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Revisiting Roe v. Wade: Substance and Process in the Abortion Debate

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Revisiting *Roe v. Wade*: Substance and Process in the Abortion Debate†

MARGARET G. FARRELL*  

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INTRODUCTION

Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

—Sierra Club v. Morton

For some time, questions about the wisdom and morality of new medical interventions, such as genetic screening, life-prolonging treatment for aged adults, neonatal therapies, organ transplantation, and reproductive technologies, have been posed as legal, sometimes constitutional, issues and presented to courts for resolution. On the twentieth anniversary of Roe v. Wade, this Article uses our experience with abortion technology to explore the consequences of resolving such complex social issues through an adversary process in terms of an abstract

constitutional right to privacy. While the author acknowledges the great contribution that public law litigation has made to the realization of important values that many people believe to be constitutional, including privacy, this Article takes no position on the merits of the abortion debate as it is posed by *Roe v. Wade* and *Planned Parenthood v. Casey*.


From 1968 to 1972 and 1976 to 1981, the author of this Article was engaged in public interest litigation involving class action lawsuits to secure statutory and constitutional rights of hospitalized mental patients and mentally disabled people, including the framing and implementation of remedial decrees designed to bring about institutional reform.

9. 410 U.S. 113 (1973). In *Roe*, Justice Blackmun wrote the majority opinion holding that a Texas statute prohibiting abortion at all stages of pregnancy except to save the life of the mother violated the Due Process Clause of the Fourteenth Amendment. Justice Blackmun's majority opinion further held that in the first trimester of pregnancy, the abortion decision must be left to the pregnant woman and the medical judgment of her attending physician; that in the second trimester, the state may regulate abortion in the interest of the mother's health; and that in the third trimester, the state has a sufficient interest in the potential human life of the fetus to regulate and even prohibit abortion except where it is necessary for the preservation of the life or health of the mother. Chief Justice Burger and Justices Douglas and Stewart filed concurring opinions, and Justices White and Rehnquist dissented.

10. 112 S. Ct. 2791 (1992). In *Casey*, Justices O'Connor, Kennedy, and Souter wrote a joint opinion in which they upheld provisions of a Pennsylvania statute that (1) required the mother's informed consent and the provision of certain information twenty-four hours prior to an abortion; (2) required the informed consent of one parent of a minor seeking abortion unless the minor obtained judicial authorization; and (3) imposed certain record-keeping requirements on facilities performing abortions. The Justices held unconstitutional a provision that required a married women to notify her spouse of her intended abortion, except in certain circumstances. The joint opinion further held that principles of stare decisis required affirmation of the basic holding in *Roe*: that a woman has a right to choose to have an abortion before fetal viability, a right protected against undue burdens of state regulation by the substantive component of the Due Process Clause of the Fourteenth Amendment. Justices Blackmun and Stevens wrote concurring opinions, and Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, dissented. Justice Scalia wrote a separate dissenting opinion.
Instead, after examining the problematic theories of judicial review implicated by Roe and Casey, this Article proposes a reconsideration of the litigation process that shapes the substance of the debate and raises difficult foundational issues. Drawing on the experience of alternative dispute resolution, institutional reform litigation, and negotiated rulemaking, this Article recommends the utilization of adjudicatory procedures that permit reflection on the complex personal relationships at stake, foster reformulation of the substantive issues to be decided, and promote collaborative solutions to the problems posed. Where parties cannot provide consensus solutions, this Article advocates that judicial resolutions be rendered in a more informed, deliberative, and legitimate way through the implementation of normative procedural principles of representation and participation that emanate from the Constitution.

The abortion debate in this country has been framed as a conflict between abstract interests in life and liberty—fetal life, when it is protected by the state, and the liberty of women to terminate their pregnancies. In 1973, the abortion conflict was settled legally by the U.S. Supreme Court in Roe v. Wade, when the Court balanced the two conflicting interests and announced a prescription for future accommodation. However, the Roe decision neither settled the national dispute about abortion nor provided instruction on the proper role of courts in the social drama played out around the life and death issues that advancing medical technology puts in high relief. Instead, the decision seemed only to fuel the acrimony between pro-life and pro-choice

11. Professor Tribe describes the abortion debate as a “clash of absolutes.” Laurence H. Tribe, Abortion: The Clash of Absolutes (1990). Professor Tribe characterizes the absolutes as “life against liberty.” Id. at 3. These interests are conceived as absolutes in the sense that they are asserted as being “free from any restriction, limitation, or exception.” The Random House College Dictionary (rev. ed. 1984) (defining “absolute”). Indeed, in his opinion in Roe v. Wade, Justice Blackmun characterizes the plaintiff’s claim as arguing “that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree,” he adds. Roe, 410 U.S. at 153; see also Casey, 112 S. Ct. at 2806 (joint opinion) (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (asserting that due process represents the balance which our nation has struck between liberty and the demands of organized society)).

12. Roe, 410 U.S. 113. However, in many other countries, legislatures have been the primary governmental forum in which such debates have been held and for the most part have been the institutions that have resolved them. Mary Ann Glendon, Abortion and Divorce in Western Law: American Failures, European Challenges 40 (1987); see also Christopher Tietze & Stanley K. Henshaw, Induced Abortion: A World Review 11-26 (1986); Donald L. Besehle, Judicial Review and Abortion in Canada: Lessons for the United States in the Wake of Webster v. Reproductive Health Services, 61 U. Colo. L. Rev. 537 (1990); Andrew Grubb, Abortion Law—An English Perspective, 20 N.M. L. Rev. 649 (1990).
advocates and to raise serious questions about the function of the Supreme Court in our constitutional democracy.

The Court recently revisited many of the issues it addressed in *Roe* in *Planned Parenthood v. Casey*. As this Article’s analysis suggests, differences between the Justices, which are evident in *Casey*, concerning the task of constitutional interpretation are bifurcated and exacerbated by the polarized substantive issues with which they must deal as a result of *Roe*. Before analyzing the Justices’ opinions on the abortion question in *Casey*, which this Article does not undertake to do, we, too, would do well to revisit *Roe* in an effort to understand what went wrong. Future courts will continue to be asked to resolve life and death questions as advances in medical science present possibilities for individual action unknown in the past. If, in those cases, the court does not perceive its task as one of balancing abstract interests in life and death, it might sanction far more creative resolutions of the complex issues posed by our new-found power to keep life and death at bay than were used in *Roe* and *Casey*.


14. In 1990, for example, the Supreme Court ruled on a state’s right to limit a guardian’s decision, made on behalf of a comatose but not terminally ill patient, to reject newly developed, life-prolonging interventions. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990). The Court divided on the question of whether constitutionally protected privacy includes a fundamental right to refuse life-sustaining medical treatment. Justices Brennan, Blackmun, Marshall, and Stevens would have held that Nancy Cruzan had a fundamental privacy interest protected by the Fourteenth Amendment that included the right to refuse unwanted medical care, including life-sustaining treatments. *Id.* at 304-05 (Scalia, J., concurring); *id.* at 344-45 (Stevens, J. dissenting). Justice O’Connor found “a protected liberty interest” to the same effect. *Id.* at 287 (O’Connor, J. concurring). Nevertheless, the Court held that the state may constitutionally require clear and convincing evidence of the incompetent’s preferences, expressed while still competent, before permitting guardians to refuse treatment on behalf of their wards. *Id.* at 283. As in the abortion controversy, the social, economic, religious, and moral implications raised by these medical procedures have not been fully explored. And again, the issue was posed as a conflict between polarized, abstract, fundamental interests—the patient’s privacy interest in choosing death and the state’s interest in the “protection and preservation of life.” *Id.* at 281. Justice Rehnquist, writing for the majority, set up the dichotomy by hypothetically assuming the Constitution would grant a competent person a protected right to refuse lifesaving interventions and finding that there is “no gainsaying” Missouri’s interest in the preservation of human life. *Id.* Compare Justice Brennan’s characterization of the issue before the Court (“The starting point for our legal analysis must be whether a competent person has a constitutional right to avoid unwanted medical care.” *Id.* at 304 (Brennan, J., dissenting)) with that of Justice Scalia (“Starving oneself to death is no different from putting a gun to one’s temple as far as ... suicide is concerned.” *Id.* at 296 (Scalia, J., concurring)). “[F]or patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is ‘life’ as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.” *Id.* at 345 (emphasis added) (Stevens, J., concurring in part and dissenting in part). “[T]his Court cannot defer to any State policy that drives a theoretical wedge between a person’s life, on the one hand, and that person’s liberty or happiness, on the other.” *Id.* at 355 (Stevens, J., dissenting).

This Article investigates how the law both defines the issues and is defined by them. It is about the effect of process on substance and substance on process in the law. Part I examines the trial record and legal strategies in Roe v. Wade to demonstrate that, by trying to resolve the social issues raised by abortion technology through litigation, we have transformed the real-life, contextual, relational, complex facts about abortion into a two-sided contest between generalized maternal rights to privacy and theoretical state interests in potential human life, a process that teaches us little about the moral and social problems we seek to resolve.

Part II examines judicial determinations based on constitutional interpretation, and contrasts this modern law-making process with that of common law judges. As the Justices' opinions in Casey make clear, the former raise serious questions about the Court's institutional competence to do the job it has created for itself, as well as about justifications for the exercise of judicial review. Part III explores the foundational theories of judicial review set forth by several prominent legal scholars seeking to answer the questions posed in Parts I and II, and examines the procedural mechanisms available for judicial resolution of broad social issues.

Part IV urges an examination of the litigation process through which the issues are framed as a clash of absolutes, and the development of civil procedures that better accommodate the many diverse interests at stake. This examination of the process and development of new procedures should be undertaken before confronting either the substance of the issues posed by Roe and Casey or the questions of governance they raise. This plea for a new process in such cases builds on the perceived "weakness" of older process theory, that is, its inevitable subjectivity. Rather than deny or embrace that perception, this Article proposes that we seek a basis for the legitimacy of judicial review that rests not on the validity of judicial value judgments measured against elusive standards of "well-ordered liberty," deep historical traditions, and "undue burdens," but one that rests instead on procedures that will give effect to the values of those affected by the Court's action, expressed through a more participatory and consensual adjudicative process. The legitimacy of such an approach lies not in its substance but in its form—the judgment as a product of a


17. See discussion infra notes 325-39 and accompanying text.
process that conforms with principles of fairness, representation, and participation, not propounded as eternal, foundational truths, but as the fundamental principles expressed in the Constitution.

I. THE ABORTION ISSUE

Abortion is an unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist . . . ; and . . . for the life or potential life that is aborted.

—Planned Parenthood v. Casey

As some of the Justices recently observed, the abortion debate is an “intensely divisive controversy” between “contending sides of a national” dispute. Thus, the Court’s decision in Roe v. Wade, which might be viewed as a compromise recognizing both a woman’s privacy interest in terminating her pregnancy in its early months and the state’s compelling interest in protecting potential fetal life in its later months, is usually regarded only as a victory for abortion rights. Responsibility for that perception has been laid upon the Court itself. Legal scholars criticized Justice Blackmun’s opinion in Roe for being unnecessarily divisive and inflammatory, and for alienating those with a world view that does not permit abortion. The presentation of the issues in irreconcilable,
polarized terms and the Court’s resolution of them in those terms, both in Roe and in Casey, have provoked extremist reactions by some members of the public, who use threats of violence to traumatize pregnant women entering abortion clinics and who vandalize, bomb, and burn the clinics themselves. The debate continues to rage around the nomination of Justices to the Supreme Court and the provision of abortion information in federally funded clinics. Unless the abortion controversy can be diffused, we run the risk that it will polarize our thinking on related issues, widening the national divisions it reflects.

A. Abortion as a Matter of Relationships

As often observed, form shapes substance. What then is the substance about abortion that is shaped by the procedural form in which it is presented to the courts? The real-life emotional, financial, and social factors that give rise to the demand for abortion, and to which abortion gives rise, do not pose “either-or” value choices for those involved. Rather, they present interrelated and indeterminate questions that reflect larger social and personal issues. One has only to read Kristin Luker’s

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book, Taking Chances: Abortion and the Decision Not to Contracept, written shortly after the Roe decision in 1975, to understand the point.\(^28\)

Luker discounts the theory that abortion is used as a contraceptive because women have incomplete knowledge about preconception measures or because of individual intrapsychic conflicts that cannot be fully understood.\(^29\) Instead, she hypothesizes that women engage in a fairly conscious, rational, though often not express, cost-benefit analysis in which they weigh the many different relational costs and benefits of pregnancy against those of contraception and birth.\(^30\) Thus, for example, many of the women she surveyed found contraception “unnatural” and “cold blooded,” a measure that robbed the sexual act of its warm intimacy.\(^31\) For others, to use a contraceptive, such as the pill, was to acknowledge to herself and to others that she was available for sex and thus transgressing the model of a “good girl” in the traditional moral sense.\(^32\) Some women avoided contraception because they saw in pregnancy a way to notify parents, husbands, and lovers that they had not been properly attentive and to ask for help and care.\(^33\) Still others recognized pregnancy as a means of measuring their partner’s commitment to them. Some believed that if they got pregnant, their partners would marry them or become more loving.\(^34\) Disillusioned in those beliefs after becoming pregnant, many sought abortions.\(^35\) Finally, some women saw contraceptives not as a way to control one’s body but as a technology that permitted women to be exploited by their male partners. As one woman stated:

> [If you use a contraceptive,] [h]e’s not worrying about what’s going to happen to you. He’s only worrying about himself.

> ... [Getting birth control pills] worked to where it was a one-way street for his benefit, not for mine. It would be mine because I wouldn’t get pregnant, but safe for him, too, because I wouldn’t put him on the spot. So I get sick of being used. I’m tired of this same old

\(^{28}\) KRISTIN LUKER, TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT (1975).

\(^{29}\) Id. at 18-25.

\(^{30}\) Id. at 34-36. For an interesting analysis of the elasticity of the demand for abortion using an economic model of the demand for abortion control, see Marshall H. Medoff, An Economic Analysis of the Demand for Abortion, 26 ECONOMIC INQUIRY 353 (1988).

\(^{31}\) LUKER, supra note 28, at 42.

\(^{32}\) Id. at 44.

\(^{33}\) Id. at 70-73.

\(^{34}\) Id. at 70.

\(^{35}\) One writer noted that some pregnant women report that they resented the fact that their partner did not try to talk them out of having an abortion. LINDA B. FRANCKE, THE AMBIVALENCE OF ABORTION 96, 100, 107 (1978).
Many women choose abortion in order to meet their moral responsibilities to existing children, or out of a moral concern about bringing a child into a world of social and financial poverty. Thus, women's relationships with boyfriends, girlfriends, peers, faithful and unfaithful spouses, parents, siblings, and children are all affected by the failure to use contraceptives and the termination of pregnancies through abortion.

Commentators have described the anguish of men who want what they have helped conceive to be born and become their children, while other potential fathers are ignorant or uncaring. Parents who would be grandparents grieve the loss of heirs they will never know, while others are eager to eliminate through abortion the burden and expense of unwanted future generations. Doctors and other health care professionals debate their own ethical obligations and the appropriate practice standards they should follow when asked to advise pregnant women of the medical implications of their conditions.

36. Luker, supra note 28, at 127-28; see also Catharine MacKinnon, The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion, RADICAL AM., July-Aug. 1983, at 23 (suggesting that polls indicating that men often support abortion rights more than women can be explained by the fact that abortion makes heterosexual relationships more available and relieves men of the responsibilities they might otherwise have for sex).

37. See Carol Gilligan, In a Different Voice 111-12, 116-17, 120 (1982); Alison Jagger, Abortion and a Woman's Right to Decide, 5 PHI. F. 347 (1974); Jean Braucher, Tribal Conflict over Abortion, 25 GA. L. REV. 595, 599 (1991) (reviewing Tribe, supra note 11). Some women were motivated to risk becoming pregnant or to terminate their pregnancies by a number of other factors, including the expense of contraceptives, the inconvenience of clinic visits, and the desire to preserve their health.


reflect shifting relational dynamics through which gender, class, and generational conflicts are played out.

Hence, as Rosalind Petchesky demonstrates, abortion as a social fact, like sexuality, is experienced through relationships, not only with sexual partners, but also with parents, peers, religious figures, and medical professionals. These relationships are often fraught with conflict, differences in power, and resistances to power which are as important as concepts of morality in determining the meanings of sexual encounters and the demand for abortion. Pregnancy can be used by young women as a way of separating from parents and establishing the boundaries between childhood and adulthood, particularly where other avenues, such as educational achievement and employment, are blocked. Abortion permits the postponement of the completion of that process while warning all that it is pending. Similarly, abortion permits a young girl to establish her sexual identity through occasional sexual intercourse without appearing to be sexually available contrary to traditional family-supported moral values. But moral traditions are perpetuated by religious traditions, and many pregnant women who want abortions are paralyzed by religious beliefs that hold that it is not just a fetus that they carry, but a soul, and that it is for God, not themselves, to dispatch souls. Thus, abortion is not a single abstraction but has different meanings to women in different social positions and to those in relationships with them.

Also like sexuality, the fact of abortion gains meaning from the historical, technological, and political contexts in which it occurs. The number of legal abortions increased by more than fifty percent in the six years following the Supreme Court's decision in Roe v. Wade. The rate

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41. Id.
42. Id. at 222-23. Petchesky notes that no sexual revolution was perceived as long as it was black women and poor white women whose sexual activity became apparent when they bore illegitimate children or showed up in hospital emergency rooms after failed illegal abortions. The sexual situations of white middle class women remained hidden since they could afford better care on the abortion black market. The advent of legal abortion has equalized the visibility of the sexual activity of young unmarried women of all races and social classes. Id. at 231.
43. While Protestant and Jewish women were less likely to have abortions in 1987 than women as a whole, Catholic women were about as likely. RACHAEL B. GOLD, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? 19 (Alan Guttmacher Institute ed., 1990).
44. PETCHESKY, supra note 40, at 221-33.
46. PETCHESKY, supra note 40, at 142. Petchesky notes that at the present time women who seek abortions are largely young and unmarried. Between 1975 and 1980, about 65% of the women who obtained abortions were under 24 years old, 75% were unmarried. Id. at 142-43.
of abortions per 1,000 women increased from about seventeen in 1973 to twenty-seven in 1988. The groups contributing most to the increase were white teenagers and slightly older, poor, minority women who were heads of households. These increases have been attributed to several factors: a trend toward postponed marriage, in part because recession precluded male partners from assuming the financial obligations of marriage; an increase in premarital heterosexual activities; and young women’s increased expectations for education and careers created by the women’s movement as well as an expanding labor market. However, out-of-wedlock births also rose during this period, particularly among poor, working-class teenagers, who view childbearing as a mark of adulthood which will also provide a welfare check to contribute to the income of an extended family. Importantly, both abortions and out-of-wedlock births “reveal sex,” and make pre-marital sexual relations a fact to be reckoned with. Abstract concepts of life or liberty fail to adequately convey the sexual meanings of abortion.

