges or Immunities Clause is quite similar to the argument I have just offered under the Equal Protection Clause.

HAVE SAID, *supra* note 3, at 141.

90. *Id.*

91. CONG. GLOBE, 39th Congress, 1st session, at 2766 (remarks of Sen. Howard).

92. *Id.* at 2765.

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First, women have a right to protect their bodily integrity; when the state bans abortion, it forces women to bear children even when it would endanger their life and their health. Second, women have a right to decide whether they wish to become parents and assume the duties and responsibilities of parenthood. These are life-changing obligations that completely transform a woman's life and prospects and may commit her to years of child care and increased social and economic dependency. The state may not force individuals to assume such life-altering obligations against their will. When the state bans abortion, it forces women to become mothers—with all the attendant social expectations and responsibilities—or else give up sexual intercourse (because contraception is not always effective). Because the state may not force people to become parents against their will, it may not put women to this choice.

The argument from the Privileges or Immunities Clause, however is more complicated than the argument from the Equal Protection Clause. The Privileges or Immunities Clause is *declaratory*—its language does not specify the rights it protects but merely asserts their existence.[93] The framers of the Fourteenth Amendment assumed that there were rights preexisting government that all citizens enjoyed; the job of the federal government and the states was to protect these rights from infringement. Until the passage of the Fourteenth Amendment, the argument went, the federal government had no power to protect these rights from state infringement except in very limited settings.[94] After the ratification of the Fourteenth Amendment the courts (through interpretation of section 1) and Congress (through its enforcement powers under section 5) would have the ability and the duty to do so.

When Congress passes legislation to protect the privileges or immunities of national citizenship, it can announce that, in its

93. On the declaratory ideas behind the Fourteenth Amendment and the ideas of declaratory theories generally, see AMAR, *supra* note 62, at 147–56.

94. *See* CONG. GLOBE, 39th Cong., 1st session, at 2542 (1866) (statement of Rep. Bingham) (new Fourteenth Amendment gives federal government the power "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State"). Bingham argued that the Amendment "takes from no state any right that ever pertained to it," because "[n]o State ever had the right . . . to deny any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised that power, and that without remedy." *Id.* That is, Bingham's view was that the Fourteenth Amendment gave power to protect the rights that citizens already had.

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view, these rights belong to all citizens. (To be sure, that is not how the Supreme Court currently understands the operation of section five of the Fourteenth Amendment, but that is in part because the Court's understanding of the text and principles behind the Fourteenth Amendment is not very good.)[95] And when individuals or social movements interpret the Constitution in pressing for social change, they can make arguments that certain rights heretofore unrecognized or insufficiently protected are fundamental guarantees of citizenship that deserve special protection. When a *court* seeks to protect declaratory rights, however, it must do something in addition to making substantive arguments for why the rights are important; it needs evidence that the rights in question have achieved a special status as fundamental. If the rights are specifically mentioned in the text, or can easily be implied from specific references in the text, the task is far easier. But if not, then courts need another way to establish that the rights already exist and deserve judicial protection. One way to do this—although not the only way—is to look at the kinds of rights that have historically or traditionally been protected by states, or rights that almost all of the states have recognized or protected. The idea is that when lots of different majorities agree that these rights deserve protection, they are more likely to be rights with special constitutional value that all governments are supposed to protect. That is, they become the (expected) privileges or immunities of citizens of the United States. The list of such rights might change over time as social and political movements mobilize to protect rights and convince their fellow citizens that these rights are indeed important, even if previous generations had not felt particularly endangered or upset by their lack of protection.[96]

There is nothing particularly strange or unusual about a dynamic conception of declaratory rights. People press for rights when they begin to feel aggrieved by their absence, and their aggrievement does not come all at once, but is triggered by new problems and changed circumstances.[97] Then people press for

95. For a discussion based on the history surrounding the adoption of the Fourteenth Amendment, see Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 182–83 (1997).

96. For a discussion of how social movements draw on existing materials to fashion rights claims, see Jim Pope, The Role of Social Movements in Constitutional Interpretation and Enforcement (Aug. 2007) (unpublished manuscript on file with author and *Constitutional Commentary*).

97. *See* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 340–45 (2001) (noting how suffragists re-

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protection of these rights, arguing that governments always should have protected them, whether or not this was in fact the case and whether or not the claim even made sense in an earlier era. Thus, a declaratory conception of rights is almost always a dynamic conception which uses history and tradition as a powerful justificatory rhetoric. Rights become fundamental and timeless, in short, when the time is right for them.

Under this approach, it is not difficult to understand why the right to use contraceptives, first recognized in *Griswold v. Connecticut*[98] in 1965, and extended in *Eisenstadt v. Baird*[99] and *Carey v. Population Services International*,[100] would qualify as a privilege or immunity of citizens of the United States, not only for legislatures, but for courts as well. A social movement for contraceptive rights had been ongoing throughout most of the twentieth century, and had eventually convinced most of the country, as evidenced by almost universal decriminalization. By 1965 when *Griswold* was decided, only one state, Connecticut, still outlawed the use of contraceptives, and the law was only fitfully enforced.

This approach to privileges and immunities sees the scope of the Privileges or Immunities Clause as dynamic, depending on the emerging customs, expectations and traditions of the American people as a whole. The clause's "declaratory" nature invites individuals throughout the country to press for reforms at the state, local, and national levels to protect rights that they believe are due to them as citizens and to explain to and convince their fellow citizens why these rights are so important. When enough people around the country have been convinced, and enough legal protections have spread throughout the country, federal courts are entitled to pronounce that these rights have become expected and customary rights of American citizens, and therefore should be binding on the small remainder of the states that have become outliers. Rights become privileges and immunities of citizenship as a result of a period of constitutional politics in which the people speak through protest and discussion and legal reform, arguing that certain rights are important basic protections of American citizenship and winning over a large number of people to their views. At the time the Fourteenth Amendment was ratified, people understood that these rights included

framed arguments as constitutional claims given the particular problems they faced).

98. 381 U.S. 479 (1965).

99. 405 U.S. 438 (1972).

100. 431 U.S. 678 (1977).

