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Empiricizing the Equal Protection Approach to Abortion

Calvin TerBeek*

I. INTRODUCTION

Much of legal scholarship on abortion is “stultified,”¹ consisting largely of an academic parlor game that, while perhaps enjoyable for the participants, fails to advance the debate. Prominent conservative scholar Michael Stokes Paulsen tells his readers in the pages of the Yale Law Journal that at a symposium he called Akhil Reed Amar (who is apparently his friend) a “coward and a collaborator” for his views on *Roe v. Wade*,² while lambasting other well-known scholars as “persons of violence” for their pro-choice views.³ On the other side of academia’s political fence, Yale law professor Jack Balkin, in *Abortion and Original Meaning*, argues that abortion can be defended on originalist grounds.⁴ While this is, in the least, a thought-provoking piece of scholarship, others have already taken Balkin to task for (what they deem to be) his unsophisticated definition of originalism.⁵ One scholar points out that Balkin’s approach may confuse some into thinking that he is still a living constitutionalist wolf in originalist sheep’s clothing.⁶ Another recent salvo by conservative scholars John O. McGinnis and

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1. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 337 (2005) [hereinafter Friedman, *Judicial Review*] (discussing how the “central debates” of normative constitutional scholarship have grown stale).

2. See Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2040 n.2 (2006).

3. Michael Stokes Paulsen, *Dissenting Opinion, in WHAT ROE V. WADE SHOULD HAVE SAID* 196, 213 (Jack M. Balkin ed., 2005) [hereinafter Paulsen, *Dissenting Opinion*].

4. Jack Balkin, *Abortion and Original Meaning* (Yale Law Sch. Pub. Law & Legal Theory, Working Paper No. 119, 2006), <http://ssrn.com/abstract=925558> (on file with the *McGeorge Law Review*).

5. Mitchell Berman, *Originalism and its Discontents (Plus a Thought or Two About Abortion)* 2 (U. Tex. Law, Public Law Research Paper No. 117, Jan. 16, 2007), <http://ssrn.com/abstract=957630> (on file with the *McGeorge Law Review*).

6. Randy Barnett, *Underlying Principles*, 24 CONST. COMMENT (forthcoming 2007), available at <http://ssrn.com/abstract=954601> (manuscript at 10, on file with the *McGeorge Law Review*); see also Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT n.4 (forthcoming 2007), available at <http://ssrn.com/abstract=952384> (manuscript at 1, on file with the *McGeorge Law Review*) (detailing academics who propound “lefty originalism.”).

Let me be clear on this point, *Abortion and Original Meaning* is an important piece of scholarship and moves the debate forward. Moreover, the prolific Balkin, as this paper was in its final stages, released two more papers on abortion. The first urges that the right to abortion, given the challenges of the future (i.e., genetic engineering, etc.), should be lodged in the Equal Protection Clause. Jack M. Balkin, *How Genetic Technologies will Transform Roe v. Wade*, 56 EMORY L.J. 843-44 (forthcoming 2007), available at <http://ssrn.com/abstract=964508> [hereinafter Balkin, *Genetic Technologies*] (on file with the *McGeorge Law Review*). While this is a typically interesting paper from Balkin, his follow-up paper to *Abortion and Original Meaning* entitled *Original Meaning and Constitutional Redemption* (a response to critiques of *Abortion and Original Meaning*) will, I predict, fundamentally change the originalism debate in the legal academy. See Jack Balkin,

Nelson Lund—in an argument that conservative scholars have been advancing for years—is that *Roe* epitomizes “an unrepresentative and unaccountable group of Justices . . . fabricating the rights that are pleasing to them.”⁷

The scholarly skirmish over abortion, it sometimes seems, threatens to become academia’s equivalent of Harold Spaeth’s and Jeffrey Segal’s “attitudinal model,”⁸ a battle of competing jurisprudential theories informed by priors based on “ideology, temperament, and one’s general bent in constitutional [scholarship].”⁹ As the Court’s composition changes, so do the normative theories about what the Court should “do,”¹⁰ leaving one to wonder whether most constitutional scholarship is simply political in nature.¹¹ Judge Richard Posner

Original Meaning and Constitutional Redemption, 24 CONST. COMM. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987060#PaperDownload [hereinafter Balkin, *Constitutional Redemption*] (manuscript at 2-3, on file with the *McGeorge Law Review*).

Balkin is also the editor of a recent compilation of mock opinions in which a collection of some of the country’s best law professors were asked to participate in a vicarious *Roe v. Wade* Court and write an opinion on the case. See WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin ed., 2005). David Garrow, reviewing the book, felt that many of the mock opinions evince “a highly embarrassing failure to perform.” David Garrow, *Roe v. Wade Revisited*, 9 GREEN BAG 2d 71, 71 (2005) (book review). Not all were failures, Garrow generously recognized. *Id.* at 72-74. Balkin’s “majority” opinion is singled out for praise. *Id.* at 72. Mark Tushnet’s mock opinion, which is essentially Justice Douglas’s opinion in *Doe v. Bolton*, 410 U.S. 179 (1973), is characteristically clever, according to Garrow. See *id.* at 74-75. Tushnet argued that the exercise was inherently flawed, “that it may be impossible, and certainly is unfair . . . to think ourselves back into the position of the judges who decided *Roe*,” and implicitly criticized those shadow justices who attempted to use an Equal Protection clause rubric because such a theory “would have been regarded in 1973 as outside the bounds of professional responsibility.” Mark Tushnet, *Comments from the Contributors*, in WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra*, at 250-52.

7. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1610 (2004).

8. JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 86 (1993) (famously stating that “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal”). See JEFFREY SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 316-19 (2002) [SEGAL & SPAETH, *THE ATTITUDINAL MODEL*] (updating their analysis of a decade earlier and noting that their model correctly predicted, for example, seventy-seven percent of the justices’ votes in Fourth Amendment cases analyzed); see also Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of the U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561 (1989) (arguing that eighty percent of justices votes in civil liberties and civil rights cases spanning almost four decades could be explained by policy preference).

9. RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 76 (2003) [hereinafter POSNER, *PRAGMATISM*]. The quote reads “bent in constitutional adjudication,” as Posner was talking about judges in the passage quoted. But there is no reason to believe that the same problems do not arise in legal scholarship, in many ways a parallel profession to the judiciary. *Id.*

10. See Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 149-51 (2004); see also Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1258 (2004) (“A positive approach is more concerned with trying to understand what the Supreme Court *does* do, and why it does it. It is that descriptive, explanatory lens that grants some small measure of remove from a subject about which there are typically strong feelings.”).

11. Cf. Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062 (2001). I still remember my youthful shock, and no slight embarrassment, when a political science professor of mine in college told me that “JDs aren’t that respected by PhDs.” Seeing my surprise, he tried to backtrack, but the damage was done, and I slunk off to law school with my intellectual tail between my legs. Not incidentally, today he’s a leading (normative) scholar of political theory and international relations at

argues that “constitutional theory has no power to command agreement from people not already predisposed to accept the theorist’s policy prescriptions.”¹² Normative constitutional scholarship—what many times essentially amounts to advocacy briefs to the Supreme Court¹³—on the abortion issue continues to be churned out,¹⁴ but it “fails to come to grips with the lessons of [the] positive scholarship” of political and social scientists.¹⁵ These “grand theor[ists]”¹⁶ include next to nothing in their scholarship about what abortion looks like in reality, that is, what the “known facts” are about the practice.¹⁷

In an insightful paper, Barry Friedman shows how normative constitutional scholarship, that is to say most constitutional scholarship, “will remain impoverished until it fully embraces the positive project.”¹⁸ More pointedly, prominent political scientist Mark Graber writes that “many [abortion] polemics do little more than reassure their small targeted audiences that only a moral cretin

Northwestern University.

More seriously, it needs to be pointed out that although Balkin and Levinson are speaking in terms of judges writing opinions that conform to their preferred policies and ideologies, the phrase fits equally well with most constitutional scholarship as much of it is devoted to being a shadow Supreme Court justice. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 157-58 (1999) [hereinafter POSNER, *PROBLEMATICS*].

12. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 3 (1998).

13. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981) (“One [strategy] is simply to acknowledge that most of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good.”); see also Scott D. Gerber, *Privacy and Constitutional Theory*, 17 SOC. PHIL. & POL. 165, 184 (2000) (arguing that all the dominant approaches to constitutional theory could be shown to both support and undercut a constitutional right to privacy).

14. See, e.g., WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 6 (asking law professors to write an “opinion” in the *Roe v. Wade* case using only those materials that would have been available to the justices in 1973); Lund & McGinnis, *supra* note 7; Michael McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997) [hereinafter McConnell, *The Right to Die*] (arguing that *Glucksberg*’s heuristic has replaced *Roe*’s as the correct approach to substantive due process questions); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003) [hereinafter Paulsen, *Worst Constitutional Decision*] (arguing that *Planned Parenthood of Se. Pa. v. Casey*, not *Roe v. Wade*, bears the title’s distinction).

15. Friedman, *supra* note 1, at 259 (arguing that legal scholars must begin to take into account the lessons of positive political science scholarship).

16. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW I* (1988) [hereinafter TUSHNET, *CRITICAL ANALYSIS*]. Daniel Farber and Suzanna Sherry also point out that grand constitutionalist theorists on the left and the right who attempt to ground constitutional law “objectively” may have good intentions, but the enterprise is doomed to fail given the inevitable smuggling in of the theorist’s priors. See DANIEL FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 140-68 (Univ. Chi. Press 2002).

17. Mark Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQ. 309, 325 (2002) [hereinafter Graber, *Constitutional Politics*]; see also MARK GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* (1996) [hereinafter GRABER, *RETHINKING ABORTION*]; RICHARD POSNER, *SEX AND REASON* (1992) [hereinafter POSNER, *SEX AND REASON*].

18. Friedman, *supra* note 1, at 259.

or constitutional moron could doubt the unassailable justice of the author's position on reproductive policy."¹⁹

The arguments for and against abortion by normative constitutional theorists have failed to produce any real level of agreement. Instead of "inhaling the intoxicating vapors of constitutional theory,"²⁰ scholars need to think about what the world might look like without a right to abortion or, conversely, with completely unfettered access to "abortion on demand."²¹ The thesis of this paper is that the strongest justification for keeping the basic premise of *Roe* intact is supplementing the normative argument finding the abortion right in the equal protection clause with the positive scholarship on abortion because that scholarship re-enforces the equal protection approach while at the same time undercutting arguments attacking the promise of *Roe*.²²

19. GRABER, *RETHINKING ABORTION*, *supra* note 17, at 37. Jack Balkin puts it this way: "I do not think that one can usefully engage in normative constitutional theory without at least paying some attention to what positive constitutional theory teaches us." Balkin, *Constitutional Redemption*, *supra* note 6, at 89.

20. POSNER, *PRAGMATISM*, *supra* note 9, at 79-80.

21. See Clark D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 125 (2005).

22. And for that matter, scholars who are opposed to *Roe* should confront the positive scholarship on abortion rather than—as we will see—make arguments that do not deal with the facts on the ground.

This is as good a time as any to note that the only other paper by a legal scholar that I am aware of that systematically utilizes medical and social science research in order to help construct their argument (there is political scientist Mark Graber's excellent book, *Rethinking Abortion*) is Clarke D. Forsythe's and Stephen B. Presser's *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. R. L. & POL. 85 (2005) [hereinafter Forsythe & Presser, *Tragic Failure*]. There they argue that the social and medical science evidence shows that abortion is an abject failure and a threat to women's health. *Id.* at 89-90. Their paper must be taken with a very large grain of salt. First, it is clear that both authors, especially Forsythe, are serious partisans on the abortion issue. Forsythe works for a non-profit organization, Americans United for Life, whose goal is to overturn *Roe*. See Clark D. Forsythe, *The Cultural Yearning for Human Dignity*, http://www.unitedforlife.org/our_philosophy.htm (last visited Mar. 26, 2007) (on file with the *McGeorge Law Review*); see also Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1023 [hereinafter Siegel, *New Politics*] (noting that Forsythe's organization "coordinates the national legislative strategy designed to chip away at *Roe*"). Presser is a well-known conservative academic that praises Justice Thomas's inclination to overrule any precedent that does not "get it right." See Stephen B. Presser, *Touting Thomas*, LEGAL AFFAIRS, Jan/Feb 2005, http://www.legalaffairs.org/issues/January-February-2005/review_presser_janfeb05.msp (on file with the *McGeorge Law Review*).

More importantly, there are problems with the substance of their argument. For example, one of their arguments is that legalized abortion has given males increased power in the marriage and sex market because females who do not engage in pre-marital sex are at a distinct disadvantage to those who will. Forsythe & Presser, *supra* note 21, at 124-25. For support, they cite to conservative academic John Lott—of *More Guns, Less Crime* fame, whose work on the gun control issue has been in the middle of an academic firestorm with serious charges of academic fraud leveled against him, see Donald Kennedy, Editorial, *Research Fraud and Public Policy*, SCIENCE, Apr. 18, 2003, at 393—who in turn cites George Akerloff's paper propounding this thesis. George A. Akerloff et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. ECON. 277 (1996). While Akerloff's thesis is surely interesting, it is important to note that Akerloff's thesis is simply based on economic models and there has been no "substantive empirical testing that could validate them." PHILLIP B. LEVINE, SEX AND CONSEQUENCES 161-64, 189-90 (2004) [hereinafter LEVINE, SEX AND CONSEQUENCES]. Nor do the authors mention that there are other economic models that come to an opposite conclusion. See *id.* at 162 (discussing Thomas Kane & Douglas Staiger, *Teen Motherhood and Abortion Access*, 111 Q. J. ECON. 467 (1996)).

This justification is especially important given the current legal climate surrounding abortion. The South Dakota legislature recently passed a law—later rejected by voters in a referendum—that restricted abortion in all cases unless the mother’s life was in danger.²³ One scholar has noted that much of the basis for the South Dakota legislation, to say nothing of the overall strategy of the pro-life movement whose central talking-point today, having turned subordinated fetal-life arguments, is that abortion is harmful to women. This contention is buttressed with debatable empirical evidence and questionable readings of the existing literature.²⁴ The recent decision in *Gonzales v. Carhart*²⁵ is a disconcerting reminder that politicized arguments have gained significant traction where it matters a great deal, the Supreme Court.²⁶

Before moving to the empirical analysis, I will sketch out the dominant normative approaches to abortion, both liberal and conservative. I then synthesize the empirical literature on abortion. It is my hope that the heuristic I advance in

Moreover, and related to this point, the authors maintain that because of this putative “fact” (that unmarried men benefit from legalized abortion) it is no wonder “men favor legalized abortion more than women.” Forsythe & Presser, *supra* note 21, at 124. It is evident that Forsythe and Presser selected only those findings that support their position. A careful analysis of the social science evidence shows inconsistent results, insofar as gender differences are concerned, in support of abortion. Jennifer Strickler & Nicholas Douglas, *Changing Frameworks in Attitudes Toward Abortion*, 17 SOC. F. 187, 189 (2002) (citing conflicting studies).