47. Profile of Abortion in the United States, N.Y. TIMES, July 1, 1992, at A12 (chart) [hereinafter Profile]. About 40% of the women obtaining abortions were under age 20; 25% to 35% were nonwhite. The percentage of women obtaining abortions who were unmarried increased from about 73% to 80% between 1973 and 1988. Id.

48. PETCHESKY, supra note 40, at 155-57. Compared to all women of reproductive age in 1987, women obtaining abortions were younger, less likely to be married, poorer, and more likely to be in school or employed. They were also disproportionately black and hispanic. Gold, supra note 43, at 16-19. Poor women were three times as likely to get abortions as other women. The average cost of an abortion in 1989 ranged from as low as $190 in West Virginia to $352 in California and $486 in Alaska. Profile, supra note 47.

49. A recent study by Johns Hopkins University tracked 360 black, teenage Baltimore women who had abortions. It found that these women were more likely to have graduated from high school and continue their education than teenage women in a control group who either carried their pregnancies to term or whose pregnancy tests were negative. Laurie S. Zabin et al., When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status and Subsequent Pregnancy, 21 FAM. PLAN. PERSP. 248 (1989). In addition, the study found that the women were not adversely affected psychologically. Id. For an anecdotal account of women who later regretted their decisions to abort, see DAVID C. REARDON, ABORTED WOMEN: SILENT NO MORE (1987).

50. PETCHESKY, supra note 40, at 144-51. Yet, two-thirds of all sexually active teenagers did not get pregnant. Id. at 145. Of those who did, two out of three of these pregnancies resulted in miscarriages or abortions. Id. at 147.

51. Demographic data indicate that in this period, there was a 30% increase in premarital intercourse among white teenage girls, a lowering of the age at which sex was initiated, and less exclusivity in partners. Id. at 211. Yet many women were found to be sexually inactive for long periods of time and thus often unprotected by contraceptive use during sporadic periods of activity. While other sexual behavior may have been practiced on an equally large scale in the 1950s, the inclusion of actual sexual intercourse in those activities in the 1970s, and its visible consequence of pregnancy and abortion, left the false impression that there was a generational sexual revolution occurring. In reality, earlier generations hid their sexual encounters behind inconclusive but satisfying sexual practices and a facade of shot gun weddings. See id. at 212-15.
The AIDS epidemic, too, has added another factor to the abortion debate. Not only has the fear of contracting AIDS modified heterosexual behavior, the disease has resulted in a significant number of pregnancies in which the fetus is also infected. The prognosis for such infants is a short life, an expensive illness, and a long, agonizing death. This new consequence of unprotected sexual intercourse provides an additional reason why an HIV-infected woman, and those financially and morally responsible for the fetus after birth, might want to terminate her pregnancy. At the same time, it raises difficult questions about the value to be placed on the quantity and quality of life.

While the authors of the joint opinion in *Casey* nod in Rosalind Petchesky's direction when they recognize that women define their lives and place in society on the basis of their legal abortion prerogatives, they fail to understand the full implications of that perspective for the resolution through litigation of questions about the utilization of abortion techniques. To grasp the relativity of the meaning of abortion and the complexity of the situations in which abortions are sought—the contradictory moral values, the complicated psychological processes, the network of affected social relationships, the effect of financial consequences of contraception, pregnancy, childbirth, abortion, and illness—and to understand how a variety of these factors come together differently for each individual woman and lead her to consider terminating her pregnancy, is to recognize the poverty of the concept of abortion as a clash of sterile, generalized, antithetical interests in life and liberty. Yet

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53. In May, 1990, 10% of all adult AIDS cases reported to the Center for Disease Control were women, the majority of whom were black and Hispanic women of childbearing age. A survey by the Center showed that nationally, 1.5 women per 1,000 who delivered babies in 1989 were HIV positive. The rate in New York State was 5.8 per 1,000. Studies show that approximately 30% of babies born to HIV positive women are infected with the AIDS virus. Other studies show that, nevertheless, in New York City, women who know they are infected with HIV become pregnant at about the same rates as women who are not infected. It is speculated that having a baby while infected with the HIV virus may result from denial, family pressure, a desire to leave a legacy, or religious opposition to abortion. For some, it is done out of hope for a healthy baby. One infected mother who had lost one child to AIDS stated she had never considered terminating her second and unplanned pregnancy because that would have given the baby a zero chance of survival. Mireya Navarro, *Women With AIDS Virus: Hard Choices on Motherhood,* N.Y. Times, July 23, 1991, at A1, B4.

54. Planned Parenthood v. *Casey,* 112 S. Ct. 2791, 2809 (1992) (joint opinion). None of the other Justices seem to see beyond the abstractions. See the opinions of Justices Stevens, id. at 2839-41 (women v. fetus); Blackmun, id. at 2846-47 (privacy v. the state); Rehnquist, id. at 2859-60 (women v. fetus); and Scalia, id. at 2874 (“The issue is whether [the power of a woman to abort her unborn child] is a liberty protected by the Constitution. . . . I am sure it is not.”).
that is just how abortion issues are framed for decision by customary litigation procedures.

B. Procedures that Polarize

An examination of the use in \textit{Roe} of traditional procedural doctrines regarding professional solicitation, standing, mootness, remedies, intervention, amicus curiae participation, and class representation illustrate how unsuited these doctrines are to the job presented by litigants seeking judicial wisdom about the utilization of new medical technology, like abortion.

1. Solicitation and Representation

Twenty-six-year-old Norma McCorvey, much better known as "Jane Roe," the plaintiff in \textit{Roe v. Wade}, discovered in 1969 that she was alone in a small Texas town, pregnant, penniless, and forsaken. When she could not find a doctor who would perform an illegal abortion for a fee she could afford,\textsuperscript{5} she was put in touch with attorneys Sarah Weddington and Linda Coffee, who, although McCorvey did not know it, were ideologically motivated lawyers looking for a plaintiff to test the constitutionality of Texas's anti-abortion laws.

One of the threshold issues presented by Norma McCorvey's situation is whether a court should have entertained a lawsuit brought in an effort to use the judiciary as an instrument of social change. Out of a concern that lawyers may stir up unnecessary litigation and engage in overreaching, misrepresentation, and invasions of privacy, lawyers have been ethically restrained from making contact with potential plaintiffs no matter how meritorious the client's unsuspected claim for damages might be.\textsuperscript{6} However, out of deference to the First Amendment rights of lawyers who have a desire to further civil rights and similar political objectives, states may not discipline lawyers who take the initiative and actively solicit clients, like McCorvey, so that they can invoke a right to judicial resolution of the political questions on their minds.\textsuperscript{7} These suits


\textsuperscript{6} \textit{Model Code of Professional Responsibility} DR 2-103, 2-104 (1980).

\textsuperscript{7} \textit{In re Primus}, 436 U.S. 412 (1978) (holding that states may not regulate nonprofit organization engaged in educational lobbying activities and assisting litigation on behalf of unpopular causes and defendants without establishing a compelling state interest in doing so); \textit{cf.} \textit{Shapero v. Kentucky Bar Ass'n}, 486 U.S. 466 (1988) (holding that states may not prohibit attorney advertising that is
present disputes different in kind from traditional lawsuits involving private claims put forward by lawyers who act as spokesmen for their individual clients.58

Furthermore, ideologically committed organizations often pay the attorneys' fees and expenses of such litigation and, in doing so, control the substantive and the procedural strategies of the litigation.59 The point is that by creating a public interest exception to rules limiting solicitation, courts themselves have invited, or at least accepted, the task of resolving complex social and politically important issues like abortion. But they do so without providing adequate procedures for carrying out the task.60

2. The Request for Relief

By the time she interviewed the lawyers who eventually represented her, Norma McCorvey was about three months pregnant; by the time they filed her complaint, she was seven months pregnant; by the time the lower court heard the case, she had given birth; by the time the U.S. Supreme Court decided the case, her baby was three years old and living with adoptive parents.61 Norma McCorvey already had responsibilities to a child being raised by her mother, had an unstable family history, had only a tenth-grade education, had little or no money for medical expenses, was without the means to support another child, and had no relationship with the man with whom she had conceived (indeed, for a time she had lied nondeceptive and truthful); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding that state may not regulate truthful attorney advertising that does not invade state's reasonably related interest in preventing consumer deception). See generally Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 829-39 (3d ed. 1992).

58. For instance, Norma McCorvey first spoke with Weddington and Coffee when she was at the end of the first trimester of her pregnancy. They had been having difficulty finding a pregnant client in the counseling and referral groups with which they had been in touch because the women who sought such services knew they were pregnant and wanted abortions and were not willing to incur the increased medical risk that would be caused by the delay that even brief legal proceedings might require. FAUX, supra note 55, at 38. The situation poses the ethical question whether Weddington and Coffee should have referred McCorvey to such a counseling group to receive advice about how to obtain an abortion in her circumstances, or represent McCorvey as a plaintiff with standing. Furthermore, in conventional lawsuits, attorneys are paid by their clients on a fixed fee or contingency fee basis, and lawyer and client generally have the same interest in recovery. In the case of public interest litigation, however, there are several possible bases upon which a successful plaintiff can claim a right to reimbursement for attorneys fees from the opposing party. To the extent that clients do not pay fees, they lose some control over their lawsuits.

59. See generally Herbert B. Newberg, Public Interest Practice and Fee Awards (1980).

60. See discussion infra part I.B.4 (noting divergent interests of attorneys and members of the class they represent in public interest litigation).

61. FAUX, supra note 55, at 7.
about being gang raped). How did the facts of Norma McCorvey's pregnancy all get reduced to the abstract conflict between a woman's right of privacy and the unborn's right to life? The litigation distorted the issues into a polarized dispute because the trial court simplistically treated McCorvey's request for broad injunctive relief as it would have treated one for compensatory relief.

The adversarial process, as it is usually applied, bifurcates messy issues like abortion into two competing camps. Having evolved largely as a mechanism for providing individual complainants compensatory relief for past injury, the litigation process necessarily presupposes the existence of a party who claims injury and seeks damages for a loss for which another party should be held responsible. The procedures used in law and equity were designed to assure the participation of suitable litigants, to permit the presentation of reliable facts relevant to the alleged injury and its causes, and to limit the court's attention to disputes it had power to resolve. Norma McCorvey, however, was not seeking damages for losses she suffered as a result of the application of Texas's unconstitutional abortion laws, nor was she even seeking an injunction permitting her to lawfully abort the fetus she carried. Instead, she sought a declaratory judgment that the Texas law, duly enacted by a legally constituted legislature, was unconstitutional on its face, not just as it applied to her. And she sought an injunction prohibiting enforcement of the Texas

62. Id. at 16-21, 328.
63. Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 369 (1978) ("The point is . . . that whatever is submitted to [judiciators] for decision, tends to be converted into a claim of right or an accusation of fault or guilt.") (emphasis in original); Even chancery courts that granted prospective remedies designed to prevent the infliction of injury in the future traditionally confined their adjudication to the particular polarized disputes and equities before them.
64. In her First Amended Complaint, Norma McCorvey alleged that she was "an unmarried pregnant woman" who "[b]ecause of the economic hardships and social stigmas involved in bearing an illegitimate child, . . . wishes to terminate her pregnancy by means of an operation, generally referred to as an abortion (within the meaning of Article 1191 of the Texas Penal Code), performed by a competent, licensed physician, under safe, clinical conditions." As plaintiff, McCorvey also alleged that her life was not threatened by the continuation of her pregnancy, although it did cause her to suffer emotional trauma; that she was unable to secure a legal abortion; that she could not afford to travel to another jurisdiction to seek a legal abortion; that an abortion by a competent licensed physician under hospital conditions was a safe procedure, particularly in the first trimester of pregnancy; and that abortions outside the clinical setting by unqualified personnel were extremely dangerous and often resulted in death, maiming, sterility, and serious infection. Plaintiff's First Amended Complaint at 1-2, Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (No. CA-3-3690-B), aff'd in part and rev'd in part, 410 U.S. 113 (1973).
65. Id.; Roe, 314 F. Supp. at 1220. Exploration of the interesting disagreement between the Justices concerning the persuasion and production burdens borne by the plaintiff who brings a constitutional facial challenge is beyond the scope of this Article. See generally Roe v. Wade, 410 U.S. 113 (1973).
statute for as long as the Constitution reigns. As unlike as the objectives of common law suits and this kind of constitutional litigation may be, the same adversarial procedures are used in both to select appropriate parties, distill factual evidence, and shape the issues for decision. The result is that the untidy issues actually faced by those who are affected by the utilization of abortion techniques are stripped of their contextual character, convolution, and relativism, and are presented as simple, abstract, absolute values in conflict.

3. Standing Requirements

In accordance with this perception, the three-judge district court in *Roe v. Wade* permitted only persons with certain interests in abortion—pregnant women and the state—to debate the constitutionality of the Texas statute. The court was willing to let Norma McCorvey bring a cause of action to strike down the Texas criminal law despite the fact that she could not be prosecuted under it.66 However, the Supreme Court found that, despite the fact that doctors could be (and were) criminally prosecuted under the statute, a doctor did not have standing to intervene in the civil *Roe* litigation.67 Ironically, in *Griswold v. Connecticut* and

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66. The statute prohibited any person from procuring an abortion for a pregnant woman, but did not prohibit a pregnant woman from procuring her own abortion. *Roe*, 314 F. Supp. at 1219 n.2. The trial court found that there was a logical nexus between the status McCorvey asserted (pregnant single woman unable to procure a legal abortion) and the claim sought to be adjudicated (a constitutional right to choose whether to have children). *Roe*, 314 F. Supp. at 1220 (citing Flast v. Cohen, 392 U.S. 83, 102 (1968)). The plaintiffs' brief in support of their motion for summary judgment based standing on injury to the class, resulting from the fact that "[b]ecause of the threat of prosecution under the Texas Abortion Laws and the consequent reprimands, etc., from various medical associations, many doctors who would otherwise be willing to perform therapeutic abortions upon the members of the class represented by Plaintiff Roe, have been deterred from doing so." Plaintiffs' Brief at 2, *Roe* 314 F. Supp. 1217 (No. CA-3-3690-B).

Although McCorvey's interest may have met Article III's case and controversy requirements, it is not clear that her individual claim as a seven month pregnant woman when she filed her complaint met the "prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979). See generally CHARLES A. WRIGHT, LAW OF FEDERAL COURTS, § 13 (4th ed. 1983); Mark V. Tushnet, The Unities of the Constitution, 21 HARV. C.R.-C.L. L. REV. 285, 300 n.40 (1986).

67. The Supreme Court found that the intervenor, Dr. Hallford, lacked standing because he could raise all of his constitutional claims as defenses to the criminal actions against him. *Roe*, 410 U.S. at 125-27. The trial court had found that Dr. Hallford, who was then being prosecuted in a separate criminal proceeding for performing abortions in violation of the Texas statute, had standing to intervene in the action to represent his own as well as his patients' interests. *Roe*, 314 F. Supp. at 1219-20. It is not clear whether Hallford's cause of action was an implied cause of action for deprivation of his right not to be criminally prosecuted under a statute so vague that it deprived him of due process of law guaranteed
Roe v. Wade, persons who could not have been prosecuted under the challenged statutes were allowed to proceed as parties to the litigation, while persons who could have been prosecuted were not permitted to participate and to represent their own interests.\footnote{68} In subsequent cases, like Casey, the Supreme Court has enabled physicians and clinics which perform abortions and provide counseling services to challenge state statutes restricting abortion by allowing them to assert their standing to represent the interests of their patients.\footnote{69} Interestingly, individual women and classes of women sometimes have not been parties to such litigation, presumably because of the difficulty of finding a plaintiff like Norma McCorvey, who was pregnant, wanted an abortion, and was willing to remain pregnant, to assert her standing to sue.\footnote{70} Yet, physicians and clinics, as clients, cannot effectively direct their lawyers to represent the interests of even abstracted women. Physicians and clinics have interests of their own at stake; moreover, they cannot know the interests of women who do not seek their services. Although individual women should have had standing to intervene in Casey as individuals or as representatives of a class of women, none seems to have sought permission to do so under the rules governing voluntary intervention.

Finally, the interests of married couples in using abortion to avoid parenthood were not represented in Roe because the trial court found that they too lacked standing.\footnote{71} Though the availability of abortion technology implicates different interests and relationships of married, as opposed to single, women and their spouses, the trial court found the

\begin{footnotes}
\footnote{68. In Griswold v. Connecticut, 381 U.S. 479 (1965), the primogenitor of privacy rights in the area of reproductive decision making, the Supreme Court held that a doctor could raise the claim of his patients to use contraceptives in the privacy of their own homes.}
\footnote{69. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (joint opinion).}
\footnote{71. Roe, 314 F. Supp. at 1220. In a separately filed action, John and Mary Doe alleged that they were residents of Texas; that they were married and had no children; that Mary was presently suffering from a neural-chemical disorder and had been advised by her doctor to avoid pregnancy, although it presented no serious risk to her life; that Mary was not pregnant; that on medical advice, Mary had discontinued use of the most effective means of contraception; that they were conscientiously practicing an alternative less effective means of contraception; that for highly personal reasons plaintiffs did not wish to become parents at any time in the near future; and that plaintiffs could not obtain a legal abortion in Texas and could not afford to travel to other jurisdictions to obtain a legal abortion. Plaintiffs’ Original Complaint at 1-2, Roe, 314 F. Supp. 1217 (No. CA-3-3691-C).}
\end{footnotes}
interests of John and Mary Doe too speculative to present a justiciable controversy. As a matter of fact, the Does had conceived a child prior to the suit and obtained an abortion. How different, then, was their situation from that of Norma McCorvey at the time of the district court hearing, after she had given birth, when the court found that her claim was not moot because she might become pregnant again and wish an abortion? Did the fact that the Does had been able to obtain an abortion by traveling out of the country, while McCorvey could not afford to do so, deprive them of standing they would otherwise have had, even as members of the class represented by Roe? We are not informed by the trial court’s cursory treatment of standing issues.