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basic access to the legal system and basic rights to make contracts and own property. The recognition that all human beings have a right to their liberty, and to the ownership of their labor was the result of a long debate over human rights in the antebellum period, bringing together Jacksonian, free soil, and antislavery ideas among others.[101] That is why the framers of the Fourteenth Amendment believed that the Black Codes were inconsistent with American citizenship. But as times change, and through sustained contestation by social and political movements and their opponents, new privileges and immunities can enter the Pantheon of American citizenship. The Privileges or Immunities Clause protects unenumerated rights whose pedigree is established elsewhere in the political system—through sustained argument, debate, and political activity.

This approach to privileges and immunities of citizenship makes sense of much of the Court's "substantive due process" doctrines, which developed after the Court improperly truncated the Privileges or Immunities Clause. These doctrines developed in response to social and political demands for rights over a sustained period of time that drew on existing traditions of practice, or that eventually convinced large numbers of people in many different parts of the country. As the sexual revolution proceeded, more and more people assumed that basic elements of sexual autonomy were guarantees of citizenship. As we have seen, this approach makes sense of *Griswold v. Connecticut*. In 1987 Judge Robert Bork's confirmation to the Supreme Court failed in part because he refused to accept that the decision in *Griswold* protected a basic right of American citizens.[102] By the time Justice Samuel Alito was confirmed to the Supreme Court in 2006, it was quite clear that support for *Griswold* was part of the "constitutional catechism" that all Justices had to recite in

101. NELSON, *supra* note 30, at 13–40, 64–90; WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760–1848, at 190–93, 206–07, 218–20, 274–75 (1977); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 435–36, 438–40 (1973); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73–99 (1970). *See also* JACOBUS TENBROEK, EQUAL UNDER LAW 51–55, 66–93, 117–20 (1965); JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 62–64, 77 (1983); CURTIS, *supra* note 62, at 42–56; ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 20–30 (1994).

102. At the very least, Bork's opponents believed that his opposition to *Griswold* helped undermine his case. *See* Lackland H. Bloom, *Twenty Fifth Anniversary of* Griswold v. Connecticut *and the Right to Privacy: The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511, 542–43 (1989).

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order to be confirmed.[103] The declaratory theory of the Privileges or Immunities Clause also makes sense of the Court's 2003 decision in *Lawrence v. Texas*.[104] By 2003, only thirteen states criminalized same-sex sodomy, and the law was almost never enforced in criminal prosecutions. Instead, it was used to deny homosexuals rights to employment, adoption, and other civil privileges.[105] As a result, it also acted as a contemporary form of class legislation that singled out a group and declared its expressions of love and intimacy criminal. A sustained social movement for reform changed public attitudes and made heterosexuals recognize that homosexuals were individuals who were equally citizens and therefore deserved the same rights of sexual intimacy that they had long enjoyed. This changed the social meaning of sodomy laws and hence their constitutional meaning with respect to the principles underlying the text of the Fourteenth Amendment. This analysis also shows why the issue presented in *Lawrence* presented a more difficult case for courts in 1986 when *Bowers v. Hardwick*[106] was decided. In 1986, only half of the country had abolished its same-sex sodomy laws, although the trend was toward decriminalization.[107]

Abortion rights, however, present a more complicated story. The Supreme Court decided *Roe* before most states had recognized abortion rights. In 1960, all states criminalized abortion with very few exceptions. In the next decade, however, in part because of the sexual revolution and the second wave of American feminism, attitudes toward abortion changed dramatically, and by 1972 a significant majority of Americans—including American Catholics—believed that the question of abortion should be left to the woman and her doctor.[108] At the same time a wide range of prominent organizations—ranging from the AMA to the YMCA to the ABA to a Presidential Commission—called for reform of the nation's abortion laws.[109] Nevertheless, by January 1973, when *Roe* was decided, only thirteen

103. Jack M. Balkin, The Constitutional Catechism, Balkinization, http://balkin.logspot.com/2006/01/constitutional-catechism.html (Last visited June 26, 2006).

104. 539 U.S. 558 (2003).

105. *See id.* at 572.

106. 478 U.S. 186 (1986).

107. *See Lawrence*, 539 U.S. at 572.

108. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 539 (1994) (noting a January 1972 Gallup poll stating that fifty seven percent of Americans, and fifty four percent of American Catholics, agreed that the abortion decision should be left to a woman and her doctor).

109. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 184 (1991).

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states had passed abortion reform statutes, which gave doctors more leeway to perform abortions in cases where life or health was threatened, and only four states had passed abortion repeal statutes that left the decision up to the woman and her doctor in the first half of pregnancy.[110] State laws on the books had not caught up with the direction of public opinion. Thus, when *Roe* was decided, the Court imposed constitutional rules that had been adopted by only four states out of fifty. In 1973, when *Roe* was decided, the right to abortion was not a privilege or immunity of national citizenship, at least under the declaratory theory.

It is possible that a wave of abortion repeal statutes might have swept the country in the 1970's, but we will never know because the Supreme Court interrupted the trend. Both David Garrow and Gene Burns have argued, to the contrary, that the pro-life movement was rapidly gathering steam even before *Roe* and might have stopped or at least greatly slowed the pro-choice movement's advance in state legislatures.[111]

When the Court decided *Roe* in 1973, the right to abortion had not yet gained the status of a privilege or immunity of national citizenship, at least as judged by the pace of abortion reform legislation. A different question is whether it has become one in the past thirty years. If *Roe v. Wade* were overruled today, it is likely that an overwhelming majority of the states would protect some kind of right to abortion—perhaps less than twelve would outlaw abortion in virtually every case.[112] And public opinion polls regularly show strong public resistance to overturning *Roe v. Wade*.[113] That suggests that most of the public now

110. *Id.* at 184. Rachel Benson Gold, *Lessons From Before* Roe*: Will Past Be Prologue?*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Mar. 2003, at 8, *available at* http://www.guttmacher.org/pubs/tgr/06/1/gr060108.html.

111. GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION AND CULTURAL PLURALISM IN THE UNITED STATES 214-228 (2005) (shift from medical frame to moral frame, exacerbated by associations between abortion and the feminist movement, limited the success of abortion repeal statutes by the early 1970s); David Garrow, *Abortion Before and After* Roe v. Wade*: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999) (arguing that the 1970 New York liberalization law, and not *Roe v. Wade*, energized the right-to-life movement).

112. Both pro-life and pro-choice groups, for different reasons, have incentives to maximize the number. Shortly before the 2004 elections, the Center for Reproductive Rights estimated that 21 states might outlaw abortion if *Roe v. Wade* were overturned. ERICA SMOCK, CTR. FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? (2004), http://www.crlp.org/pdf/bo_whatifroefell.pdf.

113. In a CNN/USA Today/Gallup Poll. taken from Jan. 20-22, 2006, 66 percent of the public opposed overturning *Roe v. Wade*, up from 63 percent in a poll taken from July 7–10, 2005. *See* PollingReport.com: An independent, nonpartisan resource on trends in American public opinion, http://www.pollingreport.com/abortion.htm (last visited June 19, 2006).

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regards a basic abortion right as among the guarantees of citizenship. But if so, critics might respond, it is in part because of the Court's bootstrapping, making the right to abortion the legal status quo and thereby acclimating the country to it. We cannot be sure how much of current public acceptance of abortion rights is due to the Court's early decision and how much is due to the success of social movement activism that changed the minds of most Americans throughout the country.

One might respond, however, that in the case of a controversial opinion like *Roe*, this "bootstrapping" effect is greatly exaggerated. Political scientists have long pointed out that the Court does not oppose popular majorities over a sustained period, particularly on controversial subjects like abortion.[114] Despite over thirty years of pro-life mobilization, the political dominance of the Republicans as a pro-life party, the election of several pro-life presidents, and decades of Republican judicial appointments, the basic right to abortion is still standing. Instead of being completely overturned, the original *Roe* decision was cut back in the *Casey* compromise, a compromise which, not at all coincidentally, also better reflected public opinion.

Although one might argue that the decision in *Roe* unfairly helped foster public support for abortion rights, it is equally possible, perhaps even likely, that the Court's early decision actually hardened and increased public opposition to abortion. The Court's decision in *Roe* galvanized an already emerging right-to-life movement and gave it a highly visible target for populist reaction. Political entrepreneurs saw that they could form new coalitions of groups previously at odds organized around a common opposition to abortion rights.[115] If the Court had proceeded more slowly, and articulated the scope of the right only over many

114. The canonical statement is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957), who noted that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States," *id.* For later versions, see Balkin & Levinson, *supra* note 26, at 1060, TERI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 80–132 (1999). Mark Graber's gloss on Dahl suggests that abortion may be an issue where many politicians are more than willing to blame the Court and make it take the political heat in order to preserve majority status. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) ("[J]ustices . . . declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute . . . [and] prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would not address.").

115. Robert C. Post and Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 43 HARV. C.R.-C.L. L. REV. 373 (2007).

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years, it would not necessarily have forestalled the growth of a powerful pro-life movement, but it might have helped produce a political compromise that better meshed with developing trends in public opinion. Possibly the Court's early intervention caused both types of effects with respect to different parts of the population. Some people came to accept abortion rights because the Court protected them, while others came to oppose them for the very same reason.

In sum, even if the right to abortion was not a privilege or immunity of citizenship in 1973, we can make a far stronger case for it thirty years later. First, there is a strong substantive argument for why abortion rights are basic rights of citizenship, which shares much in common with the argument under the Equal Protection Clause. Second, there is also a very strong case that contraceptive rights are protected under the Privileges or Immunities Clause. Finally, there is the public's stated desire not to have *Roe* overturned. Together, these elements help make the case for protecting abortion rights today under the Privileges or Immunities Clause. That is not a necessary conclusion—abortion rights are already guaranteed by the Equal Protection Clause—but this interpretation would harmonize ideas behind the two clauses. If criminalizing abortion prevents women from enjoying full and equal citizenship, then it would seem to follow that a right to abortion is necessary (albeit not sufficient) for women to enjoy equal citizenship. But if a right is necessary to enjoy equal citizenship, then it must be a basic right of citizenship and so, in the long run at least, it should eventually be protected under the declaratory model of the Privileges or Immunities Clause.

VI. THE CONSTITUTIONAL STATUS OF THE UNBORN

The case for a right to abortion is hardly complete. We must still consider whether the unborn have their own constitutional rights that trump those of the mother. Are the unborn, throughout their development, from fertilized ovum to unimplanted blastocyst to embryo to fetus, persons within the meaning of the Due Process and Equal Protection Clauses? As Justice Blackmun pointed out in *Roe* itself, if the unborn are constitutional persons, the argument for a constitutional right to abortion collapses.[116] Indeed, as I shall point out in a moment, states might be

116. Roe v. Wade, 410 U.S. 113, 156 (1973).

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constitutionally prohibited from permitting abortions under the Due Process and Equal Protection Clauses.

None of the Justices in *Roe v. Wade*—whether in the majority or the dissent—maintained that the unborn are constitutional persons.[117] In fact, none of the Justices in all of the abortion cases since *Roe v. Wade*—no matter how opposed to recognizing a constitutional right to abortion—has ever contested *Roe*'s holding about the personhood of the unborn.[118]

The word "person" means now what it meant in 1868—an individual human being.[119] A fertilized ovum has human DNA and, if it implants and is not miscarried, will eventually grow into a human being who is an individual. But the fertilized ovum is not yet an individual. Although the text of the Constitution refers to the word "person" at several points, by and large these references do not make sense when applied to fertilized ova, blastocysts, embryos or fetuses. For example, immediately before the Fifth Amendment's Due Process Clause, the Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[120] It is hard to see how a fetus could be compelled to testify against anyone, much less against itself.

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117. *See id.* at 177 (Rehnquist, J., dissenting) ("The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."); *see also* Doe v. Bolton, 410 U.S. 179, 222 (White, J., dissenting) ("This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.").