One more example should suffice to cement the point: Forsythe and Presser continually trumpet as fact that women’s mental health is severely damaged by abortion to the point that they have a dramatically increased risk of suicide. See Forsythe & Presser, *supra* note 21, at 112, 122. However, the study they cite shows that only Finnish women who have abortions have a higher suicide rate than those who give birth. Mika Gissler et al., *Suicides after Pregnancy in Finland, 1987-1994: Register Linkage Study*, 313 BRIT. MED. J. 1431 (1996) [hereinafter Gissler et al., *Suicides After Pregnancy*]. This epitomizes the old saw that “anything can be proven by statistics.” Economist Jonathan Klick has shown that “such a finding could very well be the result of self-selection bias. That is, it could be the case that women who chose to abort their pregnancies tend to be those who are predisposed to depression, implying that the link between abortion and suicide is coincidental as opposed to causal.” Jonathan Klick, *Mandatory Waiting Periods for Abortions and Female Mental Health*, 16 HEALTH MATRIX 183, 187 (2006) [hereinafter Klick, *Mandatory Waiting Periods*]. In any event, the empirical evidence actually undermines Forsythe’s and Presser’s argument. See *infra* notes 218, 219 and accompanying text. In another example of selective citation and questionable analysis, Forsythe and Presser argue that the “divorce rate was twice the rate in 1960” and that, therefore, abortion must be to blame. Forsythe & Presser, *supra* note 21, at 128. One would be hard-pressed to find a social scientist that would juxtapose these statistics and claim causation. However, since Forsythe and Presser are engaged in a partisan project, these pieces of information, surely relevant to objectively assessing their argument, are left on the cutting room floor. What is more, given that Forsythe and Presser amass what they believe to be objective data showing that abortion is a scourge upon the female gender, one must raise an eye-brow that their solution is to return the abortion issue to the states. *Id.* at 93. If they truly believe abortion is as bad as they would like the reader to think, they should advocate for the abolition of abortion.

23. Siegel, *New Politics*, *supra* note 22, at 991-94 (discussing South Dakota legislation).

24. *Id.* at 1000-29.

25. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

26. In *Gonzales*, Justice Kennedy, in what has already become an oft-quoted passage, wrote: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.” *Id.* at 1634. To support this proposition, Kennedy cited to a brief filed by a pro-life advocacy group complied and in the next sentence (also citing to this same *amici* brief) opined that “[s]evere depression and loss of self-esteem can follow [an abortion].” *Id.* The empirical evidence proves both of these points not only unexceptionable, but unsupported.

the final section will serve to reinforce the foundation for the inevitable normative argument that must be made about abortion.

II. ABORTION AND SCHOLARSHIP

Substantive due process is the legal theory which presently underpins the abortion right in the Supreme Court Reports. There are different strands of this theory.²⁷ There is the historical or tradition based theory—*Washington v. Glucksberg* is a good example²⁸—which holds that the Court will find a “new,” or unenumerated right, only when that right is “objectively, deeply rooted in the Nation’s history and tradition.”²⁹ There is also what Judge Michael McConnell calls the “moral-philosophic” approach³⁰—think Dworkin’s Hercules³¹—exemplified by the *Griswold-Roe-Casey* (and now *Lawrence*) line of cases, the so-called “sexual autonomy” cases.³² Most conservatives tend towards the former,³³ while many liberals prefer the latter.³⁴

A. Synthesizing Substantive Due Process

The Supreme Court’s reasoning in the sexual autonomy cases line of cases can be synthesized as follows: it starts with the well-known Taft Court cases invalidating Oregon³⁵ and Nebraska³⁶ regulations. These cases give the argument

27. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66-68 (2006) (discussing three distinct theories the Court has used in answering the question of how to approach unenumerated rights, namely “historical tradition,” “reasoned judgment,” and “evolving national values”); Lund & McGinnis, *supra* note 7, at 1541 (discussing the *Griswold-Roe* line of sexual autonomy cases as a subset of the Court’s substantive due process jurisprudence); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 836-40 (2003) (discussing the “fundamental liberty interest” or “unenumerated rights” branch of substantive due process).

28. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Court, in elucidating the contours of the substantive due process inquiry, states “[o]ur established method of substantive-due-process analysis . . . [is that] the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” *Id.* (citations omitted).

29. *Id.*

30. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2389 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

31. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105-30 (1977).

32. See Conkle, *supra* note 27, at 98-106.

33. See, e.g., Lund & McGinnis, *supra* note 7, at 1607-09; McConnell, *The Right to Die*, *supra* note 14, at 665-66.

34. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1137 (2004) (“Whatever its shortcomings, for lesbians and gay men, *Lawrence* is a breakthrough.”); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895, 1899 (2004) (stating that “*Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America” and rejoicing that it is a “pathmarking decision” that “significantly alter[s] the historical trajectory of substantive due process and thus of liberty”).

35. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a state law prohibiting the teaching of languages other than English in schools).

a chronological dynamic by recalling a long history of citizen's private lives being protected by unenumerated rights, untouchable by government.³⁷ Also, it may be noted that the Due Process Clause has its origins in the Magna Carta.³⁸ There will generally be a quote from *Meyer*, often that due process does not simply guarantee procedure but the substantive rights "to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."³⁹ *Skinner v. Oklahoma*⁴⁰ offers Justice Douglas's famous admonition:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . Any experiment which the State conducts is to [the individual's] irreparable injury. He is forever deprived of a basic liberty.⁴¹

Next, the argument may draw some relevant quotes from Justice Harlan's eloquent dissent in *Poe v. Ullman*,⁴² substantive due process opinion *extraordinaire*.⁴³ There are many worthwhile passages, for example: the statute

36. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding unconstitutional an Oregon law requiring public school attendance).

37. In the American constitutional tradition, one can reach back as far as Justice Chase's and Justice Iredell's "debate" in dueling opinions in *Calder v. Bull* and see that substantive due process was a colorable argument in a judicial opinion as far back the eighteenth century. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Chief Justice John Marshall, in *Fletcher v. Peck*, held that whether one looked to the "particular provisions of the constitution" or the "general principles which are common to our free institutions" the Georgia state legislature had exceeded its powers. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810). One can also reference, as conservatives often do, Chief Justice Taney's opinion in *Dred Scott v. Sanford* as early example imbuing the Due Process Clause—of the Fifth Amendment—with substantive protections. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). This, however, does not automatically impugn, as conservatives would have it, substantive due process. As Mark Tushnet has argued, it is at least understandable that "well-socialized lawyers" in the South in 1855 took the position that they did in *Dred Scott*. See Mark Tushnet, *Self-Historicism*, 38 TULSA L. REV. 771, 773-75 (2003) [hereinafter Tushnet, *Self-Historicism*] (arguing that the historical era "a well-socialized lawyer" finds himself in will determine what makes certain legal arguments plausible or not). Indeed, simply criticizing them with today's moral outlook is a historical "cheapshot." *Id.* at 773. For an argument in favor of removing the "bad cases" out of the constitutional canon, see Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998) (calling for a reassessment of the current canon).

38. Scholars note that protection from "substantively arbitrary government actions goes back a long way, indeed to the Clause's origins in the Magna Carta." Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209, 212 (2006) [hereinafter Tushnet, *Unenumerated Rights*]. See also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

39. *Meyer*, 262 U.S. at 399.

40. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating an Oklahoma law that required sterilization of criminals who had been convicted of felonies involving moral turpitude).

41. *Id.* at 541.

42. 367 U.S. 497 (1961). This was, of course, the predecessor case to *Griswold*; that is, the Court had before the very same statute at issue in *Griswold*, but ducked the issue because the case was not "ripe." *Id.*

43. See, e.g., Sanford Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123,

prohibiting contraceptive use was an “unjustifiable invasion of privacy,”⁴⁴ the Constitution should be interpreted “not in a literalistic way . . . but as the basic charter of our society,”⁴⁵ and the Due Process Clause means more than “procedural fairness” and includes more than just those “restraints which had prior to the [Fourteenth] Amendment been applicable merely to federal action.”⁴⁶ There are also these oft-quoted passages:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.⁴⁷

And:

It is this outlook which has led the Court continually to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision’s larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.⁴⁸

The typical case then moves to *Griswold*. The argument may or may not avoid Justice Douglas’s cringe-inducing⁴⁹ penumbral formulation;⁵⁰ however,

135 (1979) (calling Justice Harlan’s opinion “one of the great opinions in American judicial history”). It is, no doubt, the best defense of substantive due process in the Court’s history.

44. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting).

45. *Id.* at 540.

46. *Id.* at 540-41.

47. *Id.* at 542.

48. *Id.* at 542-43 (internal citations omitted).

49. At least, this is the received wisdom. However, Mark Tushnet makes an interesting argument that Justice Douglas’s penumbral formulation was “hardly incoherent” and that the argument contained at least the germ of a fairly sophisticated textualist argument. Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMM. 75, 79-80 (1991) [hereinafter Tushnet, *Jurisprudence of Privacy*].

Griswold's citability lies in its recognition of an overarching right of privacy.⁵¹ The Court then might turn to *Eisenstadt*.⁵² Is there any doubt Justice Brennan knew exactly what he was doing when he wrote:⁵³ "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁵⁴ This key language can easily be stretched to cover a substantive due process right to abortion (although *Eisenstadt* was an equal protection case).⁵⁵

Roe, next in the precedential line, was of course defanged a bit by *Casey*, but it is still good law (for now), although Justice Blackmun's majority opinion contains lackluster prose and substantive arguments, thus making it short on quotability.⁵⁶ Finally, the substantive due process exegesis may conclude with a some of Justice Kennedy's "distinctive"⁵⁷ prose from his opinions in the sexual autonomy cases: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life";⁵⁸ "[f]reedom extends beyond spatial bounds" and involves "more transcendent dimensions,"⁵⁹ or liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."⁶⁰

50. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564-65 (2003) (citing *Griswold* for the larger proposition and staying away from the penumbral formulation); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992) (same).

51. It also stands for what is by now the overwhelmingly accepted proposition that government cannot forbid married couples from obtaining contraceptive information or devices. *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965). For an interesting discussion of how *Griswold*'s reading of *Meyer* and *Pierce* can be called "tortured", and at the same time be read as "identify[ing] the true privacy principle of *Meyer* and *Pierce*," see TUSHNET, *CRITICAL ANALYSIS*, *supra* note 16, at 49-50.

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

53. See DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 542 (1998) [hereinafter GARROW, *LIBERTY AND SEXUALITY*] (discussing how the various justices law clerks realized that Justice Brennan was attempting to constitutionalize abortion in *Eisenstadt*). Mark Tushnet, who clerked for Justice Marshall, tells the story of how Justice Brennan would ask his clerks to name the most important rule in constitutional law, and after listening to stammer around for a suitable answer, he would raise up his hand with each of the five fingers spread, and say this "is the most important rule in constitutional law." MARK TUSHNET, *A COURT DIVIDED* 35 (2005) [hereinafter TUSHNET, *COURT DIVIDED*].

54. *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

55. See *Casey*, 505 U.S. at 859 ("If indeed the woman's interest in deciding whether to bear or beget a child had not been recognized in *Roe* . . .").

56. See *id.* at 874 (disposing of strict scrutiny review and utilizing the more lenient undue burden approach).

57. See Jeffrey Rosen, *Supreme Leader*, THE NEW REPUBLIC, June 18, 2007, at 21 (noting Justice Kennedy's tendencies towards "lucubrations").

58. *Casey*, 505 U.S. at 851. Although this is from the O'Connor, Souter, and Kennedy joint opinion, this passage is generally attributed to Kennedy. See Dale Carpenter, *Symposium: Gay Rights after Lawrence v. Texas, Is Lawrence Libertarian?*, 88 Minn. L. Rev. 1140, 1149 n. 52 (2004) (citing Jeffrey Rosen's *New Yorker* article—entitled "The Agonizer"—about Justice Kennedy).

59. *Lawrence*, 539 U.S. at 562.

60. *Id.*

B. *The Right's Reaction*

Most conservatives find this line of cases deeply unsatisfactory. Michael Paulsen's *Dissenting Opinion* in *What Roe v. Wade Should Have Said* castigates his fellow "justices" for defending *Roe*, a decision he evidently regards as constitutional sewage.⁶¹ Paulsen believes that because abortion kills human fetus or embryo, it takes a human life.⁶² He further explains that the right to an abortion does not appear in the text of the Constitution, nor can it plausibly be tied to the document's text, history, structure, or "internal logic;" therefore, using the precepts of constitutional Protestantism,⁶³ he encourages readers to engage in civil disobedience and ignore the decision.⁶⁴

Quickly dispatching with the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment as textual bases for a right to abortion,⁶⁵ Paulsen next attacks the utilization of the Due Process Clause as the proper home for the right to abortion.⁶⁶ He then makes the well-worn argument that due process only affords a person process, and that the clause is not imbued with a substantive guarantee of rights.⁶⁷ After comparing *Roe* to *Dred Scott*, he denigrates *Griswold* for the "obscurity of its reasoning" and labels *Eisenstadt* a deceitful opinion.⁶⁸ But, according to Paulsen, neither of those cases control the determination of the right to abortion. These cases were wrongly decided, and "the Court" need not countenance them.⁶⁹ Given this, Paulsen concludes that substantive due process cannot be advanced as the basis for the right to abortion.⁷⁰ He finishes his opinion by naming his "brethren"—as noted in the Introduction—one by one as "persons of violence."⁷¹

61. Paulsen, *Dissenting Opinion*, *supra* note 3, at 196-218.

62. *Id.* at 196.

63. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 19 (1988) (discussing constitutional Protestantism, the notion that the Supreme Court does not have a stranglehold on the proper interpretation of the Constitution).

64. Paulsen, *Dissenting Opinion*, *supra* note 3, at 196-97.

65. Paulsen argues that "the public meaning" of the clause "at the time it was adopted" cannot mean that the judiciary could fill up the clause with "whatever" it deemed to be a privilege or immunity of citizenship, and that there is no historical evidence to back up such wrong-headed claims. *Id.* at 200. Paulsen seems to be mistaken. As Akhil Reed Amar has shown in his book, *The Bill of Rights*, the Privileges or Immunities Clause could be a source of unenumerated rights. AKHIL REED AMAR, *THE BILL OF RIGHTS* 120-23, 180 (1999). Noted conservative scholar and jurist Judge Michael McConnell agrees, insofar as the unenumerated rights recognized are "based not on the normative judgments of courts, but on constitutional text supplemented by the tradition and experience of the nation." McConnell, *The Right to Die*, *supra* note 14, at 666.

66. Paulsen, *Dissenting Opinion*, *supra* note 3, at 202-03.

67. *Id.* at 203.

68. *Id.*

69. *Id.* at 203-04.

70. *Id.* at 204.

71. *Id.* at 213 ("Jack Balkin is a man of violence, Anita Allen is a woman of violence.").

John O. McGinnis and Nelson Lund have called the sexual liberty line of cases⁷² “an insuperable obstacle to any lasting restraint on substantive due process.”⁷³ They call for the precedential heads of *Griswold* and *Roe* and champion *Glucksberg*’s test for substantive due process,⁷⁴ where the Constitution only protects those fundamental rights that are “objectively, deeply rooted in this . . . Nation’s history, legal traditions, and practices” because such indicia “provide the crucial guideposts for responsible decision-making.”⁷⁵ *Griswold*, they contend, is a “bizarre and facetious construction[] of the constitutional text,” while *Roe* twists the evidence to conjure a deeply rooted right that never existed.⁷⁶ To McGinnis and Lund, it is important that *Roe* is still the subject of internecine political warfare, which signals a lack of “overwhelming support” required of a substantive due process right under *Glucksberg*.⁷⁷ The sexual-liberty line of cases does not have a unifying thread, they argue, and therefore the Court can never apply them in a principled manner.⁷⁸ The current state of the doctrine “collapse[s] constitutional law into a matter of mere political preference, undermining the judicial function.”⁷⁹

Justice Scalia offers somewhat similar thoughts in his biting dissent in *Casey*.⁸⁰ Arguing that the abortion is not a right protected by the Constitution, he makes the textual argument that the Constitution does not mention the right of abortion, nor is it a right that has traditionally been protected.⁸¹ In his estimation, *Roe* helped create “the deeply divisive issue of abortion . . . by elevating it to the national level.”⁸² He also notes that both *Roe* and *Dred Scott* rest “upon the concept of ‘substantive due process.’”⁸³ However, Scalia goes further, repeatedly castigating the Court’s majority for basing its decision on “value judgments”⁸⁴ and implicitly encouraging continued demonstrations and protests by those in the pro-life movement because they are simply voicing *their* own value judgments, which differ from the Court’s. The most telling sentence in Scalia’s bitter

72. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965).