4. Class Participation: Abstracting the Interests

Having thus selected the legally cognizable interests to be heard, the trial court permitted those interests to be generalized. The trial court permitted McCorvey to represent a class of “similarly situated” women described in the complaint as “adult, single, pregnant women.” Although the class in Roe was never certified, in its written opinion, the lower court in Roe did not confine the class temporally to women who were pregnant in 1972, nor socially to women who were adult and single, nor economically to poor women or women unable to travel to states where abortion was legal. Instead, the court construed the plaintiff class as broadly as possible and ultimately eliminated even its social limitations by holding that the Texas statute deprived “single women and married persons” of the opportunity to choose whether to have children.

Despite the size of the class and the importance of the issue to its members, the trial court record contains no indication that the class was

73. FAUX, supra note 55, at 41.
74. See discussion infra note 84 and accompanying text.
75. Class actions are permitted by the Federal Rules of Civil Procedure to promote the efficient administration of justice where persons interested in the litigation share common questions of law and fact, are too numerous to permit joinder, and can be adequately represented by representative parties. Fed. R. Civ. P. 23(a). Rule 23 of the Federal Rules of Civil Procedure codifies an equitable device for permitting the adjudication of those interested in the litigation when there were too many to permit joinder. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985).
76. Roe, 314 F. Supp. at 1225. The court dismissed the complaint of a childless couple who did not want to bear children and who claimed a right to terminate any future pregnancy through abortion. Id. Had the court recognized their standing, perhaps married men might claim a constitutionally protected privacy right to decide whether or not to terminate a pregnancy they conceived. As it is, the court’s statement with regard to married persons cannot be strictly regarded as a holding.
ever certified by the court or that notice was ever provided to members of the class (through individual mailings or through the public media) that their interests were being represented before the federal judiciary by McCorvey and her lawyers, Weddington and Coffee. In the Supreme Court, the class was treated as though it were all women. Yet, surely all women, even all pregnant women, or even all pregnant, single women, do not have the same interests in the question of abortion. Poor women may have an interest in obtaining free abortion counseling that wealthier women can afford to purchase; single pregnant women may have an interest in asserting claims against potential fathers for the cost of abortions or, as an alternative to abortion, in securing the payment of prenatal care, medical expenses, and child support that married women may take for granted; poor pregnant women may have an interest in securing a legal right to publicly funded abortion or child birth benefits that nonpregnant women may not. How could Weddington and Coffee effectively represent all of these diverse interests in their class action?

How should the notice and opt-out provisions of Rule 23 of the Federal Rules of Civil Procedure be applied in cases like Roe v. Wade? The difficulty of requiring actual representation of a class of people as enormous and diverse as “all women” or even “all pregnant, single women” lays bare the fictional nature of this kind of class litigation. By neglecting or loosely applying the requirements of Rule 23 and by not recognizing the difficulties of representing subclasses of plaintiffs, the trial court in Roe easily fashioned the kind of broad-gauged, public interest litigation sought by Weddington and Coffee. But it also made the interests of the plaintiff class deceptively monolithic.

Similarly, the state’s interest in prohibiting abortions could have been presented as more complex and diffuse than it was characterized by the courts in Roe. As Justice Blackmun’s historical survey makes clear, abortion laws have been motivated by many factors, including: intraprofessional disputes among doctors, concerns for women’s health, moral compunctions about terminating potential human life, efforts to punish extramarital sexual relations, religious concerns for the dispatching of souls, efforts to protect the interests of men in their offspring, interests in maintaining traditional mothering roles for women, and economic

78. For an excellent discussion of the difficulties involved in representing “an aggregation of litigants with unstable, inchoate, or conflicting preferences” in law reform class action litigation, see Deborah L. Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183 (1982).
79. See infra note 211 (discussing the requirements and application of Rule 23).
domination of women. Nevertheless, the courts adjudicating the interests of the class represented by McCorvey perceived the state's only interests as protecting the health of pregnant women and protecting potential human life. The Dallas district attorney, technically the only defendant in the case, filed only a two-and-a-half page, double-spaced brief in the trial court, stating: "Medical science now knows that life occurs in the human embryo far sooner than the twentieth week of pregnancy," and therefore "the preservation of the life of the unborn 'human organism' is a matter of compelling interest sufficient to give the State of Texas constitutional authority to enact laws for that purpose." Since plaintiff class members presumably also had an interest in the protection of their own health, the state's interest in fetal life stands out as the interest in conflict with their claims to a right to privacy.

5. Mootness

It was important for the plaintiff in Roe to proceed as a class. As an individual, McCorvey would have been asserting only the right to an abortion of a single Texas woman who was seven months pregnant when she filed her complaint and too poor to travel to a state where abortions were legal. Yet, Justice Blackmun's decision did not find unconstitutional the criminalization of abortions in the last three months of pregnancy. Even if McCorvey's complaint were construed to assert her right to an abortion when she first sought to exercise it, her complaint would have required the Court to adjudicate the rights only of women who

80. See Roe, 410 U.S. at 130-52.
82. The trial court based its finding that McCorvey had standing to bring the action on the fact that she "filed her portion of the suit as a pregnant woman wishing to exercise the asserted constitutional right to choose whether to bear the child she was carrying." Roe v. Wade, 314 F. Supp. 1217, 1220 (N.D. Tex. 1970), aff'd in part and rev'd in part, 410 U.S. 113 (1973). In her affidavit appended to Plaintiffs' Motion for Summary Judgment, "Jane Roe" stated: "At the time I filed the lawsuit [March 3, 1970] I wanted to terminate my pregnancy by means of an abortion performed by a competent, licensed, physician under safe, clinical conditions." Affidavit of Jane Roe in Support of Motion for Summary Judgment at 2, Roe, 314 F. Supp. 1217 (Nos. CA-3-3690-B & CA-3-3691-C). If the court's finding was necessary to her having standing, then her claim at the time the complaint was filed was the issue presented for adjudication. Yet her wish at the time she "filed her portion of the suit" was the wish of a woman six to seven months pregnant to exercise an asserted right to choose whether to bear a child. Roe, 314 F. Supp. at 1220.
83. See Roe, 410 U.S. at 163-64. Justice Rehnquist in his dissent noted that nothing in the majority's opinion indicated that a state might not constitutionally proscribe abortions at that stage of pregnancy. Id. at 171 (Rehnquist, J., dissenting).
sought abortions in the first trimester of their pregnancies, not their rights throughout their pregnancies as the Supreme Court ultimately adjudicated them. The class helped to obscure the mootness issue raised by the fact that McCorvey had given birth before the trial court held its hearing.  

In addition to finding that class interests remained at stake, the Court applied an exception to the mootness doctrine to permit the matter to proceed on the merits. The Court reasoned that because McCorvey was likely to become pregnant again and to want an abortion, given the delays of litigation, the Texas statute would never be subject to review unless the Court exercised jurisdiction even when the existing facts presented no controversy. But many women are likely to become pregnant and to want abortions, including McCorvey’s own lawyers, and presumably they would not have standing to proceed as plaintiffs in their own names. Why, then, was McCorvey’s claim any less moot? The point is not that the Court should have refused to permit the class action or dismissed the complaint as moot, but that by permitting the class action to represent the interests of all women who might become pregnant, the Court abstracted the represented interest beyond any recognizable reality.

6. Third Party Participation

At the same time that it applied standing requirements to limit the participation of persons with significant interests in the utilization of abortion procedures, the trial court in Roe further narrowed the range of interests that would be permitted to participate in the litigation by not seeking the inclusion of other parties. The trial court did, however, permit the Dallas Legal Services Project to file a brief as amicus curiae in support of the plaintiff. The brief set forth the importance of access to legal abortions for poor pregnant women. However, while the court had the power to do so on its own motion, it neither sought the participation of doctors and hospitals wishing to offer abortion counseling and treatment nor appointed a guardian ad litem to represent the interests of

84. Cases in which courts have permitted the class representative to continue to litigate on behalf of the class despite mootness of their individual claims include Inmates of San Diego Jail in Cell Block 3B v. Duffy, 528 F.2d 954, 956-57 (9th Cir. 1975); Conover v. Montemuro, 477 F.2d 1073, 1081-82 (3d Cir. 1972); Gatling v. Butler, 52 F.R.D. 389, 393-95 (D. Conn. 1971).
85. Roe, 410 U.S. at 125.
86. See id.
87. See Roe, 314 F. Supp. at 1217.
88. Request For Leave To File Amicus Curiae Brief by Dallas Legal Services, Roe, 314 F. Supp. 1217 (Nos. CA-3-3690-B & CA-3-3691-C).
the fetus, even though fetuses had been recognized for certain purposes at common law. Nor did the trial court invite participation, as intervenors or as friends of the court, by other affected persons or organizations, such as the putative fathers of the fetuses at issue, parents, siblings, other children, welfare agencies, social service providers, health care workers, religious leaders, indigent groups, allied health professionals, and so on. Only the representatives of certain interests—all present and future pregnant women and the state—participated in the litigation.

Having thus narrowed the number of different interests participating in the litigation and having generalized the participating interests far beyond the particular situation actually presented by McCorvey, the litigation process then polarized the interests. Intervenors such as Dr. Hallford, who was permitted to participate in the lower court, did not litigate their claims as third parties with separate status—they were required to intervene as either plaintiffs or defendants. Even the amici curiae who participated at the trial and appellate levels could do so only in support of either the appellants or appellees, not as separate parties with interests of their own. Thus, through the discretionary application of rules of civil procedure, the trial court set up the substantive issues as a zero-sum game in which none of the parties could win except at the expense of the others. So established, the polarized issue then became both the focus of

89. See discussion infra note 140.
90. Since Planned Parenthood v. Danforth, 428 U.S. 52 (1976), had not been decided yet, the trial court might have looked to precedent to the effect that a putative father of a child born out-of-wedlock is entitled under the due process clause to reasonable notice and an opportunity to be heard before his parental rights can be terminated for adoption purposes.
91. Parental interests in the abortion decisions of at least their minor daughters have been recognized by the Supreme Court. See, e.g., Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (upholding parental consent requirement with a judicial by-pass); H.L. v. Matheson, 450 U.S. 398 (1981) (holding that state may require parental notice, when possible, of minor daughter's abortion decision); Bellotti v. Baird, 443 U.S. 622 (1979) (holding that state may constitutionally require parental consent if minor is allowed to establish instead her maturity or best interest in obtaining an abortion); cf. Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986), cert. denied, 479 U.S. 1102 (1987) (holding that parental consent requirement absent judicial by-pass was unconstitutional).
92. Doctors have asserted an independent interest in providing good and ethical medical advice to patients that is uninhibited by criminal abortion statutes. Cf. United States v. Vuitch, 402 U.S. 62 (1971) (holding that District of Columbia abortion statute was not unconstitutionally vague where physician challenged constitutionality of abortion statute).
93. Religious groups have participated extensively as amici curiae in all of the major abortion cases decided by the Supreme Court. See, e.g., Brief Amicus Curiae of the Holy Orthodox Church, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605).
the court’s discussion of relevant legal principles and the focus of the nation’s debate for the next twenty years about the question of abortion.

II. CHOOSING BETWEEN THE CONFLICTING VALUES

The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.

—Planned Parenthood v. Casey

The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.

—Planned Parenthood v. Casey

A. A Concept of Legitimacy

In Planned Parenthood v. Casey, reconsideration of the abortion issue as it was posed in Roe required the Justices to address the legitimacy of their decision. Having defined the substantive issue as a choice between a woman’s right to privacy pitted against the state’s asserted interest in a fetus’s right to life, the Supreme Court in Roe had to decide the case by favoring one or the other. In revisiting that choice in Casey, the Court was obliged to explain the basis upon which such choices are to be made and why we should respect the Supreme Court’s choice as a statement of law.

In Roe, Justice Blackmun might have believed that the exercise of judicial review rests upon the same legitimacy that supports common judging. It does not. His search for such controlling values was the same task to which Louis Brandeis addressed himself in the Harvard Law Review article in which he conceived of a common law right to privacy. Like Brandeis, Blackmun searched for values regarding

95. 112 S. Ct. 2791, 2814 (1992) (joint opinion).
96. Id. at 2865 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
97. Louis D. Brandeis & Samuel D. Warren, The Right to Privacy, 4 HARV. L. REV. 193, 197 (1890). Warren and Brandeis stated, "It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is." Id. at 197.
privacy in the doctrine of caselaw. Both strove to distill essential values—Brandeis beginning with the common law decisions and Blackmun exploring constitutional precedents. Justices O’Connor, Kennedy, and Souter also seem to suggest in Casey that the legitimacy of the Court’s choice between the maternal and state interests conflicting in Roe and Casey rests on the same foundations that support common law judging—that when adjudicating due process claims, the Court is called upon to exercise “that same capacity which by tradition courts always have exercised: reasoned judgment.”99 Chief Justice Rehnquist, on the other hand, espouses a more positivistic concept of legitimacy. Using his approach, the Court’s legitimacy rests not on popular acceptance in any form, but on the Court’s institutional authority to exercise judicial review, which was established in Marbury v. Madison.100 Although the Court in Roe seems to proceed as a common law court, from examinations of precedent to statements of doctrine to their application in the dispute before it, the Court in fact performs a very different function in interpreting the Constitution to protect fundamental rights.” This Article suggests that neither the factors supporting the legitimacy of the common law nor the acceptance of the constitutionality of judicial review itself legitimate what the Court did in Roe and Casey.

In this Article, the term “legitimacy” is used to mean generally agreed upon reasons for accepting declarations by authoritative bodies as law.102 Legal positivists maintain that law is the declaration (through enactment or enunciation) of rules by those with the political authority to

98. To the effect that non-interpretive theorists like Tribe and Blackmun are paradoxical in that they justify judicial review as an exercise in traditionalism while exalting its modernistic promise of open choices, see Tushnet, supra note 66, at 285-94.
99. Casey, 112 S. Ct. at 2806 (joint opinion).
100. Id. at 2865. Indeed, Professor Alexander Bickel notes that the principle difficulty with regard to the Supreme Court’s function of judicial review of legislation under the Constitution is that it is “counter-majoritarian.” Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (2d ed. 1986).
101. Although the term “doctrine” is defined by Black’s Law Dictionary 481 (6th ed. 1990) to mean “[a] rule, principle, theory or tenet of the law,” it is used in this Article to mean a principle rather than a rule, as those terms are explained by Professor George P. Fletcher in his article Two Modes of Legal Thought. George P. Fletcher, Two Modes of Legal Thought, 90 Yale L.J. 970, 978-79 (1981). Professor Fletcher defines a principle as a judicial assertion that a particular proposition should have weight in the circumstances of the case, while a rule compels an answer in a case that we must either accept or ignore as a categorical, that is either valid or invalid, and that either binds us or does not. Id. at 978.
102. This view of legitimacy differs from one that finds legitimacy in the general acceptance of the substantive values of authoritative declarations, either because they are “rooted in this Nation’s history and tradition,” Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977), or because they will gain acceptance in the “immediate future.” Bickel, supra note 100, at 239.
make them—constitutional conventions, courts, legislatures, agencies, and so on. Others maintain that a rule need not be considered law if it does not embody, as a substantive matter, certain unwritten moral principles. In this sense, judicial holdings are not declarations of law, but assertions about conformance of their rules with a body of moral law or principles that transcend enacted rules. To be legitimate, as the term is used here, declarations must be more than simply positive law. Such authoritative enunciations or positive laws must also comport with some transcendent principles or values that underlie our willingness to accept such declarations as law.

Yet, while "legitimate" is used in this Article to mean lawful in the transcendent sense, such use does not mean that the legitimacy of the Roe or Casey decisions turns on the conformance of their substance with transcendent principles. The joint opinion in Casey seems to use the term much as it is defined here, to mean "the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it means." However, the three Justices who authored the joint opinion find such acceptance grounded in the conformance of the substance of the Court's decision with constitutional text and "legal principle[s]." In contrast, this Article suggests that those judicial rules formulated and declared in compliance with normative procedural principles of adjudicatory fairness (namely representation and participation of affected interests) and regarded as fundamental principles underlying our Constitution and political heritage, but transcending formal criteria for

103. Thus when a court makes a ruling that an agreement is a contract, it not only makes a statement, it also performs an act which entitles the promisee to certain legal remedies. See Fletcher, supra note 101, at 974; Arthur J. Jacobson, The Idea of a Legal Unconscious, 13 CARDOZO L. REV. 1473, 1475-77 (1992). See generally H.L.A. HART, THE CONCEPT OF LAW (1961). The question of what law is can be answered by the positivist as a determinate matter. The law consists of rules that meet a finite set of formal criteria that identify the manner in which authoritative institutions can declare such rules or other standards. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977). Positivists, then, must recognize as law rules that they believe to be immoral and unjust, but they can urge that the law be reformed to embody moral principles outside of the law. H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 601 (1958); Fletcher, supra note 101, at 976.

104. See, e.g., DWORKIN, supra note 103, at 22-31; Fletcher, supra note 101, at 977-79. These theorists, then, do not urge law reform, but seek rules that conform to natural law or principles of substantive due process.

105. For example, as discussed below, originalists offer the constitutional text and perceived intention of the founders as a basis for legitimacy. Fundamental rights theorists offer our national traditions, rational concepts of well-ordered liberty, and natural law. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 774-80 (2d ed. 1988).


107. Id.
Authoritative rulemaking in the positivistic sense, are legitimate. Reasons for crediting judicial declarations of law with legitimacy in this process sense are not always clear and may be different when courts act as common law and constitutional adjudicators. While courts engaged in common law adjudication and in judicial review can both be considered to be making law, decisions like Roe and Casey cannot be regarded as legitimate for the same reasons that common law decisions can be so regarded.