118. Instead they have argued that the issue of abortion should be left to the political process, a position that is inconsistent with constitutional personhood for the unborn and with a constitutional right to abortion. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and Thomas, JJ.) ("The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."); *id.* at 982 ("The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. . . . There is, of course, no way to determine that as a legal matter; it is, in fact, a value judgment.").

119. 11 OXFORD ENGLISH DICTIONARY 597 (2d. ed. 1989) ("An individual human being; a man woman or child. (In earliest use, the human being acting in some capacity, personal agent or actor, person concerned.)"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1686 (1993) ("an individual human being.").

There is also a specifically legal definition of "person" which, in this context, is almost perfectly circular: "A human being (*actual person*) or body corporate (*artificial person*) having rights and duties recognized by law." 11 OXFORD ENGLISH DICTIONARY at 597. The question in this case, of course, is whether the embryo or fetus *has* constitutional rights recognized at law.

120. U.S. CONST. amend. V.

Nor does the text of the Fourteenth Amendment compel the view that embryos or fetuses are persons. The first clause says that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Does this mean that there are "persons" who are not born and who are therefore not eligible to be citizens? Or, more plausibly, does the amendment simply assume that all persons are born somewhere, and that those born in the United States (or who are subsequently naturalized) are citizens? Section 2 of the Fourteenth Amendment, written at the same time as Section 1, says that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." [121] This language does not suggest that embryos and fetuses would count for purposes of enumeration.[122] As discussed above, the key principle underlying the text of Fourteenth Amendment is the principle of civil equality—all persons are equal under the law—born equal, we might say—and therefore enjoy basic rights accorded to all free persons. Hence the state may not discriminate against them due the circumstances of their birth, for example, that they were born black or white, male or female, rich or poor. Important as this principle is, it says nothing about the unborn.[123]

The original expected application of the Fourteenth Amendment is not by itself controlling; it is merely evidence of how to apply original meaning. But it also points against recognizing fetuses as persons. The common law distinguished between abortions before and after quickening—the point when a fetus's movements could be felt by a pregnant woman, usually between the fourth and fifth month. Abortion was a felony after

121. U.S. CONST. amend. XIV, § 2.

122. Justice Blackmun added in *Roe* that "[w]e are not aware that in the taking of any census under [the Apportionment Clause of Article I, Section 2], a fetus has ever been counted." 410 U.S. at 157 n.53.

123. The argument is not by itself conclusive. Corporations are persons under the Fourteenth Amendment, but they are not counted for purposes of the census. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 775 (1999). What reinforces the textual argument made above are the legal consequences of holding that fertilized ova, embryos, blastocysts and fetuses have the same rights as born persons. As discussed *infra*, this would mean that the Due Process and Equal Protection Clauses should apply with equal force. The alternative and, I think, better view is that although the unborn are not themselves constitutional persons, the state has important interests in their potential to become persons, as well as interests in the value of life in general; under this interpretation states could treat the unborn differently than born persons without running afoul of the Fourteenth Amendment.

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quickening, but not before.[124] This distinction would make little sense if the unborn were persons from the moment of conception; there is no good justification for imposing lesser penalties (or no penalties at all) for ending the life of human beings too young to kick. Around the time of the Civil War, many states were in the process of changing their abortion laws to criminalize abortions throughout the pregnancy, and by 1868 most states had such laws.[125] But there is no evidence that the framers or adopters of the Fourteenth Amendment sought to enact a principle that would alter common law views about the unborn. Moreover, some of the abortion statutes passed during this period—like the Texas statute at issue in *Roe v. Wade*, enacted in 1854[126]—criminalized abortions performed on women but did not punish women who self-aborted. This treatment of the unborn, too, would make little sense if the unborn were regarded as persons. (It would, however, make some sense if the point of abortion laws was to protect women from botched abortions by incompetent doctors).

Finally, arguments from consequences support the arguments from text and history. If the unborn are persons, they are entitled to equal protection of the laws. Abortion then becomes the premeditated killing of a person. This would not leave abortion regulation to individual states, as some critics of *Roe* have advocated. Rather, it would prohibit virtually all abortions except those necessary to save the mother's life.[127] States would have to treat abortions the same way they treat other premeditated killings. At least where death or serious bodily harm to the mother is not at risk, there is a fairly strong argument that criminal laws that criminalize ending the life of born persons—but not

124. *See Roe*, 410 U.S. at 132–36 and sources cited at nn. 20–28.

125. *Roe*, 410 U.S. at 175 (Rehnquist, J., dissenting).

126. Texas Laws 1854, c. 49 § 1, set forth in 3 Gammel, Laws of Texas, 1502 (1898). The statute was modified into what is essentially the present statute in 1857. See Texas Penal Code of 1857, Arts. 531–536; Paschal's Laws of Texas, Arts. 2192–97 (1866); Texas Rev. Stat. Arts. 536–41 (1879); Texas Rev. Crim. Stat., Arts. 1071–76 (1911).

127. The issue is even more complicated than this. States can certainly allow for self-defense, even against so-called "innocent attackers" who don't realize the threat they pose to others. But criminal law usually requires a reasonable belief in imminent death or serious bodily harm before a person may use deadly force. Applying the imminence standard in the case of abortion might mean waiting until it was absolutely necessary to perform the procedure, when the fetus was well along in its development. As a result, doctors might be tempted to exaggerate the imminence requirement in order to permit the abortion earlier. But if so, procedural due process should require that the embryo or fetus be entitled to a judicial hearing represented by counsel for the fetus before abortions to save the mother's life would be permitted.

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"persons" *in utero*—would violate "equal protection of the laws" in the most literal sense.

Some states in the pre-*Roe* era (like Georgia, which adopted the Model Penal Code) allowed abortions in cases of rape or incest. But if the unborn are persons under the meaning of the Equal Protection and Due Process Clauses, it would be very difficult to justify exempting a person's murder from criminal punishment merely because the victim's life arose out of coerced sex or an incestuous union. Even before *Roe* states generally did not punish abortion as severely as they did murder, some did not punish abortion at all before a certain point in the pregnancy, and some, like Texas, did not punish the mother but only the doctor who performed the abortion. All these laws would be constitutionally suspect if the unborn are persons guaranteed the equal protection of the laws. It might also become difficult to explain why fertility clinics could discard unused embryos left over from in vitro fertilization processes, even with the biological parents' permission. Normally, parents who order their born children be destroyed by third parties can be prosecuted for murder.