73. Lund & McGinnis, *supra* note 7, at 1573.

74. *Id.* at 1607-12. Conservatives were ecstatic when *Glucksberg* came down; Judge Michael McConnell wrote an article emphatically stating that “the constitutional methodology under which *Roe* was decided has been repudiated.” McConnell, *The Right to Die*, *supra* note 14, at 666. Of course, he was mistaken.

75. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (internal citations and quotations omitted).

76. Lund & McGinnis, *supra* note 7, at 1610.

77. *Id.* at 1598-99, 1608, 1610.

78. *Id.* at 1611.

79. *Id.* at 1608.

80. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980, 999-1001 (1992) (Scalia, J., dissenting).

81. *Id.* at 980.

82. *Id.* at 995. For more on this point, see David Garrow’s seminal history of *Roe v. Wade*. GARROW, *LIBERTY AND SEXUALITY*, *supra* note 53, at 482-84, 546-47, 576-77.

83. *Casey*, 505 U.S. at 998.

84. *Id.* at 983, 999-1001.

dissent⁸⁵ states his belief that the majority merely “rattle[s] off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”⁸⁶

C. *The Wandering Jew of Constitutional Scholarship*⁸⁷

There is no doubt that Justice Blackmun’s opinion in *Roe*, where it mattered most, was woefully inadequate. Justice Blackmun (in)famously wrote:

This right of privacy, whether it be found in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.⁸⁸

85. See TUSHNET, COURT DIVIDED, *supra* note 53, at 204-22.

86. *Casey*, 505 U.S. at 983.

87. Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 441 (1992) [hereinafter Posner, *Legal Reasoning*]. Posner describes *Roe* as “the Wandering Jew of constitutional law,” but the more accurate characterization is mine because insofar as the Supreme Court is concerned, the abortion right has never left the confines of the due process clause.

88. *Roe v. Wade*, 410 U.S. 113, 153 (1973). While the right is still found within the “liberty” interest protected by the Due Process Clause of the Fourteenth Amendment, it was scaled back from “fundamental right” status by the plurality opinion in *Casey* to an “undue burden” standard. *Casey*, 505 U.S. at 846; see also *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000). It is worth noting how much of the mainstream media and political punditry belabor under the misconception that Justice Douglas’s penumbra and emanation heuristic serves as the basis for the right to abortion. See, e.g., RAMESH PONNURU, THE PARTY OF DEATH 2 (2006) (recent pro-life polemic by *National Review* senior editor stating that “[t]he Supreme Court ruled in 1973 that ‘emanations and penumbras’ from the Constitution protected a right to abortion.”); Bruce Fein, *Overrule in Part, Affirm in Part*, WASH. TIMES, Mar. 14, 2006, at A18 (“The court should declare that *Roe* was wretchedly reasoned and wrongly decided. Its right to privacy rationale pivoting on penumbras, emanations, mysteries of the universe, and the meaning of existence should be renounced.”); *Premium Pressure*, ECONOMIST, Apr. 29, 2006, at 71 (“There is a lively debate in America as to whether the ‘penumbras’ and ‘emanations’ of the Constitution include the right to abortion.”). Even Justice Thomas, who I must assume is just reveling in a constitutional law “joke,” has a sign in his office that says, “Please do not emanate into the penumbra.” See Justice Clarence Thomas, Address at Ashland University’s Fifteenth Annual Ashbrook Memorial Dinner (Feb. 5, 1999), <http://www.ashbrook.org/events/memdin/thomas/speech.html> (on file with the *McGeorge Law Review*).

While Justice Blackmun’s opinion does mention “a right of personal privacy, or a guarantee of certain areas or zones of privacy,” and does cite Justice Douglas’s penumbral formulation in *Griswold*, the Court stated that it believed that the right of abortion is found in the Due Process Clause of the Fourteenth Amendment. *Roe*, 410 U.S. at 152-53; see also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); therefore, it clearly disavows Justice Douglas’s formulation, and no justice has ever advocated a return to that formulation. See POSNER, SEX AND REASON, *supra* note 17, at 336 (the *Roe* Court did not try to elaborate on Justice Douglas’s formulation, but “instead switched . . . to the more conventional, but no more satisfactory, ‘substantive due process’ ground”); Posner, *Legal Reasoning*, *supra* note 87, at 445 (discussing Justice Douglas’s “general (or at least generalizable) principle of sexual liberty” and explaining that “no judge has picked up this particular spear and tried to throw it farther”).

But simply because the basis for Blackmun's opinion was inadequate does not mean that the right to abortion is not one of constitutional dimension. Liberals rightly recognize this and have advanced a number of different textual bases for the right to abortion—hence the moniker the “Wandering Jew” of Constitutional Scholarship. Professors Lawrence Tribe and Andrew Koppelman think the right to an abortion is validated by the Thirteenth Amendment's abolition of involuntary servitude.⁸⁹ Ronald Dworkin believes the right can be found in the Establishment and Free Exercise Clauses of the First Amendment.⁹⁰ Catharine MacKinnon and Cass Sunstein were early advocates of the Fourteenth Amendment's Equal Protection Clause.⁹¹ The Equal Protection argument has subsequently attracted numerous scholars as the strongest textual argument for the right to choose.⁹²

Tribe's Thirteenth Amendment approach is unpersuasive. He analogizes to slavery and argues that the law should not require women to be “good Samaritans” and offer “aid” to the fetuses they carry (because in no other context does the law compel such a burden).⁹³ This argument is problematic for a number of reasons: the law does require persons to aid those they placed in a position of peril; the law does impose special duties on the parent-child relationship; and “the mother is not a stranger.”⁹⁴ Even fellow academics, the group that would perhaps be most receptive to Tribe's novel approach, do not seem interested.⁹⁵

89. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1354-56 (2d ed. 1988) [hereinafter TRIBE, *CONSTITUTIONAL LAW*]; Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

90. Ronald Dworkin, *Unenumerated Rights: How and Whether Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 418-25 (1992); see also RONALD DWORKIN, *LIFE'S DOMINION* 160 (1994) [hereinafter DWORKIN, *LIFE'S DOMINION*]. Some have defended its current home. See, e.g., Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293 (1986); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U. L. REV. 765 (1973).

91. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31-44 (1992) [hereinafter Sunstein, *Neutrality*]; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1319-23 (1991).

92. See, e.g., WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 6. Just as this paper was going through the final editing process, UC-Berkeley's Daniel Farber published a book on the Ninth Amendment that contends that the Ninth Amendment might be the best textual basis for the abortion right. See DANIEL FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* (2007) [hereinafter FARBER, *RETAINED BY THE PEOPLE*]. After a lucid historical survey of the Framers views on the Ninth Amendment and unenumerated rights, Farber sketches out what a Ninth Amendment approach to abortion would look like. *Id.* at 111-20.

93. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 89, at 1354.

94. POSNER, *SEX AND REASON*, *supra* note 17, at 289. And, of course, all these same arguments highlight the problem in Judith Jarvis Thomson's famous philosophical defense of abortion, which Tribe also cites approvingly. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971). Additionally, it is interesting to note that in one of the lionized liberal defenses of abortion rights utilizing the Good Samaritan heuristic, the author himself doubted the cogency of his argument. See Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979). On the last page of his article, Regan writes, “[s]ometimes the argument of this essay seems to me an adequate constitutional justification of the result in *Roe*. Sometimes it does not.” *Id.* at 1646.

95. See generally WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 6 (explaining where none of the

Moreover, Tribe's argument is easily exploitable, both rhetorically and politically.⁹⁶ Relying on the involuntary servitude clause of the Thirteenth Amendment would not help squelch the already overheated debate over abortion and prove better than Justice Blackmun's justification; it leaves him open to an easy attack that he is equating pregnancy with slavery.⁹⁷ Tribe also dismisses as "jejune" a "legislative solution" to the abortion issue,⁹⁸ by stating that its "fatal flaw" is "that it presumes that fundamental rights can properly be reduced to political interests."⁹⁹ But the continuing debate surrounding *Roe* is motivated by the lack of consensus on the fundamentality of the right to abortion. Tribe's answer to whether the right to an abortion should be constitutionally protected assumes that very fact.

Dworkin's attempt proves similarly unworkable.¹⁰⁰ He constructs an intricate argument, parts of which are very convincing. For example, he forcefully argues that pro-life rhetoric asserting that a fetus has legal rights from conception onward is inconsistent with the actions of its advocates.¹⁰¹ However, his central

participants adopted a Thirteenth Amendment justification).

96. Although these factors surely play a role in the Court's decision-making process. See, e.g., DAVID G. BARNUM, *THE SUPREME COURT AND AMERICAN DEMOCRACY* 287-99 (1993) (discussing how the interplay between the Court and public opinion); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 96 (1998) (discussing the strategic decision-making process of the justices).

97. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 89, at 1354. The attack is unsophisticated to be sure, but it would be no doubt politically and rhetorically effective. In any event, it is worth noting that the same problems plagued Tribe's book-length effort, aimed at a general audience, to tone down the abortion debate. See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 7 (1990). It took a severe beating among academic reviewers. See, e.g., Jean Braucher, *Tribal Conflict Over Abortion*, 25 GA. L. REV. 595, 596-97 (1991) (reviewing LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990)) ("Tribe makes concessions in tone and in rationale, he makes none in result. His bottom line is to favor constitutional protection of women's unlimited access to abortion prior to fetal viability."); Stephen L. Carter, *Abortion, Absolutism, and Compromise*, 100 YALE L.J. 2747, 2750 (1991) (reviewing same) ("[Pro-life] reader[s] . . . will likely come away frustrated."); Annette E. Clark, *Abortion and the Pied Piper of Compromise*, 68 N.Y.U. L. REV. 265, 275-76 (1993) (reviewing same) (criticizing Tribe for failing to mention in his general audience book that he has been heavily involved in pro-choice advocacy); Joan Mahoney, *The Continuing Clash*, 59 U. CIN. L. REV. 1231, 1232 (1991) (reviewing same) (explaining that Tribe's book is a "failure" both in its putative compromise and its attempt to present itself as objective); Isabel Marcus, *Many Realities, Many Words: Abortion and the Struggle Over Meaning*, 69 TEX. L. REV. 1259, 1262 (1991) (reviewing same) (questioning Tribe's decision to portray himself as a neutral observer when he is in fact "located deep within the adversarial fray"); Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1184 (1991) (reviewing same) ("Tribe made almost no attempt to acquaint himself with the pro-life position as it has been articulated by anti-abortion ethicists, scientists, historians, and constitutional lawyers.").

98. This solution is, of course, overturning *Roe* and sending the issue back to the state legislatures.

99. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 89, at 1351, 1358.

100. DWORKIN, *LIFE'S DOMINION*, *supra* note 90.

101. *Id.* at 31. If people really believed that abortion kills a human person they would be obligated to treat abortion, criminally, in substantially the same way as murder. However, abortion has never been treated in such manner. See POSNER, *SEX AND REASON*, *supra* note 17, at 275-76; see also Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44. STAN. L. REV. 261, 317, 318-19 n. 237 (1992) [hereinafter Siegel, *Reasoning From the Body*] (noting that even Nineteenth Century legislative efforts to punish abortion as murder could not even make it out of committee and that doctors, who were the prime movers behind the legislative campaign did not expect it to be punished that severely).

argument is that people's views on abortion are based on "a shared belief in the sanctity of human life," which is ultimately a religious belief. Therefore, a law banning abortion violates the First Amendment's Establishment and Free Exercise Clauses because it foists one group's religious beliefs on the whole of society.¹⁰² However, there is nothing to compel this conclusion. What if a legislature passed a law restricting abortion based on secular findings of fact?¹⁰³ Moreover, there is Warren Court era precedent that explicitly states that simply because legislation overlaps with religious beliefs does not mean it *ipso facto* runs afoul of the Establishment Clause.¹⁰⁴

Anyways, Dworkin's definition of what qualifies as a religious belief—a "belief in the objective and intrinsic importance of human life"¹⁰⁵—is stunningly broad.¹⁰⁶ One wonders exactly how judges, who are not equipped to divine ecclesiastical matters, would perform Dworkin's balancing test—"a test of content," in which the content is whether a belief raises the "essentially religious" issue of a "particular conception of why and how human life is sacred"¹⁰⁷—in any sort of principled fashion.¹⁰⁸

The Equal Protection Clause is far and away the most cogent of the alternative textual homes proposed for the abortion right, and scholars have congealed around it.¹⁰⁹ There is no need to replicate here the normative and doctrinal argument for finding an abortion right in the equal protection clause, as it has been propounded many times elsewhere.¹¹⁰

However, the equal protection argument, as it has been developed in the literature, is not without its problems. It is possibly problematic to utilize this argument on behalf of the female gender when a significant portion of women are pro-life (and therefore do not feel discriminated against).¹¹¹ There is also the contention of some economists, whose models posit that abortion hurts women in

102. *Id.* at 175.

103. *See, e.g.,* TRIBE, *CONSTITUTIONAL LAW*, *supra* note 89, at 1349-50.

104. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) ("blue law" requiring businesses to be closed on Sundays did not violate Establishment Clause).

105. *Id.* at 162-63.

106. Posner, *Legal Reasoning*, *supra* note 87, at 443-44.

107. *See* DWORKIN, *LIFE'S DOMINION*, *supra* note 90, at 165.

108. *Id.* at 161-62. For other criticisms of Dworkin's approach to the abortion issue see Frances M. Kamm, *Abortion and the Value of Life: A Discussion of LIFE'S DOMINION*, 95 COLUM. L. REV. 160 (1995); Book Note, *Inside Out, Within and Beyond, or Backwards?*, 107 HARV. L. REV. 943 (1994).

109. *See, e.g.,* GRABER, *RETHINKING ABORTION*, *supra* note 17, at 40-47 (arguing that abortion law pre-*Roe* deprived poor women, especially minority women, of their right to equal protection of the law because they could not obtain the relatively safe, quasi-legal abortions affluent white women procured on the gray market); Balkin, *Genetic Technologies*, *supra* note 6, at 3 (arguing for the abortion right to rest on the Equal Protection Clause because "[i]n the particular world we live in today, with its technological limitations and expectations about economic life and family structure, women must possess a right to abortion as a necessary but not sufficient condition for securing their equal citizenship"); *see also* Sunstein, *Neutrality*, *supra* note 91, at 29-44.

110. *See supra* notes 6, 91, 92. *See generally* Siegel, *Reasoning From the Body*, *supra* note 101.

111. *See* GRABER, *RETHINKING ABORTION*, *supra* note 17, at 144, 205 (collecting numerous studies on this point).

the marriage market who refuse to engage in pre-marital sex.¹¹² Prominent sociologist Kristin Luker, on the basis of her interviews with pro-life activists, concluded that women who hold more traditional values are hurt by legalized abortion because it devalues them in the marriage market, and “undermines the social value on their presence once within a marriage.”¹¹³ This research raises the question of whether “we [can] rightly call antiabortion laws even *prima facie* discriminatory against women if in fact they help some women and hurt others?”¹¹⁴ It is also worthwhile to note that the equal protection rationale has never commanded anything close to a majority of the justices’ recognition, although the plurality opinion in *Casey* did wave at the equality argument.¹¹⁵ However, many of these ostensible issues are not significant obstacles.

D. Scholarly Stalemate

While liberal legal academics have championed these alternative textual bases in an effort to shore up the abortion right, almost no one has systematically explored another intriguing possibility: Justice Douglas’s unfortunately named penumbra and emanations formulation¹¹⁶ (although Mark Tushnet has written a short paper about the possibility of such a revival).¹¹⁷ Of course, this has much to

112. See *supra* note 22.

113. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 209 (1984).