B. Paradigms of Common Law and Constitutional Decision Making

The decisions of common law judges can claim legitimacy on the basis of factors that do not pertain to the decisions of judges engaged in the review of legislation under the Constitution. First of all, the common law tradition as it developed in America prior to World War I claimed legitimacy as a body of principles that could be discovered through rational analysis and inductive logic applied to caselaw. With its origins in the English law, common law doctrine was developed over several centuries through the resolution of thousands of particular disputes by hundreds of common law judges. Upon analysis, the resolution of these disputes were thought to yield general principles, or doctrine, to be applied in the future, permitting people to order their affairs accordingly. Particularly during its formative period before the Civil War, when application of a doctrine to a specific dispute seemed to a judge to produce unreasonable results, the doctrine was modified to accommodate changed conditions and judicial common sense. Thus judicial law making in the common law tradition can be perceived as an

108. See discussion infra part II.B.
109. See discussion infra part II.B.
110. See LAWRENCE M. FREIDMAN, A HISTORY OF AMERICAN LAW 21-23 (2d ed. 1985); Grant Gilmore, The Age of Faith, in THE AGES OF AMERICAN LAW 41-67 (1977) (noting that the common law was accepted as an internally consistent and externally stable set of discoverable principles); see, e.g., CHRISTOPHER C. LANGDELL, CONTRACTS, Preface (1971) (viewing contract law as a science to be studied inductively using cases as primary sources of data).
112. See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 22-23 (1921) ("The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."). For an example of the analysis of common law cases to derive new doctrinal principles, see Brandeis & Warren, supra note 97, at 193.
ongoing, organic process in which legal doctrine is discovered inductively from past decisions, tested in the empirical crucible of a specific dispute, and very gradually shaped by its ability to resolve controversies in a manner comporting with the reasonable expectations of the parties and the values of judges. Its legitimacy, then, stemmed from the perception of judges as experts at logically discovering and applying law to facts and the notion that the law which judges applied consisted of an internally consistent body of legal principles that transcend the rules that govern particular cases.  

Constitutional interpretation by the Supreme Court, on the other hand, is not ordinarily conceived as this same kind of dynamic process, but one in which a single unchanging source of law is applied to each case. When the Constitution is ambiguous, the Court must necessarily look to its own precedents for general principles, but these principles must be derived in some way from the document and not simply from historical judicial experience with the application of mutable legal doctrine. Although legal scholars argue over the flexibility of general provisions in the Constitution to accommodate changing social and economic conditions, the inquiry must still begin with the text and the scheme of the document. Thus, although Justice Blackmun in Roe looked to prior

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114. *Id.* at 3, 46-68.

115. This view was expressed by the Court in Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

116. See BICKEL, supra note 100, at 55; ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1-11 (1990); JOHN H. ELY, DEMOCRACY AND DISTRUST 1-9, 43, 71-75 (1980). But see LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 3-8 (1985). In Roe, Justice Blackmun seems to hold such a view and yet gives considerable weight to the historical context of the issues presented and the Court's own precedents over time. Noting that the Constitution does not explicitly mention any right of privacy, Justice Blackmun first looked to the recognition of the privacy and fetal interests in the medical-legal history of our own nation and that of other countries, in an effort to resolve their conflict "free of emotion and predilection." Roe v. Wade, 410 U.S. 113, 130-47 (1973). Invoking Justice Holmes's admonition in his dissent in *Lochner v. New York*, Justice Blackmun cautions us that the constitutionality of state legislation does not depend on its compliance with opinions that seem natural and familiar to us now. "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Id.* at 117 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)) (alteration in original). The conclusion that one draws from the exercise is that attitudes about abortion are culturally and temporally contingent, serving a number of religious, professional, and social purposes, and that, even though nineteenth century laws making abortion criminal may seem unnatural and anachronistic to us now, they are not unconstitutional for that reason. Yet, Blackmun goes on to preference a current judicially defined position on abortion over a legislative position taken in the past, though he has just demonstrated that both must necessarily be culturally and temporally contingent.

Supreme Court decisions for recognition of a right to privacy, he ultimately needed to root the principle in the language and design of the constitutional document itself—a difficult task.\textsuperscript{118}

Second, even viewed as a value-laden, nonlogical exercise of judicial authority, law made by common law courts reflects the values of many judges over a period spanning our whole national history and its English antecedents. Since the realist movement debunked the notion that judges mechanically apply eternal legal principles previously discovered and applied by judges, judge-made law may be held in less esteem than it was in Langdellian days.\textsuperscript{119} Nevertheless, at some level, decisions by courts

The Court is more powerful than a common law court when it acts as a constitutional tribunal. The restraints, however, are greater, for the power of judicial review can be exercised only when the principle the Court employs is related to constitutional text. Common law courts are not so restricted.


\textsuperscript{118} On a superficial level, both the three-judge district court and the Supreme Court in \textit{Roe v. Wade} characterized the plaintiff's assertion of a right to "choose whether to have children," \textit{Roe v. Wade}, 314 F. Supp. 1217, 1219 (N.D. Tex. 1970), \textit{af'd in part and rev'd in part}, 410 U.S. 113 (1973), or "whether or not to terminate her pregnancy," \textit{Roe}, 410 U.S. at 153, as a claim to a right to "privacy." Yet, in the district court, the Texas statute was struck down as vague and overinclusive in violation of the Due Process Clause and the Ninth Amendment. For a discussion of the Ninth Amendment as a source of constitutional rights, see Thomas B. McAffee, \textit{The Original Meaning of the Ninth Amendment}, 90 COLUM. L. REV. 1215 (1990).

In \textit{Roe v. Wade}, the privacy argument was not presented in the text of the brief written by Weddington and Coffee, but was included in an appendix consisting of a photo-copy of an unidentified plaintiffs' brief in an unnamed case in the Southern District of New York, with no attribution to the attorneys who wrote it. Plaintiff's Brief in Support of Motion for Summary Judgment, \textit{Roe}, 410 U.S. 113 (No. 70-18). Both the district court and the Supreme Court looked to legal precedents in which a right to privacy had been found protected by the Constitution as a fundamental right, and drew out of those cases a principle requiring the protection of a broad right to be free of state interference in matters of family and procreation. The principle held that the protected right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." \textit{Roe}, 410 U.S. at 153. The Court then proceeded to weigh that right against the state's interest in the fetus to determine whether the state interest was sufficiently compelling to justify infringement of the right to privacy. \textit{Id.} at 154. The district court found that even if the state had a compelling interest in protecting the health of the pregnant woman and in protecting quickened fetuses, the Texas statute was overbroad in criminalizing all abortions except those necessary to save the life of the mother. In addition, the district court found the statute to be unconstitutionally vague. Professor Burt speculates that if the Supreme Court had affirmed the latter holding, it might have prompted a more satisfactory legislative solution to the abortion problem than the Court was able to fashion through its substantive due process approach.


\textsuperscript{119} Christopher C. Langdell was Dean of the Harvard Law School in the late nineteenth century and did much to engender the view that law, like science, was a body of discoverable rules or principles. \textit{See generally} LANGDELL, \textit{supra} note 110. Justice Holmes held a different view:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing
in the areas of contract, tort, and property law can claim legitimacy on the basis of their reflection of the beliefs held by a whole professional class of people—judges and lawyers—brought to bear on changing social problems over a long period of time. In exercising judicial review, on the other hand, as in Roe and Casey, the Supreme Court purports to apply not the judicial wisdom of the ages reflected in doctrine and precedent, but the directives of a two-hundred-year-old text that seldom addresses issues directly and is sporadically given authoritative meaning by a single nine-member court. Thus, Casey does not assert that historical recognition of rights by federal and state court judges or state legislatures is sufficient for their constitutional protection. Rather, the opinion grounds its decision in the Court's own precedents and stare decisis.

Third, law made by common law judges could claim legitimacy based on popular assent. The contract doctrine that was hammered out in legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 465-66 (1897).

120. As Justice Holmes observed, "The [common] law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver W. Holmes, The Common Law 5 (1881).

121. The joint opinion notes that the language of the document (the Bill of Rights) and the practices of the states at the time of the adoption of the Fourteenth Amendment are not the only sources of rights which the Constitution may protect. Further, the opinion relies heavily on the policies supporting stare decisis as the rationale for affirming Roe v. Wade. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (joint opinion).

122. Justice Scalia reasons conversely in Casey that because a woman's right to abortion has not been uniformly recognized by state law, it is not a constitutionally protected right. He finds that both the document and the legal history of asserted rights determine whether they are constitutionally protected. Justice Scalia finds that the power of a woman to abort her unborn child is not a protected liberty because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed." Id. at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part). But see Brief of 281 American Historians as Amici Curiae Supporting Appellees, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605) (arguing that abortion was not illegal for much of our history and that the legislative rationale for regulating abortion did not focus on interests in the fetus until recently).

123. Casey, 112 S. Ct. at 2808-16 (joint opinion). The opinion concludes: The underlying substance of [the Court's] legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.

Id. at 2814.
Innumerable judicial decisions, for example, can be regarded as ratified by the silence of popular legislatures with the power to reverse them. In contrast, the Supreme Court speaks with authority that can only be popularly trumped through the extraordinary process of constitutional amendment. Thus Justice Blackmun, in support of his finding in *Roe* of a fundamental right—one which he grounds in the Due Process Clause—to make an abortion decision, cites a number of Supreme Court precedents protecting privacy interests in "varying contexts." According to Blackmun, these decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships and child rearing and education. This right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Justice Blackmun does not claim that these Supreme Court decisions were made in accordance with contemporary popular will because they could have been modified only through the cumbersome process of constitutional amendment. Indeed, their particular virtue is that they act as a check on the temporal will of the people expressed through their legislatures.

Thus, in keeping with the concept of legitimacy as a generally agreed-upon reason for accepting the declarations of judges as law, common law decisions are legitimate because they are thought to conform to transcendent principles inductively discovered and deductively applied by many judges over time with the acquiescence of the people. Although the three Justices writing the joint opinion in *Casey* invoke seemingly similar "legal principles" as a basis for legitimacy, interpretation of vague and general language in the Constitution, such as liberty and due process, can claim no such legitimacy.

124. Although much contract law that was judicially created has since been codified in the Uniform Commercial Code and other specialized state statutes, these codifications were not a popular rejection of judicially crafted common law but a way of making it more uniform among the states, and their generality was an invitation to further judicial declarations of law. Gilmore, supra note 113, at 25-27; see also John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1042-44 (1976).


126. See the opinion of Justice Rehnquist in *Casey*, 112 S. Ct. at 2862 (dissenting opinion) (arguing that the judicial branch derives its legitimacy not from following public opinion, but from deciding by its best lights whether enactments of the popular branches of government comport with the Constitution); see BICKEL, supra note 100, at 16-23.

127. See the opinions in *Planned Parenthood v. Casey* of Justices O'Connor, Kennedy and Souter, *Casey*, 112 S. Ct. at 2803 (joint opinion); Justice Blackmun, *id.* at 2843 (concurring opinion); Justice Rehnquist, *id.* at 2855 (dissenting opinion), and Justice Scalia, *id.* at 2873 (dissenting opinion).
C. Evolution of the Privacy Doctrine

This conclusion is demonstrated by the history of the right to privacy itself and the evolution of the right of privacy from a proposed common law doctrine conceived by Justice Brandeis to a constitutional doctrine recognized by a majority of Justices in Roe as broad enough to require striking down the criminal abortion statutes of all fifty states. Interestingly, the right to personal privacy, or the "guarantee of certain areas or zones of privacy," that Justice Blackmun found "does exist under the Constitution" had its origins in the common law, though Justice Blackmun did not acknowledge it. As is often recounted, Justice Brandeis, while still a Boston practitioner in 1890, co-authored an article entitled The Right to Privacy in which he called for an expansion of the common law protection for the emotional and intellectual aspects of life against intrusions made possible by then-recent inventions, such as the camera, and by newspaper journalism. In the article, Brandeis's concept of privacy was an atomistic, libertarian concept which recognized certain areas of private activity and personage that would be legally protected against exploitation by other private interests—not the state. In short, the privacy Brandeis sought to protect was a right to secrecy or

128. Roe, 410 U.S. at 152 (Blackmun, J).
129. There were several other doctrinal bases upon which to find such an expression: the rationale in Griswold, that privacy principles can be found in the shadows of specific constitutional guarantees; the Ninth Amendment's reservation of rights to the people; and the concept of substantive due process under the Fourteenth Amendment. Other doctrinal bases, including the Thirteenth Amendment's prohibition of involuntary servitude, the First Amendment's prohibition against the establishment of religion, and the Equal Protection Clause of the Fourteenth Amendment, have also been offered as a constitutional basis for the upholding of women's right to terminate their pregnancies.
130. Brandeis & Warren, supra note 97. Brandeis examined the holdings in cases protecting personal interests in etchings, photographs, and letters through copyright, contract, trust, and property doctrine to find a common concern running through all—the concern for the protection of individual privacy from the prying interest of others. Thus, for example, Brandeis concluded that "the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone." Id. at 205. He stated:

The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the imposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be left alone."

Id. at 195.
solitude, and he sought to legitimate it through the authority of precedent and growth of the common law. 131

The legitimacy of a right to privacy as a constitutional entitlement does not fare as well. After Brandeis was appointed to the Supreme Court, he had occasion in Olmstead v. United States to consider the meaning of the Fourth and Fifth Amendment guarantees of personal liberty. 132 Justice Brandeis believed that, like the common law, the constitutional guarantees against "specific abuses of power, must have a similar capacity of adaptation to a changing world." 133 Thus he argued that the protection of the amendments was much broader than the majority had found it. In order to support that contention, Justice Brandeis ascribed to the framers of the Constitution the motives and concerns credited to common law judges in his article. 134 Under this approach, the concept of a right of privacy as solitude became not just a private, civil cause of action, but a constitutional right enforceable against the government. However, Brandeis's shift in the attribution of privacy concerns from judges to framers is not supported by citation to historical evidence or account. Such support would seem to be necessary in order to ground the preference for privacy in the task of constitutional interpretation in which the Court was engaged.

The right to privacy, thus elevated to a constitutional right, metamorphosed into another incarnation when Justice Brennan based his decision in Eisenstadt v. Baird 135 on Justice Brandeis's dissent in Olmstead, and held that the right to privacy protected individual autonomy

131. Id. at 193. "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Id.

132. In Olmstead v. United States, 277 U.S. 438 (1927), the question was whether, in a criminal prosecution by the United States, the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments. While a majority of the Court held that the government's wire tapping did not violate the Fourth and Fifth Amendments, Justice Brandeis dissented.

133. Id. at 472 (Brandeis, J., dissenting).

134. Paraphrasing his Harvard Law Review article, Brandeis & Warren, supra note 97, Justice Brandeis stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead, 277 U.S. at 478. Compare with quoted text supra note 130.

in decision making, not solitude. Most recently, the constitutional right to privacy (at least according to some Justices) has come full circle from a right to be left alone to a right to intimate association, based on the belief that true liberty must include the right to define oneself through intimate sexual relationships of one’s choice. No matter how compelling that conclusion may be, it is not arrived at through the same inductive process used by common law judges, and it loses its historical justifications as it takes on a life of its own in constitutional jurisprudence. Even if one grants validity to Brandeis’s premise that the framers intended to enshrine a right to privacy in the Constitution, it was privacy as solitude, not privacy with regard to certain relationships expressed as principles of autonomous family decision making or intimate association. These principles stem not from the Constitution even as it was perceived by Brandeis with its common law roots, but from a vision of privacy as it has developed since, no more or less legitimate than the vision of privacy offered by the joint opinion in Casey.

136. In Eisenstadt v. Baird, the Court was asked to decide whether a Massachusetts statute prohibiting the sale or gift of contraceptives, except by a physician or pharmacist to a married person, violated the fundamental rights of single people protected in Griswold v. Connecticut. Eisenstadt, 405 U.S. 438. Justice Brennan, in an opinion in which five members of the Court concurred, wrote that while in Griswold the right of privacy in question inhered in the marital relationship, that relationship is, after all, the association of two separate minds and hearts. Thus he found that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id. at 453 (emphasis in original).

In the footnote to that statement, Justice Brennan quoted Stanley v. Georgia, 394 U.S. 557 (1969), and the passage from Justice Brandeis’s dissent in Olmstead quoted above. Yet, Justice Brennan’s concept of privacy is not Brandeis’s concept of privacy as solitude. For Brennan, it is not so important that single people be protected against unwarranted intrusions into their homes and personal activities (as in Griswold) as it is that their authority to make certain decisions be unimpaired by the state. Thus the constitutionally protected right to privacy as solitude put forward by Justice Brandeis in Olmstead became the right to privacy as autonomy in Eisenstadt and later in Roe.

137. Bowers v. Hardwick, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting). In his dissent in Bowers v. Hardwick, Justice Blackmun, who was joined by three other Justices, looks for “the reason why” certain rights associated with the family have been accorded shelter under the Fourteenth Amendment. Id. at 204-06. He finds the principle, not inductively from the articulated rationale of Supreme Court precedents, but in his belief that “the ‘ability independently to define one’s identity that is central to any concept of liberty’ cannot truly be exercised in a vacuum; we all depend on the ‘emotional enrichment from close ties with others.’” Id. at 205 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)). Justice Blackmun goes on to note:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

Id. (emphasis in original) (citations omitted).
D. The Non-Evolution of a Doctrine of Fetal Interests

One might ask whether a similar analysis of common law doctrine pertaining to fetal interests is relevant to the adjudication of the issues raised by abortion. The principles, purposes, and social policies underlying laws pertaining to the property, tort, and criminal interests of fetuses are relevant under several theories of constitutional interpretation. For the originalist, they are significant if they can be regarded as part of the framers' understanding of the existing law at the time that the Constitution was ratified. For the non-interpretative, fundamental rights theorist or natural law theorist, they are pertinent if they can be regarded as expressions of conventional morality, traditions deeply rooted in our nation's history, or part of a concept of ordered liberty. Yet Justice Blackmun undertakes only a cursory survey of the common law regarding fetal interests and concludes that "the unborn have never been recognized in the law as persons in the whole sense." \(^{138}\)

A common law court would have done better. Persons "in the whole sense" is an interesting though unexplained concept, but not one relevant to the analysis that is necessary to the task at hand. The search is not for conformance of common-law doctrine with an ideal or fully developed principle of "whole person," but for the essential interests, values, concerns, and principles underlying the legal recognition that courts have admittedly afforded the unborn to serve the purposes of tort. \(^{139}\)

\(^{138}\) Roe v. Wade, 410 U.S. 113, 162 (1973). Justice Blackmun states that "in areas other than criminal abortion, the law has been reluctant to . . . accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." Id. at 161. Although he concedes that parents may maintain an action for wrongful death of a stillborn child for prenatal injuries, that unborn children have been recognized as acquiring rights or interests by way of inheritance, and that fetuses have long been represented in legal proceedings by guardians ad litem, Justice Blackmun deduces that the common law did not accord fetuses all of the rights of "whole persons." Id.; see Ronald Dworkin, The Future of Abortion, N.Y. REV. BOOKS, Sept. 8, 1989, at 47.