The Constitution does not require that all murder be treated the same. States can punish negligent homicide and murder committed in the heat of passion less severely than other forms of murder. But abortion involves a premeditated act with the specific intent of ending the life of the embryo or fetus. Premeditated homicide is the most severely punished in virtually all jurisdictions. To be sure, some people do believe that abortion is nothing more than cold-blooded murder. But most Americans—even those with moral qualms about abortion—do not agree. For example, they may want to punish the doctor but not the mother, even though it is the mother who seeks and pays for the abortion. That is a very different attitude from the one they would have toward a person who pays for a contract killer. They think there is a difference—in terms of who should be punished and what the punishment should be—between a woman who has a first-term abortion and a person who commits first-degree murder. We should not interpret the Constitution to forbid that distinction.

VII. THE TWO RIGHTS TO ABORTION

Nothing I have said so far tells us how the right to abortion should be enforced, or how courts should accommodate the

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state's interests in protecting potential human life.[128] If there is a constitutional right to abortion, it hardly follows that it can be exercised with equal freedom at any point in the pregnancy. Courts must create judicial constructions if they want to implement the constitutional right. Reasonable people can disagree about the best way to do this. The Supreme Court's original attempt in *Roe*—the trimester system—drew considerable criticism for being legislative and ad hoc. In this section I try to offer an alterative approach that is more closely connected to the reasons why the right to abortion deserves constitutional protection. I believe that my approach would have been better if adopted initially. However, the Court's decision in *Casey*, which rejected the trimester system, moved the doctrine toward an alternative construction that, while imperfect, is more acceptable.

When the Court first announced the right to abortion in *Roe v. Wade*,[129] it offered a fairly complicated trimester formula: In the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[130] In the second trimester, "the State . . . may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."[131] The second trimester, the Court explained, ended roughly at the point of viability, the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[132] After viability, and throughout the third trimester, the State's interest in potential human life becomes sufficiently compelling that "the State . . . may, if it chooses, regulate, and even proscribe, abor-

128. In his response to this article, Mitch Berman points out that even if the right to abortion is consistent with the Constitution's original meaning, and even if the unborn are not persons with their own independent constitutional rights, states might still legally prohibit abortions (except perhaps those necessary to save a woman's life) if they could show that (1) protection of unborn life is a compelling state interest from the moment of conception and (2) preventing all abortions is narrowly tailored to vindicate that interest. Mitchell N. Berman, *Originalism and Its Discontents (Plus A Thought Or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007). I have tried to demonstrate why states cannot successfully make this showing in WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 3, at 47–52, and I offer another version of the argument in Balkin, *supra* note 4, at 522–27. My goal here is more modest: to show that the constitutional right to abortion is consistent with the Constitution's original meaning. The argument that follows assumes that although states cannot ban all abortions, they nevertheless have important interests in unborn life that would justify banning at least some abortions.

129. 410 U.S. 113 (1973).

130. 410 U.S. at 164.

131. *Id.*

132. *Id.* at 160.

tion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[133]

The joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[134] jettisoned *Roe*'s trimester system, and substituted its own doctrinal framework, now dividing the term of pregnancy into two parts: Before viability states could adopt measures designed "to persuade the woman to choose childbirth over abortion," or to promote maternal health, as long as they did not impose an "undue burden" on the woman's ability to obtain an abortion. After viability, states could "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[135]

Note that in both *Roe* and *Casey*, viability marks the boundary between the time before which states may regulate abortion only in limited ways and the time after which they may almost completely prohibit it. Nevertheless, in both *Roe* and *Casey* the Court insisted that states must allow abortions after viability when they are necessary to preserve the mother's life or health. Although the Court did not say this directly, it follows that abortions must also be available before viability when necessary to preserve the mother's life or health.

More than a few critics have suggested that the complex formulas in *Roe* and *Casey* would have been more appropriate coming from legislatures than courts. One reason for that complexity is that the Court views the question in terms of time. In doing so, it conflates two different rights to abortion that women might exercise for different reasons. This becomes clear if we break the *Roe* and *Casey* formulas down into their component parts, and focus not on the *time* during the pregnancy when the state may regulate in various ways, but on the *reasons* why a pregnant woman seeks the abortion. Sometimes women seek abortions to avoid a risk to their life or health. Sometimes they seek abortions because they do not want to become the mother of a new child. And, of course, sometimes they do so for both reasons.

To understand how courts should enforce the right to abortion, we should recognize that it is actually two rights. The first is a woman's right not to be forced by the state to bear children at risk to her life or health. The second is a woman's right to decide

133. *Id.* at 165.
134. 505 U.S. 833 (1992).
135. 505 U.S. at 879.

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whether or not to become a mother and assume the obligations of parenthood. When a woman becomes pregnant, the first right is the right to protect her bodily integrity—her life and her health. The second right is a right against state-enforced compulsory motherhood; it is the right of a woman—as opposed to the state—to decide whether she will take on the life-altering set of responsibilities that come with being a parent. These two rights derive from the constitutional arguments for why criminalization of abortion is class and caste legislation.[136]

The first right to abortion is not time-limited—it continues throughout pregnancy. Women should always have the right to preserve their life or health when it is threatened by the continuation of a pregnancy. The second right, however, need not continue throughout pregnancy; it requires only that women have a reasonable time to decide whether to become mothers and have a fair and realistic opportunity to make that choice. The state's interest in protecting unborn life is at its strongest in the later stages of pregnancy. But letting states vindicate this interest when it is strongest is not necessarily inconsistent with the second right to abortion. When a woman's health and life are not at risk, the second right requires that women have a right to a fair and realistic opportunity to choose whether or not to become a mother, and in most cases this choice can usually be made in the earlier stages of a pregnancy. In fact, about 88 percent of all abortions occur in the first twelve weeks of pregnancy (roughly the end of the first trimester). Only 7 percent occur between weeks thirteen and fifteen, and only 4 percent occur between weeks sixteen and twenty. Twenty weeks is about halfway through the average pregnancy. Only 1 percent of abortions occur after that point, and only a vanishingly small number of abortions occur past twenty four weeks, the point of viability.[137]

Separating out these two rights also makes clear that courts face different problems in articulating and protecting them. Imple-

136. See Jack M. Balkin, "Judgment of the Court," *in* WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 3, at 41, 45 (arguing for two different rights to abortion). Recently Eugene Volokh has offered an interesting libertarian take on the two rights. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1824 (2007). He believes *Roe* and *Casey* support a more general right of individuals to engage in medical procedures necessary to protect their lives. *Id.* at 1824–28. This right of medical self-defense is both broader and narrower than what I call the first right to abortion. It is narrower because it focuses on protection of life and not merely health. The right of medical self-defense is broader because it is not specifically connected to reproductive rights, or, for that matter, to gender equality.