114. POSNER, SEX AND REASON, *supra* note 17, at 341.

115. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”). It is also worthwhile to note that Justice Ginsburg’s dissent in *Gonzales* referenced the equality argument, citing Reva Siegel’s scholarship in her dissent. See *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992)).

116. It is worth noting that the penumbral formulation so often mocked by conservatives was used, prior to Douglas’s invocation, “more than twenty times in previous Supreme Court opinions,” and a jurist no less deified than Oliver Wendell Holmes used it in a law review article and “in four Supreme Court opinions.” GARROW, LIBERTY AND SEXUALITY, *supra* note 53, at 264. Learned Hand, Benjamin Cardozo, and Felix Frankfurter also made use of the term. *Id.*

117. Tushnet, *Jurisprudence of Privacy*, *supra* note 49, at 78-80 (making a persuasive argument that Justice Douglas’s penumbral formulation was “hardly incoherent” and that his interpretive method contained at least the germ of a sophisticated textualist argument). See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“Here is another feature of the Constitution: various words and phrases recur in the document. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation. I call this technique intratextualism.”). Erwin Chemerinsky has argued that Justice Douglas’s approach is unsophisticated because it *cannot* avoid substantive due process; the First, Third, Fourth, and Fifth Amendments, Chemerinsky points out, have all been incorporated against the states via the Due Process Clause of the Fourteenth Amendment. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW § 10.3.2 (2d ed. 2002). There is of course a connection between the doctrine of incorporation and substantive due process: Incorporated rights fall under the substantive due process umbrella. See, e.g., Rubin, *supra* note 27, at 835. So, Chemerinsky’s argument goes, while Justice Douglas explicitly stated in *Griswold* that he was avoiding (what he believed to be) the albatross of *Lochner*, he neglected the fact that the enumerated rights found in the Bill of Rights are incorporated by the Fourteenth Amendment’s Due Process Clause; *voilà*, substantive due process. See *Griswold v. Connecticut*, 381 U.S. 479,

do with the disdain leveled at Justice Douglas's approach. And as often as Justice Douglas's opinion is castigated, Justice Harlan's dissent in *Poe v. Ullman* is celebrated. But a close reading of his opinion illuminates the central tension in substantive due process doctrine.

Written in 1961, Justice Harlan's lyrical dissent includes a passage defining the contours of his conception of substantive due process: "[t]hus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."¹¹⁸ But it is difficult to reconcile this position with his pliable and expansive language: "[Due process] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."¹¹⁹ In 1961, it was simply not a question of whether the state could regulate homosexual behavior; an argument to the contrary would have been beyond the pale for a constitutional lawyer to make.¹²⁰ However, any justice or advocate worth his salt could, in later years, massage that argument from Justice Harlan's language as social mores and norms changed. Put differently, substantive due

481-82; *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) ("The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . whether it is 'basic in our system of jurisprudence' . . . and whether it is 'a fundamental right'") (citations omitted); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (explaining that, in deciding whether an unenumerated fundamental right exists, the Court looks to liberties that are "deeply rooted in this Nation's history and tradition"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (explaining that the unenumerated right to procreate is fundamental because it "involves one of the basic civil rights of man").

But while Chemerinsky is technically correct that Justice Douglas cannot avoid a branch of the substantive due process tree, it is inescapable that incorporation, as a form of substantive due process, is passé. What raises the ire of conservative justices, judges, and academics is not the incorporation of the First Amendment's freedom of speech or the Sixth Amendment's right to counsel—even a conservative as firebrand as Judge Bork admits "Those battles are long over," see *That Delicate Balance II: Our Bill of Rights-The First Amendment and Hate Speech* (PBS television broadcast Dec. 14, 1991)—but instead the question of unenumerated rights is their major point of contention, or at least those unenumerated rights that they disagree with politically. See Tushnet, *Unenumerated Rights*, *supra* note 38, at 212. Although there is no doubt an interesting legal-historical discussion about incorporation as evidenced by Akhil Reed Amar's book, *The Bill of Rights*, and the scholarship surrounding it. See Steven Calabresi, Book Review, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L. J. 2273, 2273-2305 (1999)).

In other words, Chemerinsky has the answer to a question scholars no longer find interesting. Which is unfortunate because I think Chemerinsky misses something very rich about Justice Douglas's novel, though much criticized formulation about the right to privacy (criticism that, in my view, is a bit unfair). Tushnet, *Jurisprudence of Privacy*, *supra* note 49. Richard Posner has also noted that Justice Douglas was perhaps on to something, but articulated his penumbral theory "in his usual slipshod way." Posner, *Legal Reasoning*, *supra* note 87, at 445. In another writing, Tushnet called Douglas's approach "actually quite intelligent." Mark Tushnet, *Comments from the Contributors, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 3, at 251. See also POSNER, *SEX AND REASON*, *supra* note 17, at 335-36 (arguing that despite being "rhetorical[ly] maladroit[]", Justice Douglas's formulation "could have been made more respectable by further elaboration and application").

118. *Poe v. Ullman*, 367 U.S. 497, 552 (Harlan, J., dissenting).

119. *Id.* at 543 (citations omitted).

120. See Tushnet, *Self-Historicism*, *supra* note 37, at 773-75.

process is surely, as conservatives charge, a vehicle for “discovering new rights” as society changes. But to conservatives, this is bad constitutional law; this predecessor to the sexual autonomy line of cases showcases “mere political preference, undermining the judicial function.”¹²¹

This criticism is somewhat naive. It should come as no surprise that Justice Harlan’s opinion expresses his policy preferences. It is also unsurprising that the type of expansive language and reasoning in his opinion could lead to the constitutionalization of new rights (even those that Harlan did not feel should, or could, be protected by his version of substantive due process) as old justices retired and new justices with a different ideological viewpoint were confirmed.¹²² But conservatives who dislike creation of “new” rights “out of whole cloth”¹²³ are arguably not dealing in constitutional law reality.¹²⁴ They fail to explain how this ostensibly proper “judicial function”—apparently, making sure judges do not make countermajoritarian decisions—is informed by the putatively robust attitudinal model.¹²⁵ They gloss over the political valence in Justice Scalia’s and Justice Thomas’s originalism: selective reinterpretation of history and tradition to “remold the Constitution to express contemporary conservative political values.”¹²⁶ This belies the implicit charge that only a liberal judge injects his

121. Lund & McGinnis, *supra* note 7, at 1608.

122. Balkin & Levinson, *Understanding the Constitutional Revolution*, *supra* note 11, at 1064-72.

123. This is a favorite phrase of conservative pundits. See, e.g., Robert Bork, *The Uphill Fight: Can John Roberts Restore the Constitutional Order*, NAT’L REV., Aug. 29, 2005, at 32 (on file with the *McGeorge Law Review*).

124. See Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, <http://www.slate.com/id/2125226/> [hereinafter Balkin, *Alive and Kicking*] (on file with *McGeorge Law Review*) (arguing that originalists are more interested in picking those doctrines and decisions that agree with their political priors so that “strict scrutiny for federal affirmative action stays, but the right of privacy goes”). And, to be fair, most conservatives do not want to end the recognition of unenumerated rights, they simply want to cabin the “discovery” of them to those they find politically palatable.

125. SEGAL & SPAETH, *THE ATTITUDINAL MODEL*, *supra* note 8, at 86. Of course, while a judge’s “attitude” certainly has a strong explanatory component, the judge’s attitude does not fill out the whole picture. For example, Cass Sunstein’s work exploring the robustness of the attitudinal model at the circuit court level shows that policy preferences indeed play a large role, but perhaps more interestingly, the political makeup of the court’s panel is just as robust. See CASS SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 41-45 (2006) [hereinafter SUNSTEIN, *ARE JUDGES POLITICAL?*] (arguing that if a Republican judge is on the same panel with two Democratic judges he is more likely to cast a liberal vote; the same holds true, in the opposite direction, when a Democratic judge is on a panel with two Republican judges); see also Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 606, 622 (2000) (noting the strength of the attitudinal model—“its ability to muster quantitative evidence” in support of it—and its weaknesses: “[t]he attitudinalist model tells us a great deal about how a given justice is likely to vote in a case that raises particular issues, but it tells us little about how such cases arose, how those issues had been framed, and why the justices approach their task in these ways”); see also STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 132 (1996) (calling the empirical evidence for the attitudinal model “somewhat weak” given its reliance on newspaper editorials written at the time of justice’s nomination to classify her as liberal or conservative); Stephen Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQ. 89, 95 (2005) (noting that if Segal’s and Spaeth’s denigration of the legal model has any explanatory power, it is based “their cramped vision”).

126. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living*

policy preferences into judicial decisions while originalism¹²⁷ embodies “the [proper] judicial function” (a function which, in any case, is a quixotic notion that simply does not square with political reality).¹²⁸ Finally, this blinkered approach ignores insights from the “new institutionalist” branch of political science showing that the justices act strategically and are constrained by the other political institutions and actors’ reactions and preferences, not to mention the historical and cultural underpinnings of the Court’s opinions.¹²⁹ McGinnis’s and Lund’s (and presumably Justice Scalia and Michael Paulsen) conception of the proper judicial function—a normatively conservative one—simply ignores the positive scholarship and it impoverishes their approach.¹³⁰

Constitution, 75 FORDHAM L. REV. 545, 562 (2006) (arguing that Scalia’s and Thomas’s originalism relies on anachronism and ideology when deployed in favor of conservative goals such as state sovereign immunity, affirmative action, commercial speech, and *Bush v. Gore*); Balkin, *Alive and Kicking*, *supra* note 124; Jeffrey Rosen, *Originalist Sin*, THE NEW REPUBLIC, May 5, 1997, at 26 (reviewing Justice Scalia’s *A Matter of Interpretation* and arguing that he will abandon his originalism when it conflicts with his true concern: protecting traditional values).

127. For a critique of the originalist position that applies with equal force to its current incarnation, see TUSHNET, *CRITICAL ANALYSIS*, *supra* note 16, at 41 (discussing the incoherence of the originalists goal of cabining judicial discretion by relying on what is ultimately an indeterminate historical inquiry). Tushnet was writing when the framers’ intent was in originalist vogue. When that approach was devastated, it moved to the ratifiers’ intent. Today, originalists want us to determine “how the public would have understood and applied the Constitution’s words at the time they were adopted.” Balkin, *Alive and Kicking*, *supra* note 122. As noted above, Balkin has “converted” to originalism. See Balkin, *Abortion and Original Meaning*, *supra* note 4.

128. See Friedman, *Judicial Review*, *supra* note 1, at 333 (“Judicial review can be understood as attractive precisely because it is embedded in politics, but is not quite of it. Politics and law are not separate, they are symbiotic. It would be remarkable to believe judicial review could operate entirely independent of politics or would be tolerated as such. Nor is it clear that this would be desirable given social and constitutional commitments to accountability and checks and balances. The practice of judicial review is valuable in that it serves as one more counterweight, like many others in our constitutional system.”).

129. For example, “rational choice institutionalism.” See Lee Epstein & Jack Knight, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC’Y REV. 87 (1996) (discussing the paradigmatic example of Justice Marshall’s opinion in *Marbury v. Madison* and how it artfully resolved the issue in the case without placing the Court’s nascent institutional power in jeopardy). This barely scratches the surface of rich positive political literature. For example, Cornell Clayton, a “historical new institutionalist,” argues that the attitudinal model is to a certain extent reductive. Cornell Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalism*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 22-30 (Cornell Clayton & Howard Gillman eds., 1999) [hereinafter DECISION-MAKING]; see also Charles Epp, *External Pressure and the Supreme Court’s Agenda*, in DECISION-MAKING 255-79 (undercutting attitudinalists who argue that the justices grant certiorari to cases to pursue their personal political goals by noting that the justices can only take those cases that are litigated, and if the ACLU, for example, ceased to bring lawsuits it would be difficult for the judges to pursue a civil liberties agenda as aggressively); see also Cornell Clayton & Howard Gillman, *Introduction*, in THE SUPREME COURT IN AMERICAN POLITICS 2 (Howard Gillman & Cornell Clayton eds., 1999) (describing the new institutionalism as “[s]cholars seeking to explore the broader cultural and political contexts of judicial decision making”); Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDIES AM. POL. DEV. 35 (1993) [Graber, *The Nonmajoritarian Difficulty*].

130. To be fair, McGinnis and Lund would likely respond that a good originalist approach to adjudication obviates all these problems, no matter what Justices Scalia and Thomas do in practice.

The central point is that most of the normative conservative foot-stomping on *Roe* is unpersuasive because it fails to address insights from other disciplines regarding the judicial decision-making process. The result is an unrealistic conception of judicial behavior.¹³¹ In addition to making arguments that are undercut by the insights of other disciplines, conservatives' legal arguments are misguided. For example, there is the old saw that substantive due process is a constitutional oxymoron because due process only ensures proper procedures.¹³² John Hart Ely famously wrote that substantive due process is like identifying a color as "green pastel redness."¹³³ But this is sophistic. As noted above, substantive due process has a substantial jurisprudential pedigree and its use in protecting substantive rights against government interference is not as incoherent as its critics allege.¹³⁴ Moreover, had it not been for the *Slaughterhouse Cases* emptying the Privileges or Immunities Clause—a clause legal scholars of differing political persuasions believe protects unenumerated rights¹³⁵—of any meaning,¹³⁶ the fight over what substantive rights the Due Process Clause protects would instead center on ascertaining what unenumerated rights the Privileges or Immunities Clause protects. Instead of asking whether the right to abortion is a liberty interest, the issue would be whether it is a privilege or immunity of citizenship. "Substantive due process" (i.e., unenumerated rights) would merely have relocated to a different constitutional address (although maybe a more textually and historically sound one). Put another way, the *Slaughterhouse Cases* only shifted the venue of the fight, not whether there would be a fight at all.

Nor is the conservative vision of substantive due process, upon reflection, appealing. According to conservatives, the Due Process Clause protects only those fundamental rights that are "objectively, deeply rooted in this Nation's

131. See, e.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1998).

132. Paulsen, *Dissenting Opinion*, *supra* note 3, at 202-03.

133. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980). Professor Ely, it hardly needs mentioning, wrote one of the first, and most cited, salvos in the scholarly debate over the soundness of *Roe*, arguing, in another oft-quoted passage, that "[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (emphasis in original).

134. See *supra* note 37; see also James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315, 315 (1999) (showing that the Due Process Clause has a long history in the state and federal courts of being invoked to protect substantive rights).

135. Randy Barnett, whose constitutional thinking could be classified as libertarian, speaks favorably of Michael Kent Curtis's book, which was one of the first to defend the Privileges or Immunities Clause as a source for unenumerated rights. Randy Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 1 (2006). Akhil Reed Amar, a liberal textualist, has also shown in his book, *The Bill of Rights*, that the Privileges or Immunities Clause could be a source of unenumerated rights. AKHIL REED AMAR, *THE BILL OF RIGHTS* 120-23, 180 (1999). Noted conservative scholar and jurist Judge Michael McConnell argues that unenumerated rights should be "based not on the normative judgments of courts, but on constitutional text supplemented by the tradition and experience of the nation." McConnell, *The Right to Die*, *supra* note 14, at 666.