The point is not that these common law cases suggest that unborns should be recognized as persons by the Constitution, either because they were so regarded at the time of its ratification or because conventional morality as expressed in these decisions hold them so. Rather, the interest protected and the policies furthered in those cases might inform our understanding of the interest of the state in protecting fetal life and the nature of the fetal interest which the Constitution might protect directly.

Instead of such an analysis, Justice Blackmun looked to the express terms of the text of the Constitution and found that the Constitution does not include protection for the unborn, maintaining that if they were so protected, their right to life would be specifically guaranteed by the Fourteenth Amendment. This absolutist vision of the Amendment's guarantees is not warranted, however, for life itself is not guaranteed by the Amendment, as the death penalty cases would indicate, but only due process.

nine other jurisdictions that hold that actions lie by the estate of stillborn children for wrongful death incurred while they were en ventre sa mere.


What are we to make of the appointment of guardians ad litem to represent the interests of the unborn in medical treatment cases, and cases involving abuses during pregnancy? See generally In re Klein, 538 N.Y.S.2d 274 (App. Div. 1989) (holding that strangers were not appropriate guardians of fetus where mother's husband and father of fetus was competent to serve); Susan Goldberg, Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos, 66 WASH. L. REV. 503 (1991). For a discussion of maternal duties toward fetuses, see Robertson, supra note 6 (arguing in favor of limitations on abortion rights to protect mature fetuses that women have chosen not to abort); Patricia King, The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn, 77 MICH. L. REV. 1647 (1979) (arguing that fetal viability is the logical and ethical point for the attachment of legal significance); Note, Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse," 101 HARV. L. REV. 994 (1988).

Blackmun notes that citizens are defined as "persons born or naturalized in the United States," Roe, 410 U.S. at 157, and concludes that this and other references to persons have only postnatal applications. Semantically, however, if "person" must be modified by "born" as it is in the Fourteenth Amendment, then the noun "person" alone cannot mean a being that is born. Blackmun also raises various problems that he sees would exist if fetuses were regarded as persons for Fourteenth Amendment purposes, but several of these concerns are predicated on the notion that they must be treated the same as other persons for all purposes. The Fourteenth Amendment, however, does not guarantee life but only that life will not be deprived without due process.

Perhaps a partial explanation for the underdevelopment of a doctrine of fetal interests lies again in the procedures used to present substantive issues to the Court. The kind of analysis of common law cases initially undertaken by practitioner Brandeis with regard to privacy interests might have been undertaken in Roe, but what party in the Roe litigation had an interest in undertaking it? In Roe, the state was the only party opposing the plaintiff’s claim to an overriding right to privacy, yet the state’s theoretical interest recognized by the Supreme Court was in “potential human life”—that is, life after birth, not pre-natal life.144 The Dallas district attorney’s slim brief in the trial court simply asserted, without explanation, that the state’s interest in “the preservation of the life of the unborn ‘human organism’ is sufficiently compelling to give the State of Texas constitutional authority to enact laws for that purpose.”145 Perhaps if a guardian ad litem had been appointed to represent the interests of the fetus as a fetus, rather than the state’s interest in a potential, born person, a Brandeisian analysis of the historical and current legal status of fetuses might have been presented to the court for its consideration. Instead, the controversy was presented in its most uncomplicated form, as sterile abstractions of women against the unborn.

Thus, having created its own task—that of refereeing and deciding the zero-sum game—the Supreme Court made the choice by holding that a fetus is not a person for purposes of our Constitution. The Court found that one set of values or world view, that of pro-choice advocates, is recognized by our Constitution, while the other world view, that of pro-life advocates, is not. Dean Guido Calabresi concluded that by making

144. Roe, 410 U.S. at 159.
145. Defendants’ Trial Brief, Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (No. 70-18), aff’d in part and rev’d in part, 410 U.S. 113 (1973). The State of Texas also submitted a brief and made oral arguments in the trial court, although it was neither a party-defendant nor an intervenor in the suit. In its brief, the state did not argue that it had a compelling state interest in protecting fetal life either in utero or as potential human life after birth. Instead it argued that the plaintiffs had no fundamental privacy right and suggested that the state had many interests in regulating abortion apart from the protection of fetal or potential life, including the prevention of promiscuity, incest, pandering, and delinquency. Defendants’ Memorandum of Authorities in Support of its Motion to Dismiss at 9-10, Roe, 314 F. Supp. 1217 (No. 70-18). It is not clear how the state, which was neither a defendant nor an intervenor, had standing to file a motion to dismiss. The state’s brief noted that a decision finding a fundamental privacy right to choose whether to bear children “could result in undesirable circumstances. To prohibit the state from exercising reasonable control over the marriage relationship, family and sex could result in promiscuity, infanticide, incest, pandering, indecency, delinquency, etc.” Id.

When asked during oral argument in the trial court whether, if the court granted an injunction against the statute’s enforcement by the defendant Dallas district attorney, other Texas district attorneys would be free to enforce the statute, Weddington replied, “We goofed.” Transcript of oral argument at 42, Roe, 314 F. Supp. 1217 (No. CA-3-3690-B).
that decision the basis of its opinion in *Roe v. Wade*, the Court not only failed to ameliorate the conflict of deeply held values but probably exacerbated the conflict "wildly," further polarizing the national debate, not just on the substantive issue of abortion, but on the fundamental issue later raised in *Casey*—how law is to be made and why it should be respected.

III. JUDICIAL REVIEW AND LEGITIMACY IN PROCESS WRIT LARGE

A. Judicial Review in *Roe v. Wade*

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.

> —*Planned Parenthood v. Casey*[^147]

... The best the Court can do to explain how it is that the word "liberty" must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.

> —*Planned Parenthood v. Casey*[^148]

As this Part sets out briefly, the problem of legitimacy that preoccupies the Court in *Casey* is not solved by the major foundational theories of judicial review. The legitimacy of judicial review has been a concern of legal scholars almost since it was first exercised in *Marbury v. Madison*[^149] in 1803. Its exercise in *Roe v. Wade* illustrates its profound

[^146]: CALABRESI, *supra* note 22, at 92. Dean Calabresi finds such a basis for the decision unnecessarily divisive, inspiring the losers to expose as a sham the Court's finding that the fetus is not a person, by legislatively requiring women seeking abortion to view colored pictures of fetal development. *Id.* at 92-93. Calabresi would have framed the issue as a choice between women's right to equal participation in sex, and life values associated with the fetus. *Id.* at 99-100.


[^148]: *Id.* at 2875, 2882 (emphasis in original) (Scalia, J., concurring in the judgment in part and dissenting in part).

effect on our governance. Historically, the resolution of questions of a fundamentally moral nature has been considered a state prerogative. Thus the states have traditionally outlawed immoral conduct such as murder, theft, assault, and fraud. Justice Blackmun's substantive due process approach to the resolution of the conflict presented by Roe preempted state moral authority over abortion and elevated its regulation to the federal level. Moreover, by recognizing the constitutional primacy of the right to privacy over the states' interests in fetal life, at least during the first two trimesters, Roe also took the moral issue of abortion away from legislatures and deregulated it, leaving the question to individual decision makers—pregnant women—to resolve in accordance with their own moral precepts.\textsuperscript{150} Thus, not only did Roe preempt state moral prerogatives and federalize the abortion issue, it also favored individual, decentralized decision making and moral relativism over centralized, legislative decision making and moral absolutism.\textsuperscript{151} This diminution of state and legislative authority by judicial pronouncement provoked heated debate about the foundations of judicial review in constitutional interpretation.

Because it is not addressed in the text of the Constitution, the abortion issue tended to divide the discourse into two camps, those who would limit judicial review to the express language of the Constitution or original intent of the framers and those who would permit more contemporary understandings and events to inform constitutional interpretation. These divisions are reflected in the approaches to legitimacy taken by the joint opinion in Casey and those taken by Justices Rehnquist and Scalia, discussed above.

\textsuperscript{30} STAN. L. REV. 843 (1978). For an insightful reexamination of the dilemma of judicial review, see BURT, supra note 118, in which Professor Burt argues that the egalitarian democratic ideal requires that the Court act as a catalyst for legislative action that accommodates minority interests, not as the final arbiter that awards victory to one side or the other. To the extent that Professor Burt envisages the Court mediating the interests of majorities and minorities in exercising judicial review, his analysis is consistent with the views stated in this Article.

Some commentators have given up the search for a foundational theory of judicial review altogether, finding that the efforts to find one are as dangerous as they are unconvincing. \textit{See}, e.g., LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985). Professor Tribe observes:

Those who struggle to ground anything as complex as judicial review in any such more deeply secure foundation seem to me destined to leave us, and themselves, unsatisfied—caught in an infinite regress in which each reply... begets but deeper questions about why the reply should count as an answer at all....

\textit{Id.} at 4.

150. There is little question that federal anti-abortion legislation would have met the same constitutional fate as the Texas statute in \textit{Roe v. Wade} through application of the due process requirements in the Fifth Amendment.

Although this Article cannot undertake an evaluation of the resulting literature on the legitimacy of judicial review, part of the debate turns on the capacity of the Court to perform its unique functions, which is the concern of this Article. Professor Bickel has stated that "[t]he search must be for a function, which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if courts do not assume it . . . ." He finds the Court's performance of judicial review to be such a function and a primary mechanism for protecting enduring values which government was meant to serve. Some scholars, such as Dean Wellington at Yale Law School, after comparing the powers, functions, strengths, and weaknesses of common law courts and the Supreme Court engaged in judicial review, have agreed that constitutional judicial review is legitimated by the Court's peculiar institutional competence to contribute to an organic constitution. Dean Wellington finds that "because it is insulated and because constitutional law as well as common law can serve to filter out the passion and bias of the moment, the Supreme Court is an institution well-positioned to translate conventional morality into legal principle." But Wellington seems not to appreciate that the legitimating force of the common law lies not in the filtering and restraining effect of its doctrine, but in the empirically logical, historically based, and popularly embraced nature of its process. Other scholars, like Justice Scalia, argue that when engaged in judicial review, the Supreme Court's only function, to which it is well suited, is to apply the language of the document to the case before it, not to divine conventional morality and embody it in a living charter. But this originalist position does not explain how we are to discern the meaning of the textual terms or apply them to contemporary problems. Essentially, then, the adjudicatory
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Civil procedures applied in Roe, or as Professor Ely has called it, "process writ small," set up a substantive polarity to be resolved by the courts. This polarity sets in opposition not only those discussing abortion policy but also those discussing foundational theories about governance, or "process writ large," and raises elemental questions about the relationships between the federal government and the states, between the judiciary and the legislature, and between law and morality, all of which the Justices struggled with in Casey.

Recently, several prominent academic legal theorists have produced popular books presenting and justifying to the public their "foundational theories" about the Constitution, that is, their theories about fundamental institutions of governance in our representative democracy, including constitutional judicial review. Each has discussed the implications of his theories for the abortion debate. While the straightforward, coherent style of these books and their relevance to pressing moral and political issues of the day is welcome, none succeed in defusing or resolving the conflict over abortion by explaining how the needs of those affected by unwanted pregnancies can be addressed through the application of neutral, objective legal principles. Because each is confounded by or accepts the paradigm of the conflicting absolute moral interests at stake in abortion, none can escape the necessity for a judicial resolution ultimately based on the substantive moral assessments of the judiciary itself.

In his book, The Tempting of America: The Political Seduction of the Law, Judge Bork condemns the decision in Roe v. Wade because he finds it simply an expression of the Court's own subjective views about the morality of abortion. He finds that the Constitution does not address the question of abortion and that, "[t]here being nothing to work with, the

157. See notes 181-82 infra and accompanying text.
158. See notes 181-82 infra and accompanying text.
160. It is interesting to speculate whether these efforts to popularize constitutional jurisprudence stem from a perception that the law is indeed politicized and ultimately responds to popular political perceptions of it, see, e.g., BORK, supra note 159, at 12, or whether they are a response to the entrepreneurial spirit of the 1980s. Whatever the explanation, they raise interesting questions about the ability and responsibility of legal scholars when writing for a lay audience to illuminate the complexities of their subject and to disclose the primary assumptions upon which their views are based.
161. Id. at 114, 220.
judge should refrain from working." Since judges have no contribution to make, the controversy must be shouted in the media, thrashed out in the streets, and heatedly debated in the legislatures. However, Judge Bork's originalist approach fails to legitimate judicial disposition of the abortion issue because his position on the question—that judges should decide not to decide—is dependent upon the perception that the substantive issues to be decided are those posed by Roe. While they deny the existence of a right to abortion as a part of a protected liberty interest because it is not found in the text of the Constitution, originalists validate the right by accepting it as the subject of their textual search. If the judicial process were to distill and refine from the disorderly evidence about abortion a different lexicon of issues, the search would take us in different directions.

At the other end of the spectrum, Professor Laurence Tribe, as an exponent of the interpretive approach to judicial review, demonstrates that approach's inability to provide a legitimate resolution to the problem of abortion. In his popular book, Abortion: The Clash of Absolutes, Professor Tribe accurately perceives the abortion problem as one posed in terms of mutually exclusive polarities and claims an intention to find ways to move beyond the conflict to shared values upon which accommodations that respect conflicting world visions can be founded. His thesis is

162. Id. at 166.
163. Id. at 166-67.
164. Furthermore, as Professor Mark Tushnet points out, the question of whether the Constitution speaks to an issue is one which cannot be answered by judges without reference to their own subjective value preferences which dictate their selection of evidence to be taken into account in the effort to find the meaning of Constitutional provisions. Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781 (1983). Among other critiques of interpretivism, Tushnet observes that to gain understanding of past meanings, one must imagine a former world view and transport it into one's own—an exercise in hermeneutics—and seek to see the world as those who understood the meanings of words and constitutional provisions would have seen it. Yet these imaginative reconstructions of the past are shaped at least in part by our own subjective interests, concerns, and values and thus by definition cannot claim to be objectively correct. Id. at 793-804. Consequently, originalists cannot legitimate their judicial self-restraint and deference to legislative action on the ground that neutral and objective principles of judicial review require it.


166. Nevertheless, Tribe proceeds to play the advocate, not the academic, when he presents a biased exposition of the absolutist positions he characterizes.
that neither the pro-life nor the pro-choice position is, in fact, absolute, and that each permits qualifications and conditions that reflect common values and admit the possibility of compromise.\textsuperscript{167} Yet, Tribe betrays his own project by adhering to a fundamental rights approach (or some would say substantive due process approach) to judicial review.\textsuperscript{168} If the Justices interpret constitutional provisions in keeping with external sources of substantive values such as our deeply rooted national traditions\textsuperscript{169} and values fundamental to the “Anglo-American regime of ordered liberty,”\textsuperscript{170} and not in accordance with their own subjective predilections, why should we care, as Tribe professes to care, about informing the current popular debate about abortion? Why write a book to explain the abortion issue to the American public when the Supreme Court is charged with the responsibility for resolving it, not according to that public’s preferences or contemporary morality or to the preferences of its elected officials, but in accordance with the “teachings of history”? More fundamentally, Tribe’s project is doomed because he is trapped by the dichotomies he seeks to dispel. He cannot find common ground because he, too, conceives of the abortion issue as the clash of absolutes he decries.\textsuperscript{171} Despite his initial recognition of the “realness” of the problems involving abortion and the temporal and cultural contingency of positions regarding it,\textsuperscript{172} Tribe does not situate abortion rights in the

\begin{footnotes}
\item[167] Tribe, supra note 11, at 8-9, 229-38.
\item[168] Id. at 83-84, 90-95, 99, 111.
\item[169] The right to privacy, Tribe maintains, springs from “now quite ancient roots,” which had their beginnings in Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). Tribe, supra note 11, at 92-93.
\item[171] Tribe, supra note 11, at 6-7, 96-97. Tribe’s concluding effort to transcend the absolutes is provided by a hypothetical future technology that would permit the development of a fetus without the mother undergoing a pregnancy after conception. In that future world, liberty of the woman to require the death of her conception would have to yield to the claim of life for all and current claims of a right to fetal life would be unmasked as an effort to impose upon women traditional sex roles and harsh sexual morality. Id. at 225-30. What Tribe accomplishes by this flight of fancy is the conclusion that the claim to liberty in the atomistic sense is a true absolute while the claim to life is contingent and repressive. This is not the revelation that he promised.
\item[172] Tribe, supra note 11, at 27. About one-fifth of Tribe’s book deals with the history of abortion in America and around the world. Id. at 27-77. Tribe entreats:
\end{footnotes}
many communities that make up our national heritage, nor does he discuss or explain our conflicting rights analysis in temporal and cultural terms.\textsuperscript{173} Rather, he speaks as though it is the time and culture that make up our history that validate abortion rights as the abstraction and absolute that he has set out to defuse.\textsuperscript{174} What is important is not whether he is right in his reading of our national traditions (if one can be "right" about such things), but that he contends that time and culture count and make determinate the rights that he has demonstrated to be indeterminate. Again, his effort to heal the national wound inflicted by the clash of absolutes is defeated because he cannot escape the social contingency of his own perception of them as absolutes.\textsuperscript{175}

As noted by several reviewers, in the end, instead of discovering common ground, Tribe distorts and exaggerates stereotypes of the opposed positions on abortion and thus exacerbates the conflict.\textsuperscript{176}

Professor John Ely's process approach to judicial review, set forth in his book \textit{Democracy and Distrust},\textsuperscript{177} can be regarded as a middle ground on the continuum of approaches to constitutional interpretation. Ely's theory

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\textsuperscript{173} Tribe accepts the right to abortion as an abstraction of individual autonomy without appreciation of the fact that the availability of abortion technology raises questions about the moral responsibility of women for others, such as existing children, parents, spouses, and fathers, or their responsibility to their future children to provide them a minimally adequate home, family, and education. See GILLIGAN, supra note 37, at 111-120; KRISTIN LUKER, \textit{ABORTION AND THE POLITICS OF MOTHERHOOD} 180 (1984).