137. THE GUTTMACHER INSTITUTE, FACTS ON INDUCED ABORTION IN THE UNITED STATES (2006), www.guttmacher.org/pubs/fb_induced_abortion.html.

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menting the first right does not require courts to draw lines based on the progress of the pregnancy; rather it primarily concerns how much discretion legislatures must give doctors in determining whether a woman faces a genuine risk to her life or health that justifies exercising the first right. In *Roe* and *Casey* the Court held that the test was one of "appropriate medical judgment."[138]

The second right gives women a reasonable time to decide and a fair and realistic opportunity to choose whether to become mothers; it has proved more difficult for courts because the right need not continue throughout pregnancy, but will give way at some point to the state's increasingly powerful interest in protecting potential human life. What constitutes a reasonable time and a fair and realistic opportunity to choose combines a number of different factors. As noted above, it is surely concerned with the relative developmental state of the fetus. But equally important, it is concerned with the question of what it is reasonable to expect of women who are forced to make one of the most difficult and heart-rending choices in their lives. A reasonable time to decide requires that a woman has enough time to discover that she is pregnant, talk to people she trusts, decide what to do, locate a physician, arrange a time to visit the physician (which may require taking time off from work and arranging child care for other children), make excuses or dissemble to family, friends and employers to explain her absence, travel for the initial consultation, and then make another set of arrangements to go back for the procedure if necessary.

The amount of time necessary may take longer for poor women, women in rural areas, or women in states that impose a series of procedural obstacles that effectively limit the number abortion providers in the state or that impose waiting periods. One might expect that states would prefer that women who choose to have abortions carry them out as early in the pregnancy as possible. However, abortion regulations like waiting periods may require multiple trips to the doctor and perversely increase the amount of time it takes to make the decision and carry it out, thus causing women to seek abortions later in the pregnancy.[139]

138. *Roe*, 410 U.S. at 164-165; *Casey*, 505 U.S. at 879.

139. The practical effect of post-*Casey* abortion regulations has been to protect the right of affluent and well-connected women to choose abortions, while allowing states to limit the effective rights of poor women, younger women, and women in rural areas because they are easiest to deter. *See* MELODY ROSE, SAFE, LEGAL AND UNAVAILABLE: ABORTION POLITICS IN THE UNITED STATES 102–20 (2007). In effect, *Casey* has given states far more leeway to compel motherhood on the poor than on the rich. This is perverse given the purposes of the second right to abortion. Precisely because these women

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Minor women might need a longer time to decide, because they may be unable or unwilling to accept the fact of their pregnancy, because they may need guidance from parents and other adults in their lives, or because, in particularly unfortunate circumstances, they may need time to approach a court for a judicial bypass. In addition, some severe birth defects may only be discoverable later in the pregnancy.

In *Roe* and *Casey*, the Court chose the point of viability as the period at which the second right to abortion ends. That line is somewhat arbitrary; Justice Blackmun's original idea in *Roe* was to draw the line at the end of the first trimester, but other Justices pointed out that this would not give some women—particularly poor women—sufficient time to decide, and so Blackmun eventually settled upon the end of the second trimester.[140] But even this factor is arbitrary and subject to changes in medical technology. In *Casey*, the Court noted that by 1992, developments in neonatal care had pushed the average point of viability back from 28 weeks in 1973 to 23 or 24 weeks.[141]

Despite these objections, the Court in *Casey* retained the viability rule first announced in *Roe*, arguing that "there is no line other than viability which is more workable."[142] It offered two substantive justifications for its choice: First, "viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can, in reason and all fairness, be the object of state protection that now overrides the rights of the woman."[143] Second, drawing the line at viability "has, as a practical matter, an element of fairness. In some broad sense, it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[144] These arguments suggest that the Court thought it was making its own independent determination of what constituted a reasonable time for women to decide.

Perhaps the Court was ultimately correct that a uniform line should be drawn at viability, regardless of the age or poverty of

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have fewer resources, the burdens of compelled motherhood—and the derailing of lives that comes with it—may be far more significant for them. *Casey*'s "undue burden" test is flawed to the extent that it protects the second right to abortion for only a segment of American women.

140. GARROW, *supra* note 108, at 580–85.

141. *Casey*, 505 U.S. at 860.

142. *Id.* at 870.

143. *Id.*

144. *Id.*

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pregnant women or the different circumstances that different women face. But it does not follow that *the Court* should have drawn the line, at least in the first instance. The issue of what is a reasonable time to decide combines a number of different factors and is inherently legislative. For example, legislatures might decide to extend the time for women in special circumstances in ways that would be inappropriate for courts. Instead of drawing its own line, the Court should have simply announced that women had certain basic rights—a right to preserve life and health and a right to a reasonable time to decide whether to become a parent, and then leave it to legislatures to balance the various considerations of fetal development, women's practical abilities, and the different obstacles faced by different women in different situations.

That would not mean that courts would have nothing to say on the matter. They would eventually decide whether state legislatures had met their constitutional obligations. The first right is relatively straightforward: legislatures would have to allow for abortions whenever life or health was threatened. The purpose of the second right is to give pregnant women a fair and realistic opportunity to decide whether or not to become mothers. Hence legislatures rewriting their abortion laws would have to demonstrate that their statutory scheme had provided such a fair and realistic opportunity.