136. See *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1870).

history, legal traditions, and practices,” because such indicia “provide the crucial guideposts for responsible decision-making.”¹³⁷ Under Justice Scalia’s approach—trumpeted by McGinnis and Lund—the prospective right should be analyzed at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified,” which means that no more unenumerated rights will be recognized (at least not any liberal rights in a conservative majority court).¹³⁸ *Bowers v. Hardwick* is the textbook example: by making what was inherently an ideological choice to frame the issue as to whether the Constitution protects “a fundamental right upon homosexuals to engage in sodomy,”¹³⁹ Justice White made it almost comically easy to swat his own softball out of the park. Laurence Tribe and Michael Dorf, in a critique of this argument, have shown that “the choice of cognizable traditions involves value judgments.”¹⁴⁰ That is to say, it will always be possible to frame an issue so that the measuring stick of “the most specific level” will be too high for disfavored litigants.¹⁴¹ The *Michael H.* and *Glucksberg* substantive due process model is pleasing to conservatives because it means that a justice following it will be hard-pressed to recognize any “new” rights that conservatives do not find politically palatable.

Finally, the conservative objection that *Roe* took the issue away from the political process is specious.¹⁴² Historian David Garrow, who wrote what is widely regarded as the definitive history of the pro-choice movement, has shown that, prior to *Roe*, motivated pro-lifers were able to defeat, roll-back, or seriously threaten much of the legislative successes of the pro-choice movement, even in

137. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Conservatives were ecstatic when *Glucksberg* came down; Judge Michael McConnell wrote an article emphatically stating that “the constitutional methodology under which *Roe* was decided has been repudiated.” McConnell, *The Right to Die*, *supra* note 14, at 666.

138. *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989); see Lund & McGinnis, *supra* note 7, at 1608.

139. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

140. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087 (1990) [hereinafter Tribe & Dorf, *Levels of Generality*]. Jack Balkin argues that, in any event, the entire debate misses the point; that “[t]he proper level of generality for the constitutional principles in the text is the one we find in the text itself.” Balkin, *Constitutional Redemption*, *supra* note 6, at 67. That is, if the text is vague and general (like “equal protection of the laws” or “due process”), then we know to read it at a relatively high level of generality, whereas rule-like text must be read more narrowly. *Id.* at 65-70.

141. See Tribe & Dorf, *Levels of Generality*, *supra* note 140, at 1057. For example, a conservative justice could frame the abortion issue as whether there is a recognizable tradition to destroy, with the woman’s permission, a genetically human entity in her uterus.

142. This objection goes to the heart of the “counter-majoritarian difficulty.” However, “obsession with the ‘counter-majoritarian difficulty’” is an academic concern that has outlived much of its usefulness. Friedman, *Judicial Review*, *supra* note 1, at 267. Additionally, Harvard’s Richard Fallon, in a fascinating exercise, shows that it is “not just a fallacy. It is a delusion” to believe that overturning *Roe* would extricate the courts from having to decide abortion-related constitutional issues. Richard Fallon, *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS L.J. 611, 648 (2007).

the face of popular support for some sort of change in the status quo.¹⁴³ In addition, Reva Siegel and Robert Post, building on Garrow's work, knock down the notion that *Roe* immediately created a pro-life "backlash," arguing instead that it was not until the late-1970s that the social conservative movement began to use *Roe* as a political weapon.¹⁴⁴ Lastly, there is abundant evidence that the political elite, especially Republican lawmakers, are happy with having the political hot potato of abortion being in the judicial branch.¹⁴⁵

And this ties into the important but ignored fact that a majority of American citizens have long said, and continue to say that they do not want *Roe v. Wade* overturned.¹⁴⁶ Granted, for most Americans, support for abortion remains contextual:¹⁴⁷ when a women's life is endangered, eighty-two percent of Americans support an abortion right in the first trimester (the number drops to seventy-five percent in the third trimester), but the number plummets to forty-one percent when the woman simply just does not want the child (and just twenty-four percent would support that same decision in the third trimester).¹⁴⁸ The numbers have remained remarkably consistent over time, at least for those who believe that abortion should sometimes be allowed.¹⁴⁹ Perhaps most importantly, Gallup Polls show that while there is solid support for legal abortion, "most Americans support the kind of chipping-around-the-edges limits on abortion that many states

143. See GARROW, *LIBERTY AND SEXUALITY*, *supra* note 53, at 482-83, 484, 496, 546-47, 576-77 (1994); see also David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840-41 (2006).

144. Reva Siegel & Robert Post, *Roe Rage: Democratic Constitutionalism and Backlash* 39-52 (Yale Law School, Working Paper No. 131, 2007), <http://papers.ssrn.com/abstract=990968> (on file with the *McGeorge Law Review*).

145. Graber, *The Nonmajoritarian Difficulty*, *supra* note 129, at 58 (collecting studies which show that state legislators "would rather the issue . . . go away" or simply thought that it should "not be a public policy issue or that the federal judiciary should resolve the matter"). Jeffrey Rosen, *The Day After Roe*, ATLANTIC MONTHLY, June 2006, <http://www.theatlantic.com/doc/200606/roe> (on file with the *McGeorge Law Review*). Rosen makes a persuasive case that GOP legislators do not want to be forced to move from "symbolic" opposition to *Roe* to an actual floor vote given public opinion on the abortion issue. See also Debate Club, *Should Liberals Stop Defending Roe?: Sanford Levinson and Jack M. Balkin Debate*, LEGAL AFF., Nov. 28, 2005, http://www.legalaffairs.org/webexclusive/debateclub_ayotte1105.msp (on file with the *McGeorge Law Review*) (Professor Levinson argued that "I am increasingly persuaded that the principal beneficiary of the current struggle to maintain *Roe* is the Republican Party"); GARROW, *LIBERTY AND SEXUALITY*, *supra* note 53, at 490-91 (noting that a Texas state legislator was hoping, as early as 1971, that "the Supreme Court decide [the abortion issue] for us").

146. In response to a Gallup Poll taken in January 2006, sixty-six percent of surveyed Americans stated they were opposed to overturning *Roe*, compared with sixty-three percent answering the same way in July 2005 and fifty-five percent in May 2006; the percentages of those in favor of overruling *Roe* ranged from twenty-five to thirty-two percent. See Gallup Poll, Gallup's Pulse of Democracy: Abortion, <http://www.galluppoll.com/content/default.aspx?ci=1576&pg=1> (last visited May 30, 2007) (on file with the *McGeorge Law Review*). It is a well-recited but important fact that the polls have consistently shown that most Americans support some form of legalized abortion; according to the most recent Gallup polls numbers, eighty-three percent of Americans think that abortion should be legal in all or certain circumstances, with fifty-three percent answering "only under certain circumstances." *Id.* Fifteen percent felt that abortion should always be illegal. *Id.*

147. *Id.*

148. *Id.*

149. See *id.* (showing fifty-four percent with the same answer in 1975; fifty-two percent in 1981; fifty-seven percent in 1988; fifty-one percent in 1994; fifty-nine percent in 1998; and fifty-seven percent in 2003).

have enacted in recent years, and that continue to be promoted in others: parental consent for minors, informed consent for women, spousal consent, and laws that would prohibit the specific procedure known as 'partial-birth abortion.'"¹⁵⁰ It should come as no surprise that the restrictions approved in *Casey* run mostly parallel to public opinion on those restrictions; political scientists have shown that there is a strong correlation between public opinion and the Court's decisions.¹⁵¹ Seen from an empirical and historical perspective, it is difficult to understand conservative objections that the federal judiciary has usurped the people's will.

III. EMPIRICAL EVIDENCE

Commenting on abortion-related legal scholarship, Stephen Carter wrote that

[O]ne longs for something new, an idea that will shake things up, but as each new article or book comes out, one is left with the dreadful and yet unavoidable sense that everything has been said. Not only that, but most of it was said ten years ago. Whatever arguments for free choice Justice Blackmun might have omitted in his comprehensive but unsatisfying majority opinion in *Roe v. Wade* have long since been filled in, and the basic pro-life argument, that the fetus should be protected for its real or potential personhood, is restated in lots of clever ways but is still only restated. As eyes glaze over, it often has seemed during the past two decades that only the names of the authors who offer the arguments have changed.¹⁵²

This statement, written sixteen years ago, rings even more true today.

For all the inroads that empiricism and social science have made into other areas of law, they have been under-utilized in constitutional law.¹⁵³ The goal of this paper is to move away from only utilizing normative theoretical arguments

150. *Id.*

151. Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1018 (2004) (advancing thesis that the justices are "highly responsive to public mood"); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96 (1993). For a less empirical but equally interesting study, see generally LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000). See also Friedman, *Judicial Review*, *supra* note 1, at 322 n.365 (collecting numerous studies by political scientists finding the same correlation).

152. Carter, *supra* note 97, at 2747.

153. However, this is beginning to get some attention from scholars; in February 2007, the *University of Pennsylvania Journal of Constitutional Law* held a symposium titled "Positive Approaches to Constitutional Law and Theory." See *University of Pennsylvania Journal of Constitutional Law*, The 2007 Journal of Constitutional Law Symposium, <http://www.law.upenn.edu/conlaw/symposium.html> (on file with the *McGeorge Law Review*). Also, leading legal scholars have begun to, and exhorted others to, incorporate the contribution of political scientists rather than simply grind out more normative scholarship. See, e.g., MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003); Friedman, *Judicial Review*, *supra* note 1; Balkin, *Constitutional Redemption*, *supra* note 6, at 89.

and examine the empirical evidence.¹⁵⁴ What, then, are the “known facts”¹⁵⁵ about abortion in America?¹⁵⁶

A. *Higher Abortion Rates, Less Late Term Abortions*

Not surprisingly, the abortion rate increased considerably after *Roe v. Wade*¹⁵⁷—although this is mostly attributable to more accurate statistics reflecting abortion’s legality, not increased reliance on the procedure.¹⁵⁸ The abortion rate continued to rise until 1981, leveled off, and began to decline in the 1990s, settling in at slightly over 1.3 million in 2000.¹⁵⁹ To put the numbers in a somewhat clearer context, in 1996, slightly more than one in five pregnancies (21.9%) resulted in abortion.¹⁶⁰ During the 1990s, the pregnancy rate also diminished but at a far more rapid pace, declining over twenty percent from 1989 to 1996.¹⁶¹

Moreover, an overwhelming number of abortions occur during early pregnancy. Just under ninety percent of all abortions are performed before the twelve week gestation point (or the first trimester), and nearly all abortions (ninety-eight percent) are performed by twenty weeks.¹⁶² Dilation and extraction abortions, better known by their politicized moniker “partial-birth abortion,” are rare. There were an estimated 650 such abortions in 1996.¹⁶³ To put that number into context, there were 1.4 million total abortions performed in 1996. However,

154. Of course, positive research merely tells us the state of things. One still has to make normative conclusions based on the state of things.

155. Graber, *Constitutional Politics*, *supra* note 17, at 325.

156. I will use almost exclusively data from the United States for this portion of the paper because I think it is important to understand the circumstances of abortion in America. This should not be taken as meaning that I think other countries’ experiences aren’t informative—I do; for example, Mary Ann Glendon’s book *Abortion and Divorce in Western Law* was no doubt a valuable addition to the literature on the subject.

157. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States*, 35 PERSP. SEX. & REPROD. HEALTH 6, 6-8 (2003), available at <http://www.guttmacher.org/pubs/journals/3500603.pdf>. This paper was published by the Alan Guttmacher Institute (AGI) which is considered by social scientists to have the most accurate abortion data available. See, e.g., DEBORAH R. MCFARLANE & KENNETH J. MEIER, THE POLITICS OF FERTILITY CONTROL 112 (2001) [hereinafter MCFARLANE & MEIER, FERTILITY CONTROL]. This is because the AGI, as opposed the Centers for Disease Control (CDC), collects its data directly from abortion providers, while the CDC relies on state health departments. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 20. For example, four states, including California, refused to report their abortion data to the CDC. Finer & Henshaw, *supra*, at 7. These states account for eighteen percent of all reported abortions. *Id.*

158. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 21; GRABER, RETHINKING ABORTION, *supra* note 17, at 65.

159. Finer & Henshaw, *supra* note 157, at 8 tbl.1.

160. STEPHANIE J. VENTURA & CHRISTINE A. BACHRACH, CTRS. FOR DISEASE CONTROL AND PREVENTION, NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940-1999 48 (2000). The abortion rate, and pregnancy rate, is based on the number of incidences per 1,000 women aged 15-44. *Id.*

161. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 23.

162. Cynthia C. Harper, Jillian T. Henderson & Phillip D. Darney, *Abortion in the United States*, 26 ANN. REV. PUB. HEALTH 501, 504 (2005).

163. Finer & Henshaw, *supra* note 157, at 8.

caution should be exercised in interpreting data on partial birth abortions "because projections based on such small numbers are subject to error."¹⁶⁴ Finally, while there has been no empirical research on intact dilation and extraction, given the microscopic rate at which it occurs, economic models suggest that restrictions on its use would have negligible effect on abortion policy.¹⁶⁵

In short, legalized abortion leads to an increase in abortion rates, a lower birth rate, and few "partial-birth abortions."¹⁶⁶

B. Increased Access and Lower Costs

Legalizing abortion, as a whole, increased access to and lowered costs for women obtaining the procedure. The geographic distribution of abortion is informative: according to Finer and Henshaw, women in California, New York, New Jersey, Florida, Illinois, and Texas account for fifty-five percent of all abortions (while they account for only forty percent of the female population ages fifteen to forty-four).¹⁶⁷ The vast majority of abortions, ninety-three percent, are performed in abortion clinics or some other kind of clinic, with only five percent being performed in hospitals.¹⁶⁸ Virtually all abortions, ninety-eight percent, are performed in urban and metropolitan areas.¹⁶⁹ This means that very

164. *Id.*

165. *Id.* at 183. Before moving on, I must note that Steven Levitt's and John J. Donohue's path-breaking and controversial research in the area of abortion is being purposefully ignored. Their most famous paper concerned the effect of legalizing abortion on crime rates. See Donohue & Levitt, *supra* note 195. There, they argued that "legalized abortion has contributed significantly to recent crime reductions." *Id.* at 349. Their theory was contested (both in academia and in the mainstream press) and economist Ted Joyce responded with a paper arguing that Donohue and Levitt had it wrong; the decrease in crime was actually due to the waning of the crack cocaine epidemic. See Ted Joyce, *Did Legalized Abortion Lower Crime?*, 39 J. HUMAN RESOURCES 1 (2004). Donohue and Levitt replied, arguing that due to some statistical measurement errors not only was Joyce wrong, but it turns out that effect of abortion on crime are probably *underestimated*. John J. Donohue, III & Steven D. Levitt, *Further Evidence that Legalized Abortion Lowered Crime*, 39 J. HUMAN RESOURCES 29, 29-30, 47-48 (2004). It is worth noting that other researchers have found that legalization of abortion has reduced the youth homicide rate among men, both white and non-white, although there was a minimal effect on women of the same age. Richard A. Berk et al., *The Legalization of Abortion and Subsequent Youth Homicide: A Time Series Analysis*, 3 ANALYSES OF SOC. ISS. & PUB. POL'Y 45, 45 (2003). They do note, however, that Joyce's crack-cocaine hypothesis may contribute for *part* of their findings. *Id.* at 61.

However, and this is an important however, the issue remains an open question in the field and other prominent economists who have studied the issue have concluded that more research needs to be done before the "winner(s)" can be determined. LEVINE, *SEX AND CONSEQUENCES*, *supra* note 22, at 172-73 (noting that "additional study in this area is needed before we can draw firm conclusions"); see also Klick, *Econometric Analyses*, *supra* note 189, at 776 (noting that at this point, due to lack of data, it is difficult "one way or the other on the larger issue of the relationship between abortion access and general crime statistics").

166. Philip Levine et al., *Roe v. Wade and American Fertility*, 89 AM. J. PUB. HEALTH 199 (1999).

167. Finer & Henshaw, *supra* note 157, at 9. The states with the lowest abortion rates are Kentucky, South Dakota, and Wyoming. *Id.*

168. *Id.* at 12.

169. Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987-88*, 22 FAM. PLAN. PERSP. 102 (1990).

few abortion providers are located in rural counties. It is well known that the number of abortion providers has been decreasing: “there were [thirty-seven] percent fewer abortion providers in 2000 compared to those performing the procedure in 1982.”¹⁷⁰ It is estimated that eighty-seven percent of counties in the United States have no abortion provider at all.¹⁷¹ However, only thirty-four percent of women of childbearing age actually live in those counties, a fact often glossed over by pro-choice partisans. Furthermore, of the thirty-four percent of women who live in a county without an abortion provider, only eight percent have to travel more than fifty miles to reach a provider.¹⁷² Traveling to obtain an abortion, then, is not an obstacle for the vast majority of women.¹⁷³

C. *Demographics: Abortion is Common but not a Birth Control Substitute*

Nearly half of all women—forty-three percent—will have at least one abortion prior to the age of forty-five.¹⁷⁴ White, non-Hispanic women account for 40.9% of abortions, while black, non-Hispanic women account for 31.7%.¹⁷⁵ Hispanic women account for 20.1% of abortions, with other races and ethnicities accounting for 7.3%.¹⁷⁶ When we translate those numbers into abortion rates,¹⁷⁷ the total rate of abortion for all women ages fifteen to forty-four in the year 2000 was twenty-one abortions per thousand women; the abortion rate among black women of that age group was forty-nine abortions per thousand, compared to thirty-three per thousand for Hispanic women, and thirteen for white women.¹⁷⁸ The teen pregnancy rate has steadily dropping since mid-1980s.¹⁷⁹ Abortion rates for women aged 15-19 was approximately forty-two per thousand in 1986, but declined to nearly half that amount in 2002.¹⁸⁰ Similarly, abortion rates among women aged 20-24 have also dropped but not at the same pace, from fifty-two

170. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 28.

171. *Finer & Henshaw, supra* note 157, at 10.

172. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 29.

173. However, the burden of traveling to obtain an abortion has been shown to fall disproportionately on married, teenage women.

174. Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSPS. 24, 29 (1998), available at <http://www.guttmacher.org/pubs/journals/3002498.pdf> (on file with the *McGeorge Law Review*).

175. Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 PERSPS. ON SEXUAL AND REPROD. HEALTH 226, 228 tbl.1 (2002).

176. *Id.* at 228 tbl.1.

177. The abortion rate is the “[n]umber of abortions per 1,000 women in [the] relevant subgroup.” *Id.*

178. *Id.*

179. GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATS.: NAT’L AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY (2006), <http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf> (on file with the *McGeorge Law Review*).

180. *Id.* at 4 tbl.1.

per thousand in 1986 to forty-four in 2002).¹⁸¹ Slightly over half of women obtaining an abortion have not had one before; 7.6% have had three or more.¹⁸² Women presenting for a repeat abortion are more likely to be older, physically abused, and sexually abused than women presenting for their first abortion.¹⁸³ These facts fly in the face of conservatives who callously accuse women of using abortion as a method of birth control.

Social attitudes are not a predictor of abortion incidence. A high level of education has consistently been found to indicate support for abortion, with this effect even stronger in women.¹⁸⁴ However, economically disadvantaged women account for a disproportionate number of abortions.¹⁸⁵ Perhaps unsurprisingly, opposition to abortion is associated with frequent church attendance and affiliation with the Catholic and conservative Protestant churches.¹⁸⁶ However, when beliefs are translated into actions, "Catholics do not abort any more or less than one would expect based upon their share of the population."¹⁸⁷ It is also interesting, but perhaps unsurprising, that when faced with the stark choice, those who call themselves pro-life are just as apt to have an abortion as other women.¹⁸⁸

D. Health Benefits: Safer Procedures, but More Sexually Transmitted Diseases

For women deciding to have an abortion, it seems clear that the legalization of the procedure has made it safer,¹⁸⁹ and it does not seem to affect women's chances of having subsequent, wanted pregnancies.¹⁹⁰ Despite some claims to the

181. *Id.* at 10 tbl.2.6.

182. U.S. Ctrs. for Disease Control and Prevention, *Abortion Surveillance—United States, 1998* MORBIDITY AND MORTALITY WKLY. REP., June 7, 2002, at 4, 29 tbl.13, <http://www.cdc.gov/mmwr/PDF/ss/ss5103.pdf> (on file with the *McGeorge Law Review*).

183. William A. Fisher et al., *Characteristics of Women Undergoing Repeat Induced Abortion*, 172 CANADIAN MED. ASS'N J. 637, 637-38 (2005).

184. See, e.g., Nancy J. Davis & Robert V. Robinson, *Are the Rumors of War Exaggerated? Religious Orthodoxy and Moral Progressivism in America*, 102 AM. J. SOC. 756, 773 tbl.3 (1996); Donald Granberg, *Conformity to Religious Norms Regarding Abortion*, 32 SOC. Q. 267 (1991); Richard J. Harris & Edgar W. Mills, *Religion, Values and Attitudes Toward Abortion*, 24 J. SCI. STUDY RELIGION 137, 146, 148 (1985).

185. *Id.* at 228 tbl.1, 231.

186. Michael R. Welch et al., *Attitudes Toward Abortion Among US Catholics: Another Case Study of Symbolic Politics*, 76 SOC. SCI. Q. 142 (1995); Eric L. Woodrum & Beth L. Davison, *Reexamination of Religious Influences on Abortion Attitudes*, 33 REV. RELIGIOUS RES. 229 (1992). In the time period immediately after *Roe*, whites tended to be stronger supporters of abortion rights than blacks, but by the late 1980s the two groups had flip-flopped. See Strickler & Danigelis, *supra* note 22, at 195-97.

187. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 30-32.

188. GRABER, RETHINKING ABORTION, *supra* note 17, at 10.

189. Jonathan Klick, *Econometric Analyses of U.S. Abortion Policy: A Critical Review*, 31 FORDHAM URB. L.J. 751, 756 (2004) [hereinafter Klick, *Econometric Analyses*] (citing a study showing that the fatality rate for abortions dropped after legalization had taken effect); POSNER, SEX AND REASON, *supra* note 17, at 277 (discussing the drastic drop in maternal death after *Roe*).

190. B. Adelusi et al., *Pregnancy Trends After Abortion*, 18 J. OBSTETRICS & GYNECOLOGY 159, 161 (1998).

contrary,¹⁹¹ undergoing an abortion does not increase a woman's chances of contracting breast cancer.¹⁹²

Conversely, legalized abortion has probably led to an increase in sexually transmitted diseases. Economists Jonathan Klick and Thomas Stratmann found that abortion legalization increased gonorrhea and syphilis rates as much as twenty-five percent.¹⁹³ Similarly, another researcher found a decrease in female gonorrhea rates when Medicaid funding of abortion was restricted, but not at a statistically significant level.¹⁹⁴ Parallel to that, economists have also found that abortion "induces more sexual conduct or diminished protections against pregnancy in a way that substantially increases the number of pregnancies."¹⁹⁵ The empirical evidence supports the abortion as insurance hypothesis.

E. Public Welfare Spending and Restrictions on Abortion

On balance, public welfare spending for abortion yields greater benefits for society. A 1990 study found that for each dollar spent nationally on family planning services, \$4.40 was saved "as a result of averting [short-term]

191. Joel Brind and Angela Lanfranchi, co-founders of the Breast Cancer Prevention Institute, have spearheaded a movement claiming that a link between abortion and breast cancer (the so-called ABC Syndrome) exists. See, e.g., Joel Brind, *Induced Abortion as an Independent Risk Factor for Breast Cancer: A Critical Review of Recent Studies based on Prospective Data*, 10 J. AM. PHYSICIANS & SURGEONS 105 (2005).

192. The so-called ABC Syndrome (abortion, breast cancer) has not been proven. In 2003, the National Cancer Institute, a component of the National Institutes of Health (NIH) convened a workshop of the world's leading experts in pregnancy and breast cancer. NAT'L CANCER INST., FACT SHEET: ABORTION, MISCARRIAGE, AND BREAST CANCER RISK (2003), <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage> (on file with the *McGeorge Law Review*). They concluded that, after reviewing the population-based, clinical, and animal studies that had explored the ABC link, abortion or miscarriage did not increase a women's risk of getting breast cancer. *Id.* See also NAT'L CANCER INST., U.S. NAT'L INSTS. OF HEALTH, SUMMARY REPORT: EARLY REPRODUCTIVE EVENTS AND BREAST CANCER WORKSHOP (2003), <http://www.cancer.gov/cancerinfo/ere-workshop-report> (on file with the *McGeorge Law Review*).

However, in a recent article, Angela Lanfranchi claimed that politics was keeping her research linking breast cancer and abortion from getting its due, and compared the signing statement by the 100 cancer experts at the NCI workshop to the 100 scientists who signed a statement coming out against Einstein's theory of relativity. Angela Lanfranchi, *The Science, Studies and Sociology of the Abortion Breast Cancer Link*, ASS'N FOR INTERDISC. RES. IN VALUES AND SOC. CHANGE RES. BULL., 2005, at 6-8, [http://www.abortionbreastcancer.com/June 2005.pdf](http://www.abortionbreastcancer.com/June%202005.pdf). It is worth noting that the journal that published her research is published by the Association for Interdisciplinary Research in Values and Social Change, a resolutely pro-life organization. See Ass'n for Interdisc. Res. in Values and Soc. Change, <http://www.abortionresearch.us/home.html> (last visited May 31, 2007) (on file with the *McGeorge Law Review*).

193. Jonathan Klick & Thomas Stratmann, *The Effect of Abortion Legalization on Sexual Behavior: Evidence from Sexually Transmitted Diseases*, 32 J. LEGAL STUD. 407, 411-12, 431 (2003). But cf. Klick, *Econometric Analyses*, *supra* note 189, at 760-61 (critiquing his own study and noting some of its shortcomings). Klick makes the interesting point that while STDs are a cost to society, the risk may be outweighed by the pleasures individuals obtain from unsafe sex. *Id.*

194. Bisakha Sen, *A Preliminary Investigation of the Effects of Restrictions on Medicaid Funding for Abortions on Female STD Rates*, 12 J. HEALTH ECON. 453, 454 (2002).

195. John J. Donohue, III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379, 386 n.8 (2001).

expenditures on medical services, welfare and nutritional services.”¹⁹⁶ In California, a state that tends to spend more on such services than others, the savings were even larger: \$7.70 saved for each dollar spent on contraceptive services.¹⁹⁷ A more recent study found that for every dollar spent on publicly funded contraceptive services, there was a savings “of \$3.00 on Medicaid costs for pregnancy-related and newborn medical care.”¹⁹⁸ According to McFarlane and Meier, “[s]tates that fund abortions for low-income women have substantially fewer teen births and about one-fourth fewer cases of inadequate prenatal care than state[s that] do not fund abortions.”¹⁹⁹

Using restrictions on abortion financing and access as their research lens, Levine, Trainor, and Zimmerman found that when states restricted Medicaid after 1977,²⁰⁰ their pregnancy rates dropped by around 7.7%.²⁰¹ A number of other studies also found decreases—the biggest drops were among low-income women—in the abortion rate (generally around three to five percent).²⁰² Insofar as mandatory waiting periods for abortions are concerned, one group of researchers found, using a case-study approach (Mississippi passed a law requiring a 24-hour mandatory waiting period²⁰³), that the number of abortions fell due to the law.²⁰⁴ Consistent with the abortion as insurance hypothesis,²⁰⁵ they found an inverse relationship between average distance to an abortion provider and teen birth rates, affecting only teens living in very rural areas.²⁰⁶ A study by Kane and Staiger suggests that parental involvement laws—e.g. the parental notification

196. Jacqueline Darroch Forrest & Susheela Singh, *Public-Sector Savings Resulting From Expenditures for Contraceptive Services*, 22 FAM. PLAN. PERSP. 6, 6 (1990).

197. Jacqueline Darroch Forrest & Susheela Singh, *The Impact of Public-Sector Expenditures For Contraceptive Services in California*, 22 FAM. PLAN. PERSP. 161, 161 (1990).

198. Jacqueline Darroch Forrest & Renee Samara, *Impact of Publicly Funded Contraceptive Services on Unintended Pregnancies and Implications for Medicaid Expenditures*, 28 FAM. PLAN. PERSP. 188, 193 (1996).

199. MACFARLANE AND MEIER, FERTILITY CONTROL, *supra* note 157, at 139.

200. In 1977, the Supreme Court held that the Social Security Act did not require states to pay for nontherapeutic abortions in order to participate in the federal-state Medicaid program. *See Beal v. Doe*, 432 U.S. 438, 447 (1977). *See also* *Maier v. Roe*, 432 U.S. 464 (1977) (holding that states are not constitutionally required to pay for nontherapeutic abortion for indigent women simply because it pays for childbirth expenses).

201. Philip B. Levine et al., *The Effect of Medicaid Abortion Funding Restrictions on Abortions, Pregnancies, and Births*, 15 J. HEALTH ECON. 555, 564 tbl.2 (1996).

202. *See, e.g., id.*; Philip J. Cook et al., *The Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes*, 18 J. HEALTH ECON. 241(1999); Janet Currie et al., *Restrictions on Medicaid Funding of Abortion: Effects of Birth Weight and Pregnancy Resolutions*, 31 J. HUM. RESOURCES 159, 185-86 (1996). *But see* Marianne Bitler & Madeline Zavodny, *The Effect of Abortion Restrictions on the Timing of Abortions*, 20 J. HEALTH ECON. 1011, 1027 (2001) (“The results for the fraction of the post-first trimester abortions do not suggest that Medicaid restriction is a given state lead to changes in the timing of abortions in that state. . . . [o]ur results for Medicaid restrictions may be surprising since several previous studies found that Medicaid funding restrictions lower the overall abortion rate.”).

203. *See* MISS. CODE ANN. § 41-41-31 to -35 (1993).

204. Theodore Joyce et al., *The Impact of Mississippi's Mandatory Delay Law on Abortions and Births*, 278 JAMA 653 (1997).

205. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 130.

206. Thomas J. Kane & Douglas Staiger, *Teen Motherhood and Abortion Access*, 111 Q.J. ECON. 467, 467-506 (1996) [hereinafter Kane & Staiger, *Teen Motherhood*].

law like that at issue in *Hodgson v. Minnesota*²⁰⁷—tend to lower the teen birth rate.²⁰⁸

However, this “good news” about abortion restrictions—i.e., the drop in the teen birth rate—is compromised because the restrictions do not seem to reduce the teenage sex rate (a fact conservatives forget to mention when trumpeting this restriction and abstinence only sex-education)²⁰⁹ because teens use contraception rather than abstain from sexual activity.²¹⁰ Teen in-wedlock births went down—out-of-wedlock births were unaffected—when access to abortion providers was restricted.²¹¹ In any case, the implication of all these studies is “that increasing abortion access increases the incidence of unprotected sex.”²¹²

Conversely, two more recent studies found that these types of laws had no significant effect on abortion or birth rates.²¹³ This finding is consonant with the findings of political scientists McFarlane and Meier whose research indicated that none of the states’ efforts in restricting abortion—e.g., mandatory waiting periods and parental involvement law—worked in reducing abortion rates.²¹⁴ They argue that these laws might simply delay women from having an abortion rather than affecting her ultimate choice, which only serves to place her health at greater risk by undergoing a later-term abortion.²¹⁵ Building on Levine’s research (and Bitler’s and Zavodny’s), Jonathan Klick found that “waiting periods do improve mental health among females as evidenced by a statistically and practically significant drop in the suicide rate [of about ten percent] when states adopt waiting periods.”²¹⁶ However, he also noted that “it appears as though restricting Medicaid funding for abortions leads to an increase in female suicide rates.”²¹⁷

207. 497 U.S. 417 (1990). This was the Court’s latest foray into the parental notification area; they upheld the constitutionality of a Minnesota law that required both parents be notified before a minor obtained an abortion, but also upheld a law that allowed for a judicial bypass procedure. *Id.*

208. Kane & Staiger, *Teen Motherhood*, *supra* note 206, at 467, 469, 503.

209. See Sharon Jayson, *Sex Education Grants Churns Over Clash*, USA TODAY, Apr. 16, 2007, at 5d (noting that abstinence-only programs have been shown by a congressionally mandated study to have “zero” effect on teen sex); *Democrats to Cut Off Abstinence-Only Funds*, CHRISTIAN CENTURY, June 12, 2007, http://findarticles.com/p/articles/mi_m1058/is_12_124/ai_n19328667/pg_1 (noting that Democrats expected cuts “spark[ed] outrage among social conservative groups”).