\textsuperscript{175} Thus, Tribe reaffirms the absolutes when he dismisses conditional legislative compromises—such as consent requirements, notification provisions, waiting periods, and restricted funding—as not compromises at all because "they promise abortion rights in principle but deny them in practice .... [S]olutions that split the difference—denying some fetuses life and some women liberty—hardly offer a solution." TRIBE supra note 11, at 209-10; see also Maximilian B. Torres, Book Note, 28 HARe. J. ON LEG. 282, 284 (1991) (reviewing TRIBE, supra note 11). \textit{But see Richard Rorty, Contingency, Irony and Solidarity} (1989) (arguing against the notion that there are noncontingent, discoverable foundational truths, such as absolute rights).


\textsuperscript{177} ELY, supra note 159.
of judicial review relies on interpretation of the constitutional text, but it is not the "clause bound" interpretivism of originalists like Judge Bork. Instead, Ely reads the Constitution to be a document establishing a system of government based on two principles: representation and participation—the archetypal democratic values. His process approach promises a theory of constitutional interpretation mainly free of subjective judicial value judgments and subject only to judicial implementation of these process values. A participation-oriented and representation-reinforcing approach to judicial review is both supportive of our representative democracy and involves tasks that courts are institutionally well-equipped to perform. His thesis is summarized as follows:

[C]ontrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.


179. Ely states:

[The] "values" the Court should pursue are "participational values" of the sort I have mentioned, since those are the "values" (1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose "imposition" is not incompatible with, but on the contrary supports, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to "impose." Ely, supra note 159, at 75 n.*.

180. This understanding of the document eschews a role for the Supreme Court in choosing between substantive values in conflict, unless the Constitution clearly prefers one value over the other. Otherwise, the Court must intervene only when persons with interests in one value or the other have been excluded from participation in representative government (and thus a legislative resolution of the issue) or such persons have been unduly prevented from participating in the costs and benefits legislated. Ely, supra note 159, at 77; John H. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 933-36 (1973).

181. Ely observes:

[A] representation-reinforcing approach assigns judges a role they are conspicuously well situated to fill. My reference here is not principally to expertise. Lawyers are experts on process writ small, the processes by which facts are found and contending parties are allowed to present their claims. And to a degree they are experts on process writ larger, the processes by which issues of public policy are fairly determined: lawyers do seem genuinely to have a feel, indeed it is hard to see what other special value they have, for ways of insuring that everyone gets his or her fair say.

182. Ely, supra note 159, at 102 (emphasis in original).
Since there is no express treatment of abortion in the text of the Constitution, and no issue of participation or representation posed by abortion, under Ely's theory of judicial review there are no constitutional principles to apply and the conflict must be resolved by the legislature. Finding that "the moral dilemma abortion poses is so difficult as to be heartbreaking," Ely nevertheless finds Roe's resolution of it "frightening" because the woman's "super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."  

However, even this seemingly neutral, principled process approach fails to provide an adequate explanation of the proper role of the Court in resolving questions like abortion. Thus Ely's process approach has been criticized, first, because, as Judge Posner has pointed out, the argument proves too much, for one can find participation and representation issues in almost any constitutional challenge; and second, because, as Professor Ortiz argues, no process theory, Ely's included, can escape the subjective judgments courts must make when interpreting the Constitution. Judges are able to find imperfections in participation and process only by applying their own value judgments about what groups are being improperly excluded from the process.  

Professor Ely's process approach fails for our purposes, not so much because it must necessarily involve some judicial choice among substantive values (since on some level all judgments do), but because, like originalism, it accepts the wrong choice. This Article defines the problem to be the formulation and conception of the complex issue of

184. Id. at 933, 935-36.
185. Richard A. Posner, Democracy and Distrust Revisited, 77 VA. L. REV. 641, 649 (1991). Because Ely cannot produce social science data to support his conclusions about the representational issues at stake in, for instance, affirmative action suits, Posner believes any constitutional controversy can be conceived as implicating participational and representational questions for the Court's resolution. Thus, Ely's theory leaves judges free to do anything: "abolish capital punishment, force the states to allow homosexual marriage, force them to extend the franchise to nonresidents and maybe even to aliens—all in the name of the Constitution's participation-oriented, representation-reinforcing theme," id. at 649, much like fundamental rights theorists. Ely, of course, would disagree. Earlier, he argued clearly that the abortion issue does not present a representational issue, for he finds that although few women sit in the legislatures that restrict their right to abort, no fetuses sit in legislatures. Ely, supra note 180, at 933-36.
186. Ortiz, supra note 178, at 722.
187. Id. at 741. Therefore, in Ortiz's view, Ely fails to provide an alternative to a fundamental rights approach or a resolution to the irreconcilable conflict embedded in our political tradition between majoritarianism (based on an aggregation of individual value preferences) and judicial review (based on communitarian assumptions about social values). Id. at 744-45.
abortion as a conflict between two simple, abstract absolutes. Ely’s theory does not speak to that problem or examine the constitutionality of the formulation of the issue through what he terms “process writ small.” Therefore he seeks to answer the wrong questions—those posed by a flawed adjudicatory process. The question to be answered is whether the judicial process that formulates the substantive issue comports with the constitutional principles of procedural fairness informed by the participational and representational principles he finds underlying process writ large. Do those principles also provide a standard for evaluating the legitimacy of adjudicatory process? If judges are to make law, as surely they do in cases like Roe, does not the constitutional blueprint partially revealed by Ely require that their law making be based on a process as participatory and representative as possible?188

The Justices in Casey do not do much better than these academics in articulating for popular understanding coherent theories legitimating judicial review, and their positions suffer from the same weaknesses. The authors of the joint opinion seem to understand that many question why the nation should accept Supreme Court interpretations of the Constitution as the law of the land. The authors took a nonpositivistic approach to answering these concerns by not regarding the Court’s formal authority under the Constitution and Marbury v. Madison as dispositive. The joint opinion would seem to hold that the legitimacy of its judgments is to be found in the public’s belief that the Court’s substantive judgments are derived from “legal principles.”189 But there the string runs out. It is not clear where the Justices find such principles if they are not articulated in the Constitution. Precedent plays a role, as the joint opinion’s discussion of stare decisis indicates, but not a determinative one, as the Justices’ willingness to narrow and modify previous abortion decisions demonstrates. Again, from history, precedent, perceptions of popular reliance, acceptance of its prior decisions, and its own sensibilities, the Court seems to distill an approach, if not a principle, to govern this and future cases. But the approach is still a balancing one, though different from that struck in Roe, and one that weighs the same abstract interests set in conflict there. Instead of dividing gestation into three zones in which the two interests weigh differently, the Casey plurality would weigh the two interests throughout gestation and permit regulation except where the state imposes an undue burden on a woman’s choice.

188. See John Leubsdorf, Constitutional Civil Procedure, 63 Texas L. Rev. 579 (1984) (urging that constitutional requirements be more clearly established to govern civil procedure in state and federal courts).
In applying the undue burden standard in *Casey*, the Court seems to be trying to find the middle ground between radical advocates on both sides of the controversy that it polarized in *Roe* and to find legitimacy in the perceived consensus of the American public favoring women’s choice, but with limitations. While seeking common ground and trying to avoid the aggravating effects of *Roe* are laudable efforts, the Court is still trapped in the dichotomy. Its perception of the issue as a choice between two conflicting interests is again conveyed to the nation and validates the demonstrations by both sides, who blame the Court for withholding total victory in the zero-sum game. Furthermore, although the authors of the joint opinion seem willing to give more weight to information about the social, economic, and political meaning of abortion, findings of “undue burden” will ultimately rest on the Court’s substantive judgment about how much is too much. The Court will be subject to the same accusations that it simply imposes its own political judgment, favoring one interest or the other, in place of that of the legislature. As we have seen, that is where the debate over judicial review began. Thus, while the joint opinion acknowledges the importance of the question, it does little to advance its resolution.

Chief Justice Rehnquist and Justice Scalia, on the other hand, part company with the authors of the joint opinion at the statement of the issue. They do not see legitimacy to be a question of public acceptance of the Court’s role as lawgiver, but a question of the Court’s institutional authority under the Constitution to apply its language to the case at hand. Thus, they adhere to a more mechanistic, positivistic, and institutional concept of legitimacy. Like Professors Bork and Ely, these Justices base the legitimacy of judicial review on the application of the document’s text. Any textual ambiguities are to be resolved in light of historical practices at the time of its framing. However, this formulation suggests that if, historically, abortion had been liberally permitted in this country, as indeed it was prior to the twentieth century, then the ambiguity in the term “liberty” might be resolved the other way, a result Justice Scalia would surely condemn. Further, this originalist approach is subject to the criticisms discussed above. Justice Scalia does not tell us, for instance, how we are to know the meanings of the text or historical practices he finds relevant, or how judges are to avoid their own selective use of historical information.

The purpose of this Article is not to evaluate and advocate one foundational theory of judicial review over another, but to demonstrate
how confounded these theories are by the task they seek to perform—justifying judicial choices between antithetical values set in opposition by adversary procedures—when the express language of the Constitution does not dictate one. Rather than continuing to try to resolve this conundrum, courts should view the task as an effort to create procedures that will frame the issues in such a way that stark choices between antithetical interests will not be presented for judicial review. If trial court procedures precipitated more focused, better understood, fully discussed, multifaceted (or polycentric) issues for decision, perhaps the discourse about legitimacy would change, and we might come closer to establishing some basic agreement about the legitimacy of the Court’s role in judicial review.

B. The Problem of Institutional Competence

The District Court heard the testimony of numerous witnesses and made detailed findings of fact regarding the effect of this statute. . . .

These findings are supported by studies . . .

—Planned Parenthood v. Casey¹⁹¹

[If a court can find [a constitutional violation] simply by selectively string-citing the right social science articles, I do not see the point of emphasizing or requiring “detailed factual findings” in the [trial] court.

—Planned Parenthood v. Casey¹⁹²

In the exercise of judicial review in suits like Roe, the courts are called upon to perform at least two functions: first, to divine the constitutional boundaries of permissible legislative action; and second, to grant relief affecting large numbers of people and bureaucracies. The latter necessarily requires courts to make judgments with regard to the desirability, feasibility, and reasonableness of various social policies. Yet, courts have difficulty carrying out this function because the procedures used are not suited to establishing a factual basis upon which to formulate prospective rules of general applicability.¹⁹³

¹⁹¹. Id. at 2826-27 (joint opinion).
¹⁹². Id. at 2880 n.6 (Scalia, J., concurring in judgment in part and dissenting in part).
In both *Roe* and *Casey*, the Supreme Court felt a responsibility to establish guidelines for future bureaucratic or legislative action, rather than leave legislatures to a trial-and-error method.\(^{194}\) The relative novelty of this judicial task strains traditional procedures available to carry it out. Modern courts, asked in effect to adjudicate the future interests of many people, are placed in the position of a legislature or administrative agency engaged in prospective rulemaking, not in their traditional role of creating law incrementally through retrospective, case-by-case determinations involving individual litigants. Yet courts lack the representative quality of legislatures, as well as their authority to hold investigatory hearings, exercise continuing oversight over administrative programs, and create new approaches to the remediation of social problems. They also lack the substantive expertise, the accountability to the executive branch, and the continuity of jurisdiction that characterize administrative agencies. Thus, the resolution of the clash of absolutes raises serious questions about the institutional ability of courts to carry out the tasks required by judicial review, regardless of the jurisprudential basis for that review.

First, how well can a court gather information necessary to wisely and fairly settle public policy disputes? The exchange between the authors of the joint opinion and Justice Scalia lays bare the uncertainty and disagreement on the Court about how it should obtain factual information necessary for constitutional adjudication. The Supreme Court has long recognized the importance of social policy-oriented information to its constitutional decision-making process.\(^{195}\) As early as 1908, Justice Brandeis, then an attorney practicing before the high Court, submitted his innovative brief in *Muller v. Oregon*\(^{196}\) setting out facts about the effects of long working hours on women, as opposed to facts particular to

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\(^{196}\) 208 U.S. 412 (1908).
the situations of the parties to the suit. Professor Kenneth Culp Davis later characterized these as "legislative facts."

In the exercise of judicial review, courts are necessarily required to examine the factual predicate of legislation to determine whether the challenged statutes are rationally related to valid legislative goals or whether the legislation is tailored to serve a compelling state interest. Judicial scrutiny of legislative facts which are asserted to support challenged statutes has become accepted as a task the judiciary must necessarily perform. Yet traditional procedures used by federal courts to carry out that task were developed for a different purpose—finding facts about a particular situation, determining the relevance and veracity of testimony from litigants and witnesses, assuring that the dispute is limited to justiciable issues, and permitting the parties to present reasoned argument.

The traditional civil procedures provide only limited opportunities to include legislative facts in the adjudication. In Roe v. Wade, the trial court had only the state and two private parties before it, and the Supreme Court had only one private party (after affirming the dismissal of the Does and finding that Dr. Hallford lacked standing to sue). Neither court, then, was enlightened by the contributions that other interested parties might have made at the trial level about their own situations and that of others like them.

197. Id.; see also John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. PA. L. REV. 477 (1986) (arguing that social science research used to create a legal rule should be treated as social authority and given precedential effect).

198. 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.3 (1979); Kenneth C. Davis, An Approach to Problems of Evidence in the Administrative Process, 55 HARV. L. REV. 364, 402-03 (1942); see also Kenneth C. Davis, Facts in Lawmaking, 80 COLUM. L. REV. 931 (1980) (arguing that Supreme Court law making should not be based on legislative facts that parties have not had an opportunity to challenge).

199. Even when fundamental rights are not at stake, the Court requires that challenged legislation be at least rationally related to a valid legislative end. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that zoning ordinance requiring special use permit for mentally retarded persons' group home was not rationally related to legitimate governmental purpose); cf. Allied Stores v. Bowers, 358 U.S. 522 (1959) (holding that state law exempting from taxation merchandise belonging to nonresidents was rationally related to a legitimate state policy). For a comprehensive discussion of legislative facts in constitutional litigation, see Rachael N. Pine, Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights, 136 U. PA. L. REV. 655 (1988).


201. Fuller, supra note 63, at 364-371; THE ROLE OF COURTS, supra note 193, at 114.

It is true that on appeal scores of organizations representing a wide variety of interests in the question of abortion filed briefs as amici curiae in the Supreme Court, offering the Court legal argument and factual information of which it might take judicial notice. Moreover, Supreme Court rules require these amici filings to support the position of either the plaintiff or the defendant, not their own mediate positions. Often the briefs amount to nothing more than "me too" briefs in which amici essentially vote their support for one side or the other. Yet this kind of voting is a far cry from even a Gallup poll as a means of determining popular views on questions the Court has framed. Amicus briefs may, however, be valuable as avenues of pluralist representation before the Court.

Many of these briefs have provided the Court with relevant information, such as descriptions of medical technology, epidemiological data, religious views on abortion, historical accounts of abortion practices, and sociological analyses of the phenomenon of abortion. However, this information is usually provided at the last stage of legal proceedings, permitting the parties little or no opportunity to rebut it. Thus, the veracity of the information provided by amici is not tested in the crucible of evidentiary rules and cross-examination in the trial court. The methodology of studies cited goes unexamined. Requiring amici to take adversarial positions might be justified if the effect of doing so were to test the veracity of their information through the adversarial process. This benefit is lost, however, when amici do not file until the last stage of appellate review.

Finally, the submissions are not a response to the Court's need for information but the amici's perception of what the Court needs to know. Yet the Court is ill-equipped to generate needed information for itself.


206. Kolbert, supra note 205, at 156-57.
Folklore has it that Justice Blackmun spent the summer before writing the Roe decision in the library of the Mayo Clinic in Rochester, Minnesota, researching the medical issues he thought important to his decision. Similarly, while Justice Blackmun recited a good deal of the history of abortion practices and the attitudes toward fetal interests, he was assisted in doing so only by his law clerks and by partisan amici briefs, not by legal or social historians the Court might have chosen to rely upon. While the Court's passive posture with regard to the generation of information is a basic characteristic of the Anglo-American adversary process, it may not be conducive to effective law making.

The primitive state of legislative fact-finding in Roe v. Wade became more sophisticated in later abortion litigation. For example, in Hodgson v. Minnesota the plaintiff doctors and clinics presenting an "as applied" challenge to Minnesota abortion regulations amassed an impressive array of expert witnesses and statistical information about the actual effects of the law. In Planned Parenthood v. Casey, plaintiffs provided the same kind of information about the probable effects of the law in presenting a "facial" challenge to Pennsylvania's abortion regulations. The plaintiffs in Hodgson and Casey supplied the trial courts with much of the information the Texas court lacked in Roe, some of it presented as stipulated facts agreed to by all parties. This practice of making a joint presentation of undisputed facts and expert testimony with regard to disputed legislative facts is to be applauded. However, only some of the interested parties affected by the litigation were parties to the suit, and the trial court did not have the benefit of the legislative facts as others, such

208. 648 F. Supp. 756 (D. Minn. 1986), rev'd, 853 F.2d 1452 (8th Cir. 1988), aff'd, 497 U.S. 417 (1990). In Hodgson, the Minnesota statute requiring notification of both parents with a judicial bypass provision had been in effect for five years and advocates were able to dramatically demonstrate its actual effects in a hearing that lasted for five weeks. Id.
209. 744 F. Supp. 1323 (E.D. Pa. 1990), aff'd in part and rev'd in part, 947 F.2d 682 (3d Cir. 1991) (affirming district court's holding that statutory spousal notice provision constituted an undue burden and reversing the holding that other provisions constituted an undue burden), aff'd in part and rev'd in part, 112 S. Ct. 2791 (1992) (holding that all of the challenged provisions of the statute except spousal notification were constitutional). Plaintiffs in Casey challenged the constitutionality of Pennsylvania abortion regulations, which required, among other things, spousal notification, before they were enforced. Id. Therefore, plaintiffs were required to show that the spousal notification provision could not be constitutionally applied to the one percent of the women who obtain abortions, whose behavior it was thought to affect. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2829 (1992) (joint opinion). In order to do so, plaintiffs presented extensive expert testimony about the likely effects of the provisions on such women and about the obstacles those effects would cause for such women. In the context of a facial challenge, these legislative facts were accepted for their predictive ability, not as proof of the statute's actual effect as in Hodgson. Justice Rehnquist dissented, finding that plaintiffs had failed to establish that no set of circumstances existed under which the provision would be valid. Id. at 2870.
as poor women, minors, and men, might have perceived and presented them.