The approach I advocate is *discourse shaping*—it demands that the arguments and justifications a legislature offers to support a law's constitutionality respond to particular constitutional goals and concerns that a court identifies. In this case, it requires legislatures to justify their abortion regulations in terms of how they affect women's practical equality in civil society and their practical ability to choose whether to become mothers, rather than solely in terms of the developmental stage of the fetus. If courts merely struck down existing abortion laws and demanded that legislatures passed new ones, legislatures might make their decisions based on pictures of fetuses. But if courts tell legislatures that they must justify the lines they draw based on whether they provide women a reasonable opportunity to decide whether to become mothers, they will have to organize their discussions and their justifications around the choices and obstacles that real women face. Courts would then decide whether those justifications were sound according to the basic constitutional principles they laid out in their original opinion.

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There is a rough analogy between my "discourse shaping" approach and the Vermont Supreme Court's 1999 decision in *Baker v. State*,[145] which held that the Vermont Legislature had a "constitutional mandate" under the state's constitution to find a way to give same-sex couples the "same benefits and protections afforded by Vermont law to married opposite-sex couples."[146] The *Baker* court explained the constitutional principles that the legislature had to comply with, but it left appropriate enforcement of those constitutional principles to the legislature in the first instance, noting that the legislature could extend marriage rights to same-sex couples or create a form of "domestic partnership" with similar rights and benefits. In response, the legislature created the nation's first civil unions law. By inviting legislative participation and innovation in enforcing constitutional guarantees, the Vermont Supreme Court diffused much of the political backlash that might have flowed from its groundbreaking and controversial decision. By contrast, when the Massachusetts Supreme Judicial Court held that gays were entitled to marry in *Goodridge v. Department of Public Health*,[147] it refused to give the state legislature any leeway in enforcement.[148] Although the Massachusetts Legislature ultimately complied with the court's decision, the *Goodridge* case quickly became identified—far more than the *Baker* decision in Vermont—with courts imposing controversial solutions on majorities. Thus, it may have created a far more powerful backlash.

My discourse shaping approach makes even fewer demands on the legislature than the *Baker* court, because it does not specify when the cutoff point for abortions must take place. It merely requires that legislatures make findings about what period of time is sufficient to give pregnant women a fair and realistic chance to end their pregnancies. It brings the legislature into the process of articulating constitutional guarantees and therefore gives them a sense of democratic responsibility and ownership for the result.

This approach is not "minimalist" in Cass Sunstein's sense of the word. Sunstein has argued that courts should rule nar-

145. 744 A.2d 864 (1999).

146. *Id.* at 886. The New Jersey Supreme Court recently adopted a similar solution. Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (giving legislature 180 days to amend the marriage statutes or enact a statutory structure that afforded committed same-sex couples the same rights of married couples.). On December 21, 2006, the New Jersey state legislature responded by passing a civil union act, New Jersey Public Law 2006, c.103.

147. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

148. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

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rowly on constitutional questions wherever possible and they should be reluctant to give controversial substantive reasons for their decisions, hoping instead to ground doctrine on reasons that most people can agree to.[149] Sunstein believes that by proceeding in this manner courts can make modest progress in promoting constitutional values and catalyze legislative protection of constitutional rights without generating a counterproductive political reaction.[150]

I agree that these are worthy goals but doubt that minimalism is always the best method. Judges do not have to write minimalist opinions to respect democratic processes or to avoid a backlash. To the contrary, giving a legislature guidance about what constitutional principles are at stake may be a better way of facilitating a legislative solution that is both constitutionally and democratically acceptable. If the court says nothing, or very little, about what principles guide its decision, and simply throws the issue back to legislatures without explanation, legislatures may respond with solutions that courts must repeatedly strike down, and *that* experience may well exacerbate political tensions and lead to backlash effects. Instead of hiding the ball in a minimalist decision, courts should explain why the constitutional rights they seek to protect are important, and what they will be looking for when they review the legislature's work.

Under my approach, the Court would have done something closer to what it did in the death penalty cases, which were decided around the same time.[151] It would strike down old abortion laws and require the states to create new ones guaranteeing the two rights to abortion. Although the right to life movement was gathering steam well before *Roe*,[152] there was still strong sentiment for abortion reform throughout the country. In the political

149. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1996).

150. *Id.* at 59 (Judicial intervention in highly controversial cases "may produce an intense social backlash, in the process delegitimating itself as well as the goal it seeks to promote.").

151. In *Furman v. Georgia*, 408 U.S. 238, 239–240 (1972), the Supreme Court struck down the nation's death penalty laws because they were so arbitrary as to violate the Eighth Amendment's prohibition against Cruel and Unusual Punishments. The Court detailed what made the implementation of the death penalty constitutionally infirm, and then waited for states to pass new laws. Then in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court began a long process of selectively upholding and striking down various death penalty laws and procedures, moving in rough coordination with the public's changing views about the death penalty. Although the Court has hardly escaped criticism for its death penalty jurisprudence, it has not generated the same degree of backlash as the Court's abortion decisions.

152. BURNS, *supra* note 111, Garrow, *supra* note 111.

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climate of the early 1970's, most states would probably have guaranteed a basic right to abortion perhaps averaging around twenty weeks, halfway through the term of a normal pregnancy, along with a host of various regulations and exceptions. For example, in February 1972, almost a year before *Roe* was decided, the American Bar Association had advocated repeal of abortion laws up to the first twenty weeks, midway between the end of the first and second trimesters.[153] We should not overestimate the degree of liberalization that the 1970's would have produced without *Roe*, particularly as the right-to-life movement energized and abortion rights became increasingly identified with feminism and the ERA. New abortion laws would probably not have given women guarantees as extensive as those which originally appeared in *Roe* and *Doe v. Bolton*.[154]

After many states passed new abortion laws and created legislative records justifying them, the Supreme Court would be able to evaluate legislative decisions and fix upon a minimum set of standards for outlier jurisdictions. Because it would be reviewing comprehensive schemes that legislatures themselves had devised, the Court would be exercising less of a traditionally legislative and more of a traditionally judicial role. The legislative decisions would also possess a greater democratic legitimacy than a one-size-fits-all requirement imposed by a court. This would not end all controversies over abortion, but it would have given the abortion right a firmer, more democratic grounding than the actual decision in *Roe* did.