210. Philip B. Levine, *Parental Involvement Laws and Fertility Behavior*, 22 J. HEALTH ECON. 861, 875 (2003).

211. Kane & Staiger, *Teen Motherhood*, *supra* note 206, at 467.

212. Klick, *Econometric Analyses*, *supra* note 189, at 763. This makes sense. A central thesis of econometric studies of abortion is that abortion operates, in many important ways, like a form of insurance. *Id.* at 755-56. Put differently, the legalization of abortion decreased the cost of unintended pregnancy (and consequently, because of the lower cost, people engaged in more “risky” sex). LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 3.

213. Phillip Levine, *Parental Involvement Law and Fertility Behavior*, 22 J. HEALTH ECON. 861, 873 (2003); Marianne Bitler and Madeline Zavodny, *The Effect of Abortion Restrictions on the Timing of Abortions*, 20 J. HEALTH ECON. 1011, 1026-27 (2001).

214. MCFARLANE & MEIER, FERTILITY CONTROL, *supra* note 157, at 126-28.

215. *Id.* at 128.

216. Klick, *Mandatory Waiting Periods*, *supra* note 22, at 185.

217. *Id.* at 207-08 (emphasis added).

An important tangent to the increase in suicide rates is the claim, common in the pro-life movement, that the scientific evidence shows that abortion results in psychological and emotional harm to women.²¹⁸ David Reardon—a leader in the pro-life movement who is also a medical doctor—and others point to studies that ostensibly show emotional problems post-abortion.²¹⁹ However, these studies have been severely undercut by other researchers who note that they suffer from severe methodological and analytical shortcomings.²²⁰ Moreover, there is a significant body of research from reputable organizations and scholarly journals—such as the American Psychological Association (APA) and the Journal of the American Medical Association (JAMA)—which has repeatedly rejected the notion that there are psychological ills that await women who obtain an abortion.²²¹ Researchers have concluded that “[t]here is no scientific basis for constructing abortion as a severe physical or mental health threat,”²²² nor do women show increased psychiatric illness after undergoing an abortion.²²³

F. Legalized Abortion Enhances Women’s Chances to Succeed

Abortion legalization has decreased teen (1) marriage rates; (2) fertility; and (3) single-mother births.²²⁴ It has increased schooling and employment rates for black teens, which is connected to significant decreases in their fertility rates (including out-of-wedlock fertility).²²⁵ White teens did not seem to experience any increase in schooling and employment rates; connected with this, they experienced slight decreases in birth and marriage rates.²²⁶ A careful study by economists²²⁷ shows that both black and white women who bear children in their

218. See Siegel, *New Politics*, *supra* note 22, at 993 n.5 (collecting sources from organization like Concerned Women for American and Focus on the Family).

219. See, e.g., David Reardon et al., *Psychiatric Admissions of Low-Income Women Following Abortion and Childbirth*, 168 CANADIAN MED. ASS’N J. 1253 (2006); Gissler et al., *Suicides After Pregnancy*, *supra* note 22.

220. Brenda Major, *Psychological Implications of Abortions—Highly Charged and Rife with Misleading Research* 168 CANADIAN MED. ASS’N J. 1257, 1257-58 (2006); Klick, *Mandatory Waiting Periods*, *supra* note 22, at 187 (criticizing the Gissler study).

221. See, e.g., Nada L. Stotland, *The Myth of the Abortion Trauma Syndrome*, 268 JAMA 2078, 2078 (1992); see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed. 1994) (refusing to name as a disorder “postabortion syndrome”)

222. Nancy F. Russo & Jean E. Denious, *Controlling Birth: Science, Politics, and Public Policy*, 61 J. SOC. ISSUES 181, 185 (2005).

223. Anne C. Gilchrist et al., *Termination of Pregnancy and Psychiatric Morbidity*, 167 BRIT. J. PSYCHIATRY 243, 243-48 (1995).

224. Joshua Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, NAT’L BUR. ECON. RES. 27 (1996), <http://nber.org/papers/w5406> (on file with the *McGeorge Law Review*).

225. *Id.*

226. *Id.*

227. Many of the previous studies, routinely cited by those on the left, have serious methodological issues. See, e.g., Arline T. Geronimus & Sanders Korenman, *The Socioeconomic Consequences of Teen Childbearing Reconsidered*, 107 Q. J. ECON. 1187, 1188 (1992) (arguing that previous studies of teen mothers

teenage years have significantly higher rates of poverty, are more likely to be on welfare, and are more likely to have lower incomes²²⁸ (exactly how much higher of rate is subject to some dispute).²²⁹

Salting these decidedly positive findings is Akerlof's model,²³⁰ theorizing that legalized abortion gives males increased power in the marriage and sex market because females who do not engage in pre-marital sex are at a distinct disadvantage to those who will.²³¹ However, this has been through no "substantive empirical testing that could validate" it,²³² and, moreover, there are other economic models that come to a contradictory conclusion (which of course have not been subjected to their own crucible of empirical testing).²³³

G. Legalized Abortion Protects Children Against Violence and Marginalization

Abortion legalization has resulted in a statistically significant reduction in homicides of one to four year-olds, although researchers did not find a statistically significant reduction in homicides of infants less than one year old.²³⁴ In other research focusing on children, economists Marianne Bitler and Madeline Zavodny found that while there was no clear negative relationship between child abuse and common restrictions on abortion, legalized abortion led to lower reported rates of "child maltreatment."²³⁵

Jonathan Gruber, Phillip Levine, and Douglas Staiger, in a fascinating piece of research utilizing econometric tools, find that children who would otherwise have been born but were aborted—the "marginal child"—would have been nearly fifty percent more likely to live below the poverty line, forty percent more likely not to make it past infancy, roughly sixty percent more likely to live in single-parent home, and forty-five percent more likely to be on welfare.²³⁶ Concomitant with that, women who have an unplanned teenage pregnancy have

have failed to take into account relevant differences in these types of women vis-à-vis the female population).

228. Jeff Grogger & Stephen G. Bronars, *The Socioeconomic Consequences of Teenage Childbearing: Findings From a Natural Experiment*, 25 FAM. PLANNING PERSP. 156, 158-59 (1993).

229. V. Joseph Hotz et al., *Teenage Childbearing and its Lifecycle Consequences: Exploiting a Natural Experiment*, 40 J. HUMAN RESOURCES 683 (2004) (arguing that previous studies have overstated the negative consequences of subsequent life impacts on teenage mothers).

230. Forsythe & Presser, *Tragic Failure*, *supra* note 22.

231. *Id.* at 280.

232. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 161-64, 189-90.

233. Kane & Staiger, *Teen Motherhood*, *supra* note 206, at 467.

234. Susan B. Sorenson, Douglas J. Wiebe & Richard A. Berk, *Legalized Abortion and the Homicide of Young Children: An Empirical Investigation*, 2 ANALYSES SOC. ISSUES & PUB. POL'Y 239, 250-53 (2002). It is noteworthy that the researchers were "hard-pressed" to find any plausible alternative explanations, other than legalized abortion, for the reduction. *Id.* at 252-53.

235. See Marianne Bitler & Madeline Zavodny, *Child Abuse and Abortion Availability*, 92 AM. ECON. REV. 363, 365-66 (2002). The common restrictions are restrictions on Medicaid funding, mandatory waiting periods, and parental notification laws. *Id.* at 366.

236. Jonathan Gruber et al., *Abortion Legalization and Child Living Circumstances: Who is the "Marginal Child"?*, 114 Q.J. ECON. 263, 288-91 (1999).

much higher rates of poverty, welfare dependency, and lower rates of income.²³⁷ However, some caution should be used in drawing conclusions from these studies because of causation vis-à-vis correlation.²³⁸

IV. NORMATIVE IMPLICATIONS

A fair reading of the empirical evidence shows that, while something of a mixed bag, legalized abortion has been a positive for women. There are fewer late-term abortions.²³⁹ Legalization has increased access for most women and decreased medical costs.²⁴⁰ In health terms, legalized abortion has led to safer procedures and lessened negative side-effects, with the notable exception of sexually transmitted diseases.²⁴¹ Public welfare spending for abortions, moreover, yields greater societal benefits than costs.²⁴² Finally, greater reproductive choice and control leaves women with more control over their future²⁴³ and protects children from violence and marginalization.²⁴⁴

The issue here though is to figure out how the empirical evidence can do work in the constitutional law context. I think that it's time to stipulate that perhaps the substantive due process basis for the right to abortion has run its course as the primary basis for the abortion right and should be subordinated to the equal protection clause as the textual basis for the abortion.²⁴⁵ Some scholars, however, are not ready to make that concession. They contend the distinction between enumerated and unenumerated rights—the central issue with substantive due process doctrine—is a false choice, positing instead that the “[lawyer’s] toolkit is so large that any right can be described as enumerated.”²⁴⁶ A favorite thought experiment of those who espouse this viewpoint is the First Amendment: the text of that amendment certainly does not protect flag burning²⁴⁷ or nude dancing.²⁴⁸ How do we, the argument goes, get from speech to flag burning or

237. See, e.g., Grogger & Bronars, *supra* note 228, at 156.

238. LEVINE, SEX AND CONSEQUENCES, *supra* note 22, at 175-76.

239. See *supra* note 163 and accompanying text.

240. See *supra* notes 164-70 and accompanying text.

241. See *supra* notes 171-85 and accompanying text.

242. See *supra* notes 193-218 and accompanying text.

243. See *supra* notes 219-24 and accompanying text.

244. See *supra* notes 229-33 and accompanying text.

245. Although, I feel compelled to reiterate my earlier point that substantive due process could just as easily be classified as the Privileges or Immunities Clause by a different name. See *supra* notes 132-34 and accompanying text. I also sometimes wonder whether the substantive due process doctrine, as a whole, should be abandoned given the internecine warfare that has been waxing and waning since *Lochner*, especially given the rhetorical advantage it gives to those who oppose recognition of unenumerated rights. See FARBER, RETAINED BY THE PEOPLE, *supra* note 92, at 2, 47, 73, 77, 82.

246. Tushnet, *Unenumerated Rights*, *supra* note 38, at 218 (using Frank Michelman’s idea of “standard legal methods” lawyers use to argue).

247. See *Texas v. Johnson*, 491 U.S. 397 (1989).

248. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); see also DWORKIN, LIFE’S DOMINION,

nude dancing, neither of which are obviously speech? To answer the question satisfactorily “the discussion gets into considerations of free speech theory, precedent, and the like—precisely what happens when the Court enforces what its critics describe as an unenumerated right.”²⁴⁹

But this too easy. The free speech clause is self-sealing. Of course, political (in addition to strategic, historical, and institutional) considerations will be taken into account when a judge is evaluating whether the putative expression at issue is protected—the Warren Court era draft card burning case is a good example.²⁵⁰ However, at a certain point, the First Amendment’s text cannot be stretched any further, at least not without making “off the wall” legal arguments.²⁵¹ At a certain point, the “expression” at issue can no longer rationally be called thus the dichotomy between conduct versus expression in First Amendment jurisprudence. Compare gay and lesbian rights, punitive damages, anti-commandeering legislation, contraception and abortion, family autonomy, euthanasia, information control, right to travel, voting rights, right to marry, freedom of association, and the right of parents to educate and rear their children.²⁵² Even an amendment as broad as the First Amendment cannot cover the rights territory that Fourteenth Amendment “liberty” does (or could, or will).²⁵³ There is no common legal thread (or principle) that can plausibly tie together all the unenumerated rights cases.²⁵⁴ While the First Amendment allows judges free rein to make policy-based decisions within a pliable but bounded jurisprudential solar system, substantive due process can be stretched to a constitutional Milky Way.²⁵⁵

supra note 90, at 130 (arguing that the distinction between enumerated and unenumerated rights is “simply irrelevant”).

249. Tushnet, *Unenumerated Rights*, *supra* note 38, at 216.

250. See *United States v. O’Brien*, 391 U.S. 367 (1968).

251. See Balkin, *Constitutional Redemption*, *supra* note 6, at 87; see also Mark Tushnet, *Self-Historicism*, *supra* note 37, at 773-75 (arguing that the historical era “a well-socialized lawyer” finds himself in will determine what makes certain legal arguments plausible or not). In this same vein, this is one of the central problems with Dworkin’s First Amendment abortion argument; if the religion clauses can house the right to abortion, then “religion” has ceased to exist as a meaningful word.

252. *Id.* at 211-15 (delineating unenumerated rights currently protected under the Constitution and noting that this is a somewhat arbitrary way to list them).

253. For example, if not for the “Nixon Four” (and an otherwise general shift in the political will away from liberalism) the Court could have added education and welfare to the list. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). Although *Dandridge* is technically an equal protection case.

254. One might respond that perhaps there’s not supposed to be, but this again cedes the rhetorical high-ground to conservatives. See also Tribe & Dorf, *Levels of Generality*, *supra* note 140, at 1061 (arguing that the process of determining the contours of enumerated rights is no less subjective than determining whether there is an unenumerated right).

255. Perhaps the whole debate is beside the point for entirely different reasons. First, one might respond, the recognition of unenumerated rights was intended by the Framers of the Bill of Rights and Reconstruction Amendments, so it does not matter what the scope of unenumerated rights are. See FARBER, *RETAINED BY THE PEOPLE*, *supra* note 92, at 39-44, 53-62. Second, fears that Supreme Court will, without some constraining theory (say, originalism), begin to arbitrarily “find” new rights in the Constitution is an unlikely scenario. This is because the Supreme Court, as political scientists have been telling us for decades, rarely strays far from

As currently conceived, substantive due process, to borrow Akhil Reed Amar's phrase, allows scholars to belong to the "these are a few of my favorite rights" school of constitutional theory.²⁵⁶

With these inherent problems—and without a revival of the Fourteenth Amendment's Privileges or Immunities Clause²⁵⁷ (or much more fancifully, Justice Douglas's holistic approach in *Griswold*)—reliance on substantive due process should be subordinated to the equality principle(s) of the Fourteenth Amendment.²⁵⁸

Utilizing the Equal Protection Clause, buttressed by the empirical evidence, is the most persuasive justification for the abortion right. In Jack Balkin's latest paper, *Original Meaning and Constitutional Redemption*, he argues that we need to take the Constitution's text and history seriously to ensure that our "common [constitutional] project" stays strong.²⁵⁹ This means divining the "underlying principles" that the Constitution's text will bear.²⁶⁰ In the case of abortion, Balkin argues that those principles embodied in the Fourteenth Amendment include "prohibiting caste legislation, subordinating legislation, and arbitrary and unjust discrimination."²⁶¹ I agree with this assessment. But I hasten to add that if we are going to inform the underlying principles in the most intellectually satisfying way, positive scholarship on abortion must have a more prominent role.