Second, how well can courts take into account the many varied and important interests at stake in law-making litigation? Standing requirements serve the worthy goals of conserving judicial resources and permitting only those with an interest, and hence an incentive to litigate effectively, to participate in suits like Roe. Nevertheless, standing requirements hobble the courts as well as the parties, making it difficult for them to understand the issues confronting them and to assess the consequences of proposed judgments. In addition, conventional procedures do not permit the fair resolution of disputes because they do not provide notice and an opportunity to be heard to many persons whose interests will be dramatically and directly affected by the suit. Husbands, potential fathers, grandfathers, grandmothers, unborns, doctors, poor women or unhealthy women who want abortions only if they cannot obtain needed health care, women carrying deformed fetuses, and childless persons seeking to adopt children were not represented in Roe, yet their relationships with each other were profoundly affected by it. Thus in Roe the Court observed: "Neither in this opinion nor in Doe v. Bolton . . . do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases . . . ." 210 Furthermore, the class of women who were plaintiffs in Roe was so broadly defined that no meaningful representation of their actual interests could have been provided by two lawyers, even if some kind of notice had been given to the class members, which it was not. 211


211. Rule 23 of the Federal Rules of Civil Procedure establishes four requirements: that the number of people in the class be too numerous to permit ordinary joinder; that members of the class share common questions of law or fact; that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and that the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a). Parties may maintain suits under subsections b(1) and (2) where separate actions might result in judgments subjecting the party opposing the class to inconsistent standards of conduct, resulting either from conflicting injunctions or from an inability to satisfy all claimants when money damages are at issue. However, subsection b(3) encompasses group litigation where it would be both convenient and desirable to seek primarily money damages and where questions common to the class predominate over the questions affecting individual members. Persons included in b(3) class certifications are entitled to notice of the action and may be excluded by the court if they so request; any judgment will be binding against all members who do not request exclusion, and any member who does not request exclusion may enter an appearance through counsel. FED. R. CIV. P. 23(b).
Without notice of the action or the position of the named plaintiffs on the issues to be litigated, all women, as the class was ultimately considered, can hardly be said to have been represented.

Third, conventional procedures used in Roe involved no effort to explore areas of agreement that might have permitted the parties to arrive at a partial settlement of their differences. For example, the State of Texas was never permitted or encouraged to offer Norma McCorvey subsistence benefits or medical care, to help her secure child support payments or adoption or child care assistance under existing programs, nor to offer to construe any ambiguities or vagueness in the statute generously in the future. Had the suit been settled on such bases, it might have provided precedent for others to obtain relief. Women similarly situated who did not want such relief would have been free to litigate their own interests. As it was, the lower court’s judgment in Roe was not based on any common values held by the parties and expressed in settlement negotiations. The court’s own value choices were reflected in its finding that the asserted liberty interests were protected by the Ninth Amendment. To the extent that courts can ascribe value judgments to the parties participating in voluntary settlements, they avoid accusations that they have imposed their own predilections on the parties in the name of constitutional interpretation.

What is needed is a judicial process that permits the substantive issues presented to the court for judicial review to reflect the multifaceted nature of the substantive policy issues to be affected by new medical technologies, not the all-or-nothing dichotomy of the adversarial process. Unless we are willing to pay the price in inefficiency and delay that case-by-case adjudication of constitutional challenges brought by individual litigants will exact, but to which traditional procedures are well-suited, we must refine those procedures to perform new functions. In cases in which large groups of people request prospective, systemic relief against government action pursuant to generally worded constitutional provisions, the purpose of civil procedure should be to enable the court to order an informed resolution of the complex social policy controversy necessarily resulting from its interpretation of the document. Thus the task is to create or implement procedures that will permit judicial resolution of this type of dispute and that are fair, informed, efficient, institutionally appropriate, and legitimate.

212. Justice Blackmun agreed with the district court that the Texas statute should be struck down as void for vagueness. Roe, 410 U.S. at 164. The district court wondered, among other things, whether the statute’s exception for abortions necessary to save the life of the mother would apply to a woman who threatened suicide. Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970), aff’d, 410 U.S. 113.
IV. PARTICIPATION AND LEGITIMACY IN PROCESS WRIT SMALL

The law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of. Where [a patient], or a parent, or a doctor, or a hospital, or a State seeks the process and response of a court, it must answer with its most informed conception of justice in the previously unexplored circumstances presented to it. That is its obligation... for the actors and those having an interest in the matter should not go without remedy.

—In re Quinlan

If we take seriously the untidy evidence about abortion as a utilization of medical technology that takes on meaning only through its implication of various relationships in their historical, social, and political contexts, what can we do with it? If traditional adversarial procedures are inappropriate for the resolution of the social policy issues the evidence presents, what are the alternatives? It is unlikely that the Supreme Court will abdicate its long-standing practice of reviewing the constitutionality of state legislation, even when challenges are based on ambiguous, indeterminate provisions of the text. Federal courts will continue to receive constitutional challenges to abortion legislation under the Supreme Court's new undue burden test announced in Casey. Even if all constitutional questions involving abortion were rendered moot by federal legislation, the Supreme Court would be called upon to adjudicate other constitutional claims regarding the utilization of medical technology.

There are two courses. We could decide to accept the polarization of issues in such cases, as in the past, but utilize procedures that would confine the litigation to the specific complaints of the parties, restrict the certification of class action suits, and provide only retrospective relief where possible, thus developing policy through case-by-case adjudications. Under such procedures, the claim of Norma McCorvey would have been adjudicated as the claim of a seven-month pregnant, poor, single, Texas resident. The relief granted her would have been precedential only in cases subsequently determined to be similar by other judges. Proceeding thus, courts engaged in constitutional judicial review would imitate the common law tradition of judicial regulation, permitting social policy formation to evolve like common law doctrine on an incremental basis.

Such a process for the formulation of social policy is inefficient, however, in its excessive utilization of judicial resources to try a large number of similar cases. It is time consuming and expensive for the litigants, and it results in a lack of uniformity and an uncertainty about the applicability of doctrine to unlitigated situations.

A. The Participatory Rulemaking Model

Alternatively, courts might emulate a rulemaking model for policy formulation. Since the problems of institutional competence arise from the law-making functions of the court engaged in judicial review, it is instructive to look at the procedural mechanisms that better equip other rulemaking and law-making institutions to make social policy determinations. In an effort to point out its illegitimacy, critics of Roe liken Justice Blackmun's creation of trimester limitations on state abortion legislation to a regulatory code. But, if broad-gauged judicial regulation is an inevitable part of judicial review, and if that regulation must necessarily be based on a judicial selection of values (as discussed in Part III, either directly in the case of fundamental rights approaches or indirectly in the case of originalism and representational process approaches), then why should the courts not draw on the experience of administrative agencies engaged in rulemaking to devise suitable policy formulation procedures for themselves? In addition, as developed below, a new process which renders courts more institutionally competent to perform their judicial law-making functions may provide their judgments with a clearer claim to legitimacy as well.

A court engaged in judicial review of open-ended constitutional provisions, such as liberty and due process, is not unlike an administrative agency given a broad mandate from Congress to make law under a general policy directive, such as the mandates found in the Sherman Act and the Civil Rights Act. In both cases, the court/agency has only the vaguest instructions from its empowering source indicating the goals its law making is to achieve. And, in both cases, the attenuated nature of the relationship between the court/agency and its authorizing and

217. One rationale for such broad legislative directives is the inability or unwillingness of the legislature to come to grips with difficult policy choices and the desire to pass politically charged issues to administrative bodies only indirectly accountable to the electorate.
legitimating source (the Constitution and the Congress, respectively) gives rise to questions about the body's law-making authority. The courts might do well to consider adopting the rulemaking principles developed for administrative law making, particularly recent models of negotiated rulemaking that seek to avoid polarization in the administrative process.

The Administrative Procedure Act (APA) requires that certain kinds of rules be promulgated after notice and an opportunity for comment has been given to interested parties. This kind of rulemaking is called "informal rulemaking." Administrators and legal scholars have long been interested in improving informal rulemaking by making it less an adversarial and more a collaborative process, through what has become known as "negotiated rulemaking." Recent legislation establishes a framework for the conduct of negotiated rulemaking by those federal agencies that voluntarily decide to use the procedure. In the negotiated rulemaking process, parties affected by an agency rule help


219. 5 U.S.C. § 553 (1989). Administrative agencies make law through both adjudication and rulemaking. While neither the Constitution nor most statutory delegations of rulemaking authority require agencies to promulgate rules in a particular way, the Administrative Procedure Act (APA) does contain such requirements. BERNARD SCHWARTZ, ADMINISTRATIVE LAW §§ 4.8, 4.10 (2d ed. 1984). The APA establishes minimal procedures, including public notice in the Federal Register and an opportunity for public comment, when an agency formulates a rule or statement of future effect that is not required by statute to be based on a formal, on-the-record hearing. See 5 U.S.C. §§ 553, 556-557 (1989). Sections 556 and 557 establish trial-like procedural requirements for rulemaking required by Congress to be made through on-the-record hearings. These include requirements that the rule adopted be supported by substantial evidence, that the hearing be conducted by an administrative law judge or agency member, and that the parties be allowed to present oral and written testimony, cross-examine witnesses, and present proposed determinations of fact and law and exceptions to the recommended determinations of the tentative agency decisions. The trial-like procedures required for formal rulemaking are not commonly required because they are considered cumbersome and undesirable for many administrative law purposes.


formulate the rule before it is published as a "proposed rule" in the Federal Register. Negotiated rulemaking grew out of experience with labor negotiations and the settlement of litigation challenging agency rules.²²² Often, when an agency has adopted a rule using informal notice and comment rulemaking procedures, the rule will be challenged and subjected to judicial review. Once a complaint has been filed, the plaintiffs bargain with the agency for a new rule, agreeing to dismiss the suit if the agency adopts a course of action which all parties find agreeable.²²³ Thus, several prominent commentators believe that informal notice and comment rulemaking under the APA polarizes issues that must be finally settled in costly litigation. To eliminate this inefficient conflict and delay, Professor Philip Harter and others propose that persons affected by the rule, who might otherwise take their objections to court, participate with the agency in shaping policy and writing detailed rules.²²⁴ Negotiated rulemaking is based on the premise that the participation of interested parties in the formation of policy leads to accommodation rather than the bifurcation of positions, and not only produces more acceptable rules, but produces them more quickly and at less cost.

Under procedures recommended by the Administrative Conference of the United States (ACUS)²²⁵ and essentially enacted by Congress, an agency considering negotiated rulemaking with regard to a set of issues must first assess the feasibility of negotiating a rule.²²⁶ Usually, the agency chooses a "convener" to identify affected parties and interests²²⁷ and

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²²⁵ Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 305.82-4 (1992) [hereinafter ACUS Recommendations].
²²⁶ See Administrative Dispute Resolution Act, 5 U.S.C. § 583 (Supp. 1992). Under § 583, the agency is to consider the need for a rule, whether there are a limited number of identifiable interests that will be significantly affected by the rule, and the reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the identified interests and who are willing to negotiate in good faith to reach a consensus.
²²⁷ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK, 97 (1990) [hereinafter ACUS]; 5 U.S.C. § 583(b). Sometimes such a convener has been a disinterested person within the agency, and sometimes it has been a private organization with whom the agency contracts. ACUS, supra, at 98. The Administrative Dispute Resolution Act, which establishes a framework for voluntary negotiated rulemaking by agencies, provides that the agency should consider the convener's report and publish notice in the Federal Register announcing the intention to establish a rulemaking committee, the subject of the rule to be developed, a list of the interests affected, a list
publishes a notice in the Federal Register indicating the agency’s intention to engage in negotiated rulemaking, seeking comments on the proposal, and inviting applications for additions to the proposed rulemaking committee. Some commentators have argued that agencies should provide funds to finance factual research and hire staff to support the parties in their negotiations, so that all affected interest groups, including those with few financial resources, can participate. Often the agency agrees to publish the negotiated consensus rule in the Federal Register as a proposed rule. In addition to identifying affected interests, the convener may conduct pre-negotiation training and orientation sessions for participants and usually supervises fact-finding activities and the acquisition of technical advice. The rulemaking committee’s objective is to bargain out a consensus rule that the agency and all participants will agree is better than the rule they might get of persons to represent those interests, a proposed agenda, a target date for publication of a proposed rule, and a description of the administrative support to be made available. See 5 U.S.C. § 583.

228. 5 U.S.C. § 584.


230. ACUS Recommendations, supra note 225, ¶ 13; ACUS, supra note 227, at 97-105. Subsections 583(a)(6) and (7) of the Administrative Dispute Resolution Act provide that the agency shall consider whether “the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee,” and whether “the agency... will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.” 5 U.S.C. § 583(a)(6), (7).


232. The agency may participate in the negotiations as a kind of disinterested referee protecting the public interest in negotiations between affected private interests, as it has in some environmental rulemaking proceedings. Alternatively, an agency may actively participate as an interested party to ensure that the proposed rule is consistent with statutory requirements and is administratively feasible. The agency reserves a veto power over any consensus rule, a power inherent in its legislative authority to promulgate the final rule. See Susskind & McMahon, supra note 221, at 158. The Administrative Dispute Resolution Act makes such participation necessary to its model and provides so in § 586(b):

The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.


It is important that the agency assure that it can effectively administer the rules it proposes. For a discussion of several recent examples of the Social Security Administration’s failure to do so, see
through litigation. Typically, the proposed rule will be published by the agency for comment, and because most of the interested parties were involved in the drafting, the final rule will usually be very similar to the one proposed by the committee, unless the agency receives unanticipated responses during the period for public comment. Courts would do well to consider adopting similar principles and procedures in order to resolve complex policy disputes affecting large numbers of people in a more deliberate, consensual, and informed way.

Certain essential conditions must be present if negotiated rulemaking is to be successful. The ACUS recommends that the rulemaking committee consist of a limited number of interested parties who believe that they may have more to gain from negotiating a consensus rule than pursuing litigation, and who have a number of specific interests that can be traded off in the negotiations. In addition, parties must share fundamental values at some level or they will not be successful in finding a common basis for their agreement. This precondition to successful negotiation among interested parties may be especially problematic in the abortion context.

Advocates of negotiated rulemaking maintain that the overall costs of negotiated rulemaking are lower than the costs of conventional rulemaking because interested parties can often avoid duplicative research by cooperatively developing information needed to settle the policy at issue; there are fewer incentives for parties to posture and to engage in fact-finding in order to position themselves for future court challenges; policy positions do not become radical and polarized; consensus rules are developed faster under agency-imposed deadlines; and parties agreeing to consensus rules are less likely to challenge them, thus reducing the likelihood of expensive, protracted litigation.

Negotiated rules are regarded by proponents as more accurate because they take into account information provided through a cooperative process

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233. Section 582(2) of the Administrative Dispute Resolution Act defines consensus as "unanimous concurrence among the interests represented on a negotiated rulemaking committee . . . unless such committee (A) agrees to define such term to mean a general but not unanimous concurrence; or (B) agrees upon another specified definition." 5 U.S.C. § 582(2).
234. 5 U.S.C. § 553. In several instances, negotiated rulemaking has failed to produce a consensus, and agencies have proceeded with informal rulemaking. See, e.g., United Steelworkers of America v. Rubber Mfrs. Ass'n., 783 F.2d 1117 (D.C. Cir. 1986).
235. ACUS Recommendations, supra note 225, ¶ 4; see Harter, supra note 222, at 50.
236. Harter, supra note 222; Susskind & McMahon, supra note 221, at 139.
237. See discussion infra at notes 301-03 and accompanying text.
238. See Harter, supra note 222, at 55-56.
239. See generally id. at 28-31.
consented to by all parties and supervised by the convener. More importantly, the negotiation process also takes into account the policy positions of affected people, which has not been the case in agency-dominated notice and comment rulemaking and litigation. This quality of negotiated rulemaking adds legitimacy to the resulting rule, based on notions of notice, pluralism, participatory government, respect for affected interests, and agency expertise. With regard to reforms in the administrative process, Professor Stewart noted that:

So long as controversies remained bipolar in form and character—citizen versus the government—it remained possible to conceive of administrative law as a means of resolving conflicting claims of governmental power and private autonomy. However, the expansion of the traditional model to include a broader universe of relevant affected interests has transformed the structure of administrative litigation and deprived the simple notion of restraining government power of much of its utility. In multipolar controversies, demarcation of distinct spheres of governmental and private competency may no longer be feasible, and the non-assertion of government authority may be itself a decision among competing interests.  

Similar observations could be made about judicial resolution of constitutional challenges to abortion regulation.

While courts are not administrative agencies and should not try to be, some of the conditions that make negotiated rulemaking an appealing device for the promulgation of rules of general applicability pertain to judicial adjudication as well. As noted earlier, judges must address the need to depolarize issues, to avoid subsequent litigation, to obtain information, and to take account of the values of affected interests when they engage in law making as part of judicial review.

**B. The Participatory Adjudication Model**

What would it be like if courts adopted principles of administrative rulemaking—notice to affected persons, representation of their interests, participation in policy formulation, and consensus or authoritative

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240. Stewart, supra note 218, at 1756 (exploring the extent to which expanded notions of standing have developed in administrative adjudication to permit broad participation in policy making). See generally Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359 (1972); Hanes, supra note 220 (recognizing the tension between enhanced public participation and prompt public action); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193 (1982).
arbitration? Suppose, just suppose, that the trial court in *Roe v. Wade* had foreseen the full consequences of the case that began with Norma McCorvey and ended with attempts to amend the Constitution and the bombing of abortion clinics. Suppose the trial court had adopted procedures that permitted or even encouraged representatives of women with different interests in terminating their pregnancies to intervene in the litigation. Suppose the court had ordered the broad class of all single and married pregnant women to be divided into subclasses and their members notified of their representation in the litigation at least by publication. Suppose, in addition, the court had appointed and required the joint funding of a special master to establish joint fact-finding procedures and had invited knowledgeable amici curiae to participate. And suppose the court had appointed a special master or magistrate to act as a facilitator or mediator to encourage those who would be affected by the court’s disposition of the issues to find areas of agreement and to settle at least some of their differences, such as discussing ways to develop certain kinds of assistance that would make abortion less a necessity and more an alternative for many women.241

Such procedures would have had several objectives: first, to broaden participation in the litigation by recognizing more parties, including public entities, in the interest of fairness; second, to obtain reliable and relevant information about the subject of litigation, in the interest of reasonableness; third, to provide a means of settling related policy issues in a single proceeding, in the interest of efficiency; and fourth, to encourage the parties to engage in good faith efforts to settle their differences on the basis of shared values so that, to the greatest extent possible, the values embodied in a consent decree or the court’s judgment are those of the parties and not the judge, in the interest of legitimacy. To a court engaged in interpreting general constitutional provisions, these procedures would have several advantages over the conventional adversary process.