To be sure, a small number of states would have insisted on virtually no abortion rights, or would have made spurious determinations that a very short time—say three weeks—was all the time that women needed to decide. However, precisely because these states would be outliers, it would be far easier for the Court to hold their restrictions unconstitutional. Instead of the Court choosing its own line and then imposing it on all of the states simultaneously, the Court could point to the laws created by the majority of states as evidence that these outlier states were not protecting women's rights adequately. In addition, it would be far easier for the Court to show that these legislatures had not seriously engaged with the substantive guidelines the Court set out in its initial opinion—to give women a right to pro-

153. *See* Roe v. Wade, 410 U.S. 113, 146–47 & n.41; GARROW, *supra* note 108, at 539.

154. 410 U.S. 179 (1973) (striking down parts of Georgia's abortion law).

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tect their health and life throughout the pregnancy and give women a reasonable time and a fair and realistic opportunity to decide whether or not to take on the obligations of motherhood.

Finally, by leaving the length of the second right up to legislatures in the first instance, the Court would, ironically, have empowered defenders of abortion rights far more than it did by imposing a single national solution in *Roe v. Wade*. *Roe's* trimester formula—which effectively imposed a model abortion statute on the entire country—simultaneously gave pro-choice forces a enormous victory and seriously demobilized them. Faced with mounting pro-life opposition, defenders of abortion rights repeatedly diverted resources to litigation because they assumed that the federal judiciary would ultimately back them up. But if courts had guaranteed only the basic outlines of a right to abortion and left many of the details of abortion regulation open, pro-choice advocates would have been forced to devote their resources to gaining public support for abortion rights and forging political compromises that would win in legislatures and would appeal to a broad segment of the American public. Having to fight the details of abortion regulation in the political process would probably have helped secure both the democratic character and the democratic legitimacy of abortion rights.

Of course, this not what the Supreme Court did in *Roe*. Rather, it imposed a single solution to the second right to abortion in 1973. As a result, the federal judiciary has gradually been pushed toward a compromise position anyway through decades of social movement mobilization against abortion rights, through the transformation of one of the two major political parties into a pro-life party that eventually dominated American politics, and through a series of Republican judicial appointments that often put abortion rights on an insecure footing. Indeed, although the *Casey* opinion suggested that it was reaffirming the "central holding"[155] of *Roe*, it actually overturned significant elements of *Roe v. Wade* and moved toward a new judicially-created compromise. To be sure, it was not necessarily the best political settlement that pro-choice forces might have otherwise obtained: it allowed state legislatures to deny the nation's most vulnerable women—particularly poor women and women living in rural areas—their effective rights to abortion while doing little to stem the resentment and determination of pro-life forces. But

155. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860–61, 864–65, 873, 879.

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a compromise it was, nevertheless. The history of abortion law from *Roe v. Wade* onward shows the familiar lesson of American constitutional politics—the Court is part of the dominant national coalition, and no matter how much it insists that it is above everyday politics, the Supreme Court's doctrines will eventually gravitate toward the center of public opinion. The real question is on what terms it will gravitate. Given these facts, the Court could have saved itself a great deal of needless trouble, put abortion rights on more secure footing, and shown greater respect for democracy if it had engaged in a more conscious process of interaction with Congress and state legislatures over the scope of the second right to abortion.

Does this mean that the Court should now overturn the viability rule and return the scope of the second right to the states? As noted earlier, even without *Roe*, most states would probably guarantee a qualified right to abortion, but many—perhaps up to a dozen—would ban almost all abortions. That might sound promising for a the sort of approach I advocate, but unfortunately, one cannot turn the clock back to the early 1970's and start all over again. The current political structure in the United States has been produced in part because of the controversy over *Roe v. Wade*, and many judges have been appointed to the bench in significant part because of their opinions about *Roe*. Those judges who would be willing to return abortion regulation to the states at this point are the same judges who would be delighted to eliminate the constitutional right to abortion completely. It is very unlikely that, once *Roe* were overruled, and states left to design their own abortion laws, that the Supreme Court would then reinstate a national constitutional right to abortion, even if most states subsequently guaranteed some form of a right. Once the Court returned the issue of abortion to the states, it would be very hard for a future court to impose a national rule against outlier states once more. Like it or not, if one thinks that the Court was correct that there is a constitutional right to abortion (albeit for different reasons than stated in *Roe*), it is probably better to work within the *Roe/Casey* framework than to hope that by overturning it one would obtain something that better protected the constitutional rights of women. Unlike an expectation originalist, I do not think that the Court recognized a right that it should not have, and that we are stuck with that right because of reliance or *stare decisis*. The Court correctly recognized that there was a right to abortion; but its construction of how to protect that right—the trimester system—was flawed. Since then it has moved to a new construction

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that is probably the best one can do under the political circumstances produced by the original decision.

VIII. CONCLUSION

Roe v. Wade and the right to abortion have often been viewed as a controversial symbol of a "living constitution" that cuts itself adrift from the Constitution's text and history and, in the view of its critics, becomes no more than a question of contemporary politics exercised by the judiciary. This is a false portrait reflecting a false dichotomy between fidelity to the constitutional text and a living Constitution. The Constitution, and particularly the Fourteenth Amendment, was written with the future in mind. Its drafters deliberately chose broad language embracing broad principles of liberty and equality.

Fidelity to the Constitution means applying its text and its principles to our present circumstances, and making use of the entire tradition of opinions and precedents that have sought to vindicate and implement the Constitution. Reasonable people may disagree on what those principles mean and how they should apply. But the larger point about constitutional interpretation remains. We decide these questions by reference to text and principle, applying them to our own time and our own situation, and in this way making the Constitution our own. The conversation between past commitments and present generations is at the heart of constitutional interpretation. That is why we do not face a choice between living constitutionalism and fidelity to the original meaning of the text. The two are opposite sides of the same coin.

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