A compelling example is the difficult question of how to deal with the rights of the fetus. The typical response from pro-choice scholars has been to pit the female and a fetus in a moral personhood cage match and declare the woman the winner,²⁶² or declare that at a certain point the state's interest in fetal life trumps the women's right to abortion (which undoubtedly should be the case).²⁶³ But

majoritarian legislative preferences. Robert Dahl, *Decisionmaking in a Democracy: The Supreme Court as National Policymaker*, 6 J. PUB. LAW. 279, 285 (1957) ("The fact is, then, 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."); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975) (only "during transitional periods, in which the Court is holdover from the old coalition [due to transitional elections]" will the countermajoritarian difficulty rear its head); see also Balkin & Levinson, *supra* note 11, at 1064-70.

256. AMAR, *THE BILL OF RIGHTS*, *supra* note 65, at 297.

257. See FARBER, *RETAINED BY THE PEOPLE*, *supra* note 92, at 197-200 (discussing the Ninth Amendment).

258. See Balkin, *Constitutional Redemption*, *supra* note 6, for a good discussion of why the Equal Protection Clause is the most cogent textual basis for the abortion right.

259. *Id.* at 62.

260. *Id.*

261. *Id.* at 61 (citing to Balkin, *Abortion and Original Meaning*, *supra* note 4).

262. See, e.g., TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 89, at 1352, 1354-55 ("Even if we view pre-viable fetuses as full human beings, the intimate and personal sacrifice that a ban on abortion would impose on requiring a pregnant woman to nurture unborn life is one that our legal system almost never demands"); Sunstein, *Neutrality*, *supra* note 91, at 32 (stating that his argument "is entirely comfortable with the claim that the destruction of the fetus is at least a morally problematic act. But it asserts that under current conditions, the government cannot impose on women alone the obligation to protect fetuses through an legal act of bodily cooptation").

263. See, e.g., Balkin, *Constitutional Redemption*, *supra* note 6, at 99.

neither approach answers the objections of those like Michael Paulsen, who believe that abortion at any stage is akin to murder.²⁶⁴

Essentially, conservatives contend that pro-choice accounts give short shrift to the value of the fetal life. There is something to this argument, but it is ultimately a weak one when viewed through the lens of the empirical evidence. As a preliminary matter, it is certainly a valid concern that legalized abortion might lead to a more callous societal attitude toward life, and that abortion—particularly late-term abortions—brushes up close to infanticide, something no one, save for Peter Singer and a few others,²⁶⁵ is comfortable with.²⁶⁶

However, putting to one side the infinitesimal number of these types of abortions, the fetal life argument becomes most unconvincing when pro-lifers like Michael Paulsen argue that the Supreme Court, through its abortion jurisprudence, “affirms and embraces human genocide in the United States of a dimension exceeding, in the decade that has just past, that of the Rwandan genocide, the Nazi Holocaust, Stalin’s purges, and Pol Pot’s killing fields, combined.”²⁶⁷ This argument epitomizes the overheated rhetoric that infects abortion scholarship. Paulsen neglects the fact that if there was no legalized abortion, abortion would simply be driven back into the black and gray markets that existed pre-*Roe*;²⁶⁸ estimates are imperfect but our most reliable ones indicate that during the 1950s and 1960s, women obtained as many as one million abortions per year.²⁶⁹ There is no reason to doubt that this practice, in

264. See Paulsen, *Dissenting Opinion*, *supra* note 3, at 196-213.

265. See PETER SINGER, *PRACTICAL ETHICS* 169-74 (2d ed. 1993); see also Michael Tooley, *In Defense of Abortion and Infanticide*, in *THE PROBLEM OF ABORTION* (Joel Feinberg ed., 1984).

266. It is worth noting that this is a cultural reaction rather than some universal moral value. For example, neither the Greeks nor the Romans found infanticide morally problematic. See POSNER, *SEX AND REASON*, *supra* note 17, at 272-73.

267. Paulsen, *Worst Constitutional Decision*, *supra* note 14, at 995-96.

268. See POSNER, *SEX AND REASON*, *supra* note 17, at 277, 286; GRABER, *RETHINKING ABORTION*, *supra* note 17, at 40-47 (discussing how from 1900-1970 affluent white women were able to obtain safe abortions on the gray market with the help of sympathetic doctors and a conscious decision by law enforcement agents not to interfere with the practice).

269. See Susan A. Cohen, *Envisioning Life Without Roe: Lessons Without Borders*, GUTTMACHER REP. ON PUB. POL’Y, May 2003, at 3, <http://www.guttmacher.org/pubs/tgr/06/2/gr060203.pdf> (on file with the *McGeorge Law Review*) (in the 1950s and 1960s “some 700,000 to 800,000 abortions were estimated to have taken place annually”). See also LAWRENCE LADER, *ABORTION II: MAKING THE REVOLUTION* 22 (1973); POSNER, *SEX AND REASON*, *supra* note 17, at 206 (citing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 180 *tbl.6.1* (1991)) (estimating “that 70 percent of abortions today would be performed anyway if abortion were illegal”); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 353-55 (1991) (aggregating studies and determining that one million abortions per year is the most reasonable estimate); James R. Abernathy et al., *Estimates of Induced Abortion in Urban North Carolina*, 7 *DEMOGRAPHY* 19, 26 (1970) (using statistical analysis to reach estimate of 700,000 and 829,000 abortions per year in the United States). Christopher Tietze & Clyde E. Martin, *Fetal Deaths, Spontaneous and Induced, in the Urban White Population of the United States*, 11 *POPULATION STUD.* 170, 175 (1957) (arguing that 20-25% of pregnancies were aborted). For a rejection of the pro-life attempt to dispute these numbers, see GRABER, *RETHINKING ABORTION*, *supra* note 17, at 23.

substantially the same amount, would still go on were abortion recriminalized.²⁷⁰ Setting aside the fact that legalized abortion has allowed women a chance to safely terminate pregnancies which, in many cases, would have been terminated in unsafe conditions (especially for women from low socio-economic backgrounds),²⁷¹ it is hard to take seriously the comparison of *forty-three percent of all American women*²⁷²—the percentage, remember, who will have at least one abortion—to genocidal maniacs and sadistic dictators. The fetal life argument simply does not deal in the reality of how society operates when abortion is illegal. This argument—whether abortion is murder—is, or should be, a non-starter in a legal discussion of the constitutional right to abortion; the government cannot plausibly advance protection of fetal life as an important and legitimate state interest when the recriminalization of abortion would do little to actually curb the practice. It could only be accepted if we knew that abortion laws would be vigorously enforced. However, this was not case pre-*Roe* (and therefore cannot be expected to be the case if abortion was again outlawed). Given that public opinion does not favor outlawing abortion, this is not a large logical leap; it is difficult to imagine that upper-middle class Americans would countenance criminal prosecution—or some significant regulation—of their daughters' reproductive choices.²⁷³ Along the same lines, we know that abortion is disproportionately favored by the American elite, the same people responsible for enforcement (or lack thereof) of the abortion laws.²⁷⁴ The moral personhood of the fetus should be left instead to the field of moral philosophy (and of course scientific advances).²⁷⁵

The empirical evidence, besides offering a way out of the fetal life dilemma, powerfully undercuts the current rhetorical approach of the pro-life movement—abortion harms women—instead showing that abortion has benefited women and helped *equalize* their role in society. First, as previously discussed, the notion that women are harmed psychologically by abortion is not supported by the empirical evidence.²⁷⁶ What is more, now that misperception has the imprimatur of the Supreme Court.²⁷⁷

270. GRABER, RETHINKING ABORTION, *supra* note 17, at 41-47.

271. *Id.*

272. Henshaw, *supra* note 174.

273. See Gallup Poll, *supra* note 146.

274. See GRABER, RETHINKING ABORTION, *supra* note 17, at 146-47.

275. Moral philosophers are nowhere near agreement on the fetal personhood issue. See generally THE ABORTION CONTROVERSY: 25 YEARS AFTER *ROE V. WADE* (Louis P. Pojman & Francis J. Beckwith eds., 2d ed. 1998) (collecting, among other writings, essays by moral philosophers which collecting essays by moral philosophers who argue about fetal personhood and its moral implications).

276. See *supra* notes 215-18 and accompanying text. It is also an eerily fascinating contention because it mirrors in important ways the argument made during the postbellum campaign to criminalize abortion that women needed to be prevented from having abortion because it was harmful to them. See Siegel, *Reasoning From the Body*, *supra* note 101, at 293-94.

277. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). Perhaps most troubling is that Justice Ginsburg included, in a footnote, some of the studies cited above (and others) that undercut what Justice Kennedy deemed

Second, the empirical evidence shows that, on balance, abortion has given women an equal chance at the full and unfettered participation in all facets of life. Conversely, foreclosing the abortion option for teenage mothers may foist upon them poverty and welfare dependence; access to abortion can give these women a chance to perhaps avoid that fate. We have also seen that legalized abortion reduces the number of late-term abortions which pose a greater threat to women's health. Finally, proscribing abortion would mean that women who obtain multiple abortions would be forced to endure raising a child in a physically or sexually abusive relationship.²⁷⁸ All of these examples empirically support the argument that abortion bans (or substantial early-pregnancy regulation) run afoul of the underlying principles of the Fourteenth Amendment: "prohibiting caste legislation, subordinating legislation, and arbitrary and unjust discrimination."²⁷⁹

Reva Siegel's scholarship serves as a good tool to make the point more explicit. In her Stanford Law Review article from 1992, Siegel argues for an equal protection approach to the abortion right.²⁸⁰ After an expert synthesis of the history of the postbellum movement by the medical profession to encourage legislatures to criminalize abortion, Siegel provides a very useful discussion of how current equal protection precedent and doctrine could quite easily be applied to the abortion context.²⁸¹ However, the final section of her article—coming under the heading "The Antisubordination Inquiry"—attempts to cement her point by arguing that an equal protection analysis needs to focus not only on the state actors' "judgment and justifications" but on how abortion affects women's lives.²⁸² Up until this point, Siegel's argument is persuasive. However, she invokes mostly feminist theory to talk about the effects of abortion regulation on women, including advocating that women be compensated by the state for bearing and raising children.²⁸³ This is where her argument loses steam. I agree

an "unexceptionable" proposition. *Id.* at 1649 n.7 (Ginsburg, J., dissenting). Interestingly, this is not the first time Kennedy has been criticized for his utilization of the empirical evidence. In the juvenile death penalty case, Kennedy asserted that "as any parent knows," juveniles lack the emotional or moral maturity to be held to account the same as adults. *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005). In fact, the empirical literature showed "that there is no inflection point at age 18 at which murderers suddenly discover the moral significance of their acts." Richard Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1713 (2006); see also Richard Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 64-65 (2005) (noting that the empirical evidence did not "support a categorical exclusion of sixteen-and seventeen-year-olds from the ranks of the mature. At most, the studies demonstrate a need for careful inquiry into the maturity of a young person charged with capital murder."). Jeffrey Rosen recently wrote an article about Justice Kennedy arguing that he has didactic tendencies toward moral certitudes. See Rosen, *Supreme Leader*, NEW REPUBLIC, at 20-27. One might query whether Justice Kennedy's *Gonzales* opinion was example of the tendencies delineated in Rosen's article.

278. See *infra* note 282.

279. Balkin, *Constitutional Redemption*, *supra* note 6, at 61.

280. See Siegel, *Reasoning From the Body*, *supra* note 101.

281. *Id.* at 347-63.

282. *Id.* at 368-69.

283. *Id.* at 377.

that the judicial inquiry should also (perhaps primarily) be on the effects of abortion regulation on women. But abortion regulations or prohibition subordinate and discriminate against women in numerous empirically verifiable ways—e.g., forcing them into the choice of bearing a child against their will or having an abortion in unsafe or unsanitary conditions (especially for low-income women), increasing the number of late-term abortions which pose a greater risk to women, and forcing them to raise a child in an abusive relationship—that we can show without resorting to the contested normative arguments.

Finally, the objections to the equal protection argument noted above are not substantial. As noted above, that some economic models show that abortion hurts some woman in the marriage market is small beer; there is no empirical evidence to support those models²⁸⁴ (obviating Judge Posner's point).²⁸⁵ However, even if we stipulate that abortion hurts as well as helps some women, this is not enough to deprive women of the right to abortion. Simply because Booker T. Washington, in his famous "Atlanta Compromise" speech of 1895, contended that the Jim Crow apparatus was tolerable²⁸⁶ did not mean that it was constitutionally acceptable. Parallel to that, simply because some women are ostensibly opposed to abortion—although it should not be forgotten that pro-life women abort the same rate as all other women²⁸⁷—this cannot mean their putative preferences control the constitutionality of abortion restrictions.²⁸⁸

In sum, it is more difficult to dismiss arguments based on empirical evidence (combined with the already substantial body of normative and doctrinal work), than arguments grounded only in normative constitutional theory. It is more persuasive to be able to point toward the real gains available to women in no small part due to legalized abortion (and the real burdens should it be overregulated or outlawed) rather than waxing philosophical about what "equality" means. To give one more example: when discussing the constitutionality of Medicaid funding restrictions on abortion, rather than penning another paean to equality and the penalty for poverty, scholars should discuss the

284. See *supra* note 22 and accompanying text.

285. See POSNER, SEX AND REASON, *supra* note 17, at 341.

286. See Booker T. Washington, *The 1895 Atlanta Compromise Speech*, <http://historymatters.gmu.edu/d/39/> (on file with the *McGeorge Law Review*) (stating that "[i]n all things that are purely social we can be as separate as the fingers . . ." and "[t]he wisest among my race understand that the agitation of questions of social equality is the extremist folly, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing"). It is eerie how in many respects Justice Thomas seems to have taken over Washington's mantle. See KEVIN MERIDA AND MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS, 232, 257, 266-67, 302 (2007) (recounting, for example, the putative paradox that most who "love Thomas are white" and his many times cantankerous relationship with the black civil rights establishment); see also Calvin TerBeek, *Write Separately: Justice Clarence Thomas's "Race" Opinions on the Supreme Court*, 11 TEX. J. C.L. & C.R. 185, 204-09 (2006) (discussing Thomas's aversion to affirmative action).

287. See *supra* note 171 and accompanying text.

288. The Court has sufficient doctrine to work with in order to make a smooth transition, should it so choose, to an equal protection basis for abortion. See Siegel, *Reasoning From the Body*, *supra* note 101, at 264, 349, 355-56.

truly disturbing fact that these restrictions lead to an increase in suicides among low-income women.²⁸⁹ This is *concrete* evidence that this restriction may very well run afoul of the Court's equal protection jurisprudence.

This article only scratches the surface of the wealth of positive scholarship on abortion that can be used to further strengthen the constitutionalization of the abortion right.²⁹⁰ The underutilization of empirical evidence in the debate is to our detriment. Constitutional scholarship is, to my mind, most useful insofar as it acknowledges its real world consequences. The debate can best be furthered by focusing on the "known facts," rather than normative constitutional theorizing that only preaches to the pro-choice professorial choir. Grounding the right to abortion in the Equal Protection Clause gives the right its strongest textual foundation, and utilizing the empirical evidence to buttress the right gives it the strongest possible constitutional foundation.

289. See Klick, *Mandatory Waiting Periods*, *supra* note 22, at 207-08. The author theorizes that "[i]t would seem that funding restrictions lower the access one has to abortion services, leading women to bear the burdens of childbirth and child rearing for which they may not be ready. This apparently leads to increases in stress levels and eventually a rising suicide rate." *Id.*

290. Sanford Levinson has argued that perhaps *Roe* should be abandoned because its opponents are not going to give up and the ensuing political fight is an electoral boon to the GOP. See Debate Club, *Should Liberals Stop Defending Roe?*, *supra* note 145. This argument has some appeal at first blush but, to take just one of Balkin's counterpoints, if *Roe* falls, this places the rest of sexual-autonomy line of cases—*Griswold*, *Eisenstadt*, and *Lawrence*—in a politically and doctrinally perilous position. *Id.*