1. Broadening Participation in the Interest of Fairness

Given the reality that judicial review will continue to be an important function of the Court and that it necessarily entails basic policy determinations, the Court would be wise to emulate a deliberative, law-
making model for performing that function. In some respects, the
procedures recommended here can be seen as an effort to create a mini-
legislature within a court, a representational process for putting social
policy into law. Insofar as the proposed reforms would facilitate the
reflection in policy formulation of a variety of interests that exist in the
larger political body, they are such an effort. The process recommended
here would require courts to take affected interests into account by
including them in deliberations and listening to their positions before
formulating policy prescriptions. The approximation would be imperfect,
however, since practical limitations would restrict the number of interests
to be represented. In addition, unlike legislation, the social policy
embodied in a judicial decision need not accommodate all interests
represented, though courts should encourage the parties to do so by
agreement.

The procedural rules regarding standing, mootness, and intervention
have traditionally been used to define legally cognizable interests
narrowly and to exclude from participation many parties with actual, and
sometimes substantial, interests in the resolution of the conflict. These rules help to assure that courts will not render advisory opinions,
that courts will exercise their powers only to settle real cases and
controversies, and that parties before the courts will have an interest in
vigorously litigating their claims. However, a less restrictive application
of those rules would reflect the fact that questions involving the
application of new medical technology (such as abortion, genetic
screening, organ transplantation, new reproductive techniques, or life
sustaining treatments) are not bifurcated, but are complex situations
affecting a variety of relationships not easily reformulated by judicial
decisions. They may well reflect what Professor Lon Fuller has called the
“polycentric” nature of the disputes, such as those submitted for judicial
resolution in modern public law litigation. As Professor Eisenberg
observed, “many legal problems seem nonpolycentric only because the

242. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (finding that interests of
private plaintiff challenging affirmative action plan did not represent the views of all individuals affected
by the court’s judgment). For a discussion of similar observations with regard to litigation brought under
Title VII of the Civil Rights Act of 1964, see Maimon Schwarzchild, Public Law By Private Bargain:

243. According to Fuller, polycentric disputes involve problems presenting a number of related issues
(“interacting points of influence”), the resolution of any one of which depends on a resolution of the
others (requiring spontaneous and informal collaboration, shifting its forms with the task at hand). Fuller,
supra note 63, at 395. That quality was shared by many of the institutional reform problems presented
to courts in the 1970s and 1980s. See supra note 8.
common law solves them by treating as ‘irrelevant’ a number of circumstances and ramifications that might be considered perfectly relevant at other times or places.”

Representation of persons with many different interests in the litigation not only informs the court of their experience and perspectives but increases perceptions of the fairness of the proceeding and its result. Individuals excluded from such suits will not be directly bound by the court’s decree under the doctrine of res judicata, but the stare decisis effect of the judgment may have the same practical effect. Thus, providing them with an opportunity to make some input into the disposition of their interests comports with our notions of fair adjudication. The significant effect of broad prospective judgments of courts exercising judicial review on interests now excluded from participation would seem to justify, indeed require, the loosening of procedural restrictions on participation in such suits.

In addition to participation, the negotiated rulemaking model of public law adjudication will most often require that persons with affected interests participate through representatives. Representation of the interests of unorganized individuals in litigation is most often accomplished through class actions, and courts have considerable experience policing representation through the class action device. If interested individuals are members of a class in a class action lawsuit, they are subject to the final adjudication of their interests in judgments that will be applied as res judicata in subsequent litigation of those same interests. Very often, individual class members are not members of

245. See infra notes 262-67 and accompanying text.
246. Where there has been a consent decree, the doctrine of collateral estoppel does not preclude subsequent suits by persons not parties to the decree from challenging the decree entered into by the defendant in a prior action and involving the subject matter of the subsequent suit. Martin v. Wilks, 490 U.S. 755 (1989). This decision is contrary to prior rulings by some federal appellate courts that nonaggrieved employees in employment discrimination disputes who failed to intervene, or who were denied intervention, could not subsequently attack the decree in a separate action. See, e.g., Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); Dianna Rohleder Mans, Civil Procedure: Consent Decrees and the Doctrine of “Impermissible Collateral Attack” (Martin v. Wilkes, 109 S. Ct. 2180 (1989)), 29 WASHBURN L.J. 475, 476-77 (1990).
247. The Federal Rules of Civil Procedure permit the voluntary intervention of persons to be affected by the remedy in a suit brought by others. FED. R. CIV. P. 24; Berkman v. City of New York, 705 F.2d 584, 588 (2d Cir. 1983), cert. denied, 484 U.S. 848 (1987). The involuntary joinder of parties considered necessary to the provision of complete relief to existing parties is also permitted. FED. R. CIV. P. 19(a); Zipes v. Trans World Airlines, 455 U.S. 385, 400 (1982). Also, the court can invite interested persons and groups to participate as amici curiae. FED. R. APP. P. 29.
248. See, e.g., Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295, 1299 (9th Cir. 1981) (binding members of the class provided they were adequately represented); Fowler v. Birmingham News
an organized association or corporation, but are identifiable only by the similarity of their relationship with the defendant and the similarity of their interests with those of the named plaintiff. Usually these interests are not sufficiently great to justify the expenses of litigation as an individual. Because the individual named plaintiff and his or her attorneys are distinct from those on whose behalf the action is brought, there is the danger that class members will not be adequately represented. Ideologically motivated attorneys, many of whom work with organizations with predetermined litigation programs, may consciously or unconsciously subordinate the interests of class members or subgroups of class members to their political agendas. In addition, classes as defined by the named plaintiff may be underinclusive in failing to take into account all those who share common interests in the subject of the suit, or overinclusive in purporting to represent divergent interests or those who differ with the named plaintiffs and lead attorneys on the merits of the controversy, those who wish to assert different claims against the defendant, or those who seek different relief from that sought by the named plaintiff and others in the class.

Representation of class members’ interests should be sought through publication of notice to the class—an element of Rule 23 that is not always considered. If the idea of publishing notices in newspapers to inform women that their rights are being finally adjudicated in a class action lawsuit such as Roe seems inappropriate, it may be because we actually regard the class action as a fiction, merely a procedural device for obtaining a broad pronouncement of judicially formulated social

249. FED. R. Civ. P. 23(b)(2); PROPOSED RULES OF CIVIL PROCEDURE, 39 F.R.D. 69, 102 (1966) (advisory committee’s notes to Proposed Rule 23). Thus, class plaintiffs in suits challenging governmental action are defined in part by the jurisdictional authority of the defendant. According to this reasoning, since Roe sued only Wade, the Dallas District Attorney, and not the Texas State Attorney, the plaintiff class ought to have been limited to Dallas residents.


251. See generally Note, supra note 250, at 1416-38.

252. Special Project, supra note 250, at 883-87; Stewart, supra note 218, at 1765-66.

253. FED. R. Civ. P. 23(d)(3) requires notice to the class members in certain kinds of class actions, for example, those certified under subsection (b)(3). See discussion supra note 211. As noted above, no certification motion was submitted in Roe and no notice was given to the class. Nevertheless, the litigation was characterized as a class action by both the trial court and the Supreme Court. Roe v. Wade, 410 U.S. 113, 122 (1973); Roe v. Wade, 314 F. Supp. 1217, 1223 (1970).
policy. Commentators have recommended that, in class action lawsuits, courts should conduct an investigation early in the litigation to determine divergent interests within the asserted class, and where conflicts within the class seem likely, that members should be notified, not simply of the pendency of the suit, but of class preferences, and that seriously conflicted subclasses should be represented by separate attorneys. The court's authority to certify classes provides it with a mechanism for conditioning certification on modifications of the class definition, the creation of subclasses, and subsequent periodic notice on the progress of litigation to the class. In addition, the court may permit intervention as of right to disaffected class members.

Finally, the interests of subclasses most often conflict at the remedial stages of litigation. Where the injunctive relief sought is of a complex nature, as it proved to be under Justice Blackmun's trimester system, represented subgroups of the class should be given opportunities to articulate and assert their particular objectives and to negotiate their individualized interests in order to build a satisfactory overall settlement. Although the ability of the court to predict the interests of subgroups becomes more difficult as the remedy sought becomes more complex (and hence the court is less able to predict the need for subclass representation), the members of the class can exercise their Rule 23(c) right to exclude themselves from the judgment or seek other counsel. They may effectively do so, however, only if they are informed of how their interests are perceived and asserted by the named plaintiffs at the remedial stage. Without such notice, the silent consent of members to representation can hardly be said to be informed. Especially where class representatives propose consent decrees, class members and others who will be affected by the decree should be notified and invited to comment upon it.

254. Rhode, supra note 78, at 1197-99.
256. See, e.g., cases cited in Rhode, supra note 78, at 1187-89 nn.14-22; Special Project, supra note 250, at 889.
257. See, eg., cases cited in Rhode, supra note 78, at 1187-89 nn.14-22.
258. For a discussion of a district court judge's creativity in providing notice to a proposed class of tens of thousands of potential plaintiffs in mass tort litigation, see Ellen Tannenbaum, Note, The Pratt-Weinstein Approach to Mass Tort Litigation, 52 BROOKLYN L. REV. 455, 466-67 (1986).
259. Schwarzschild, supra note 242, at 929-34.
The use of such extended participation has been employed in some institutional reform litigation, sometimes called "public law litigation," in which class action suits are brought against large public or private institutions, such as hospitals, to obtain systemic reforms. In several such suits, trial courts have actively sought the participation of professional, patient, and family groups, at least at the remedial stage of litigation. Amici curiae and expert witnesses have presented testimony in court or have participated with the parties in formulating remedial decrees. These participants not only have informed the court of professional standards and concerns; they also have presented the views of a wide variety of other affected groups, such as service providers, relatives, and patient subgroups, before the court issued a judgment and order which directly affected them. Notions of fairness based on

260. Chayes, supra note 8, at 1284; Rudenstine, supra note 8; see, e.g., Hutto v. Finney, 437 U.S. 678 (1978) (creating a detailed remedial order directed at state prison system); Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) (requiring minimum constitutional standards for in-state facility for mentally retarded if the state chose to operate one); Milliken v. Bradley, 402 F. Supp. 1096 (6th Cir. 1975) (designing decree to implement desegregation in education); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (holding that civilly committed mental patients have a constitutional right to treatment, to be implemented by courts). With regard to remedial devices for affecting reform, see generally Special Project, supra note 250; Fiss, supra note 8; Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355 (1991) (arguing in favor of the legitimacy of a deliberative model of remedial decision making).


262. For example, Dixon, 405 F. Supp. 974, was a suit in the District of Columbia brought as a class action by patients at St. Elizabeth's Hospital to enforce a statutory right to treatment and compel the creation of community mental health treatment for persons who would otherwise require institutional care. After finding the federal and District of Columbia defendants obligated to create such treatment opportunities for the class, the district court required the government defendants to cooperate with the plaintiff class in proposing a remedial decree for the provision of needed community mental health services. Although the court did not appoint a special master or other representative of the court to mediate or coordinate such joint efforts, the attorney for the federal government fulfilled that function, and after two years of negotiations between public and private community providers, including but not limited to the parties, a several hundred page document was produced that required procedures for assessing patients, finding and developing needed community services for them, requiring individualized treatment plans and case management services, specifying the devotion of certain public funds to finance the provision of services, and requiring periodic reporting to the court on implementation of the decree. Parties to the suit and the community groups who participated in the remedial process became better acquainted with the difficulty others had experienced in giving them what they wanted; they exchanged information which none had had access to before the proceeding; and eventually they became invested in their work product and sought its successful implementation. All felt more fairly treated for having had the opportunity to participate in the development of a comprehensive court order that virtually determined the viability of their efforts to provide housing, jobs, services, and treatment to mentally ill patients.

For materials describing the remedial stage of the Dixon suit, see records of the Dixon Monitoring Committee, on file at the Mental Health Law Project, 1101 15th Street, N.W., Washington, D.C. 20005.
notice and an opportunity to be heard—that is, to participate—underlie our most fundamental concepts of due process. Although the process used to develop remedial decrees in institutional reform suits is complicated and time consuming, the process permits the resolution of literally hundreds of issues subsidiary to the initial liability determination in a single proceeding, thus reducing litigation and fact-finding costs for all.263

Moreover, broadened participation serves other fundamental values embodied in our notions of fairness.264 Permitting those with affected interests to articulate their concerns before a neutral decision maker demonstrates respect for their worth as individuals and concern for their situations.265 Furthermore, in the process of identifying those with affected interests, participatory procedures help allocate responsibility for the social problems before the court and require those included to take responsibility for their solution as well.266 Finally, the involvement of affected parties promotes their acceptance of the outcome and makes more likely their support of and commitment to the remedy ultimately ordered.267

My thesis is that this kind of participatory, deliberative process can be implemented at the liability stage as well as at the remedial stage of litigation. Such a participatory process was effectively used in the Karen Quinlan case in which the father of a twenty-two-year-old comatose woman petitioned the court to be appointed her guardian, with express power to terminate all extraordinary medical measures keeping her alive.268 Joined in the proceeding were a court-appointed guardian ad litem, the hospital in which Ms. Quinlan was a patient, her attending

263. See, e.g., Halderman, 612 F.2d 84; Wyatt, 503 F.2d 1305; New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (approving consent judgment fulfilling inmates' constitutional right to protection from harm and to a minimum quality of care); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (holding that plaintiff class of mentally retarded residents had an Eighth Amendment right to protection from harm which had been systematically violated).

264. Professor Summers argues that a process can be evaluated in accordance with its ability to obtain "good results" and its ability to further "process values" such as participation, rationality, and humaneness. Robert S. Summers, Evaluating and Improving Legal Processes—A Plea for "Process Values," 60 CORNELL L. REV. 1 (1974).


physicians, the county prosecutor, and the New Jersey attorney general. The court consulted expert medical witnesses and invited religious authorities to comment on the petitioner's character and to inform the court of the religious doctrine underlying the petitioner's motivations. The New Jersey Supreme Court correctly understood that:

The litigation has to do, in final analysis, with [Karen's] life,—its continuance or cessation,—and the responsibilities, rights, and duties, with regard to any fateful decision concerning it, of her family, her guardian, her doctors, the hospital, the State, through its law enforcement authorities, and finally the courts of justice.

All were represented. The court held that Ms. Quinlan had a right of privacy protected by the New Jersey and United States Constitutions to refuse medical treatment; treatment that held little or no promise for her improvement or recovery from her terminal condition. It also held that her right could be exercised by her guardian during her incompetence if certain procedures were followed. The New Jersey Supreme Court held that if after future medical examinations Ms. Quinlan's guardian, family, and physicians concluded that there was no reasonable possibility of her return to a cognitive and sapient state, they must consult with the hospital's ethics committee or some similar body. If that consultative body agreed with the prognosis, in accordance with medical practice and prevailing standards, life support systems could be withdrawn without any civil or criminal liability on the part of any participant.

The collective determination required by the court before Karen's guardian could terminate her life support can be considered the exercise of a constitutionally protected privacy right. While the court did not ask the parties to agree on a constitutional standard establishing the nature of that right, their participation in the determination of the merits of the controversy permitted the parties to inform and influence the constitutional parameters established by the court. The court in Quinlan may have sensed that there was a lack of community consensus on the underlying substantive principles for determining whether a life is worth

269. The physicians, hospital, and county prosecutor were joined as parties so as to restrain them from interfering with the powers of the guardian to authorize discontinuance of all extraordinary medical procedures for his comatose daughter. These parties then requested declaratory judgments regarding their responsibilities. The state attorney general intervened as a matter of right. The New Jersey Catholic Conference was admitted as amicus curiae and evidence of religious dogma permitting the withdrawal of extraordinary medical treatment from terminally ill patients was admitted as relevant to Mr. Quinlan's character and qualifications to be appointed guardian. Id. at 651-53.

270. Id. at 651.
271. Id. at 671-72.
continuing and the likely success of treatment. The court may have thus concluded that a choice of controlling principles and procedures should reflect the preferences of those affected—the hospital, treating health care professionals, and the family—as well as the court's. Further, the court created a permanent collective decision-making body to carry out the remedial aspects of its judgment and to continue the deliberative process. Thus the court fashioned an institutional mechanism, modeled on hospital ethics committees, which could include health care professionals, social workers, theologians, and attorneys to consult with family members and to implement its judgment that Karen's guardian could, with legal impunity, terminate life-sustaining treatment under certain circumstances.

Similarly creative procedures might well be added to the repertoire of courts entertaining constitutional challenges based upon the privacy doctrine to state control over the utilization of other medical technology, including abortion, so that liability determinations as well as remedial efforts will be more informed, respectful, and accepted. If rights are linked definitionally and logically to remedies, then the broad, social policy-filled law making engaged in by the Supreme Court in cases like Roe and Casey should flow, not from liability determinations set up by polarized adversaries, but from a broad representation of the social realities upon which sound policy must be based.

272. Quoting a law journal article written by a medical doctor, the court described a need for a "forum for more input and dialogue in individual situations [as a way] to allow the responsibility of these judgments to be shared. Many hospitals have established an Ethics Committee composed of physicians, social workers, attorneys, and theologians." Id. at 668 (quoting Dr. Karen Teel, The Physician's Dilemma: A Doctor's View: What the Law Should Be, 27 BAYLOR L. REV. 6, 8-9 (1975)). For a discussion of the development of interdisciplinary, hospital ethics committees to educate and advise physicians and families on difficult treatment decisions, see RONALD E. CRANFORD & A. EDWARD DOUDERA, INSTITUTIONAL ETHICS COMMITTEE AND HEALTH CARE DECISIONMAKING (1984); Joan Gibson & Thomasine Kushner, Will the "Conscience of an Institution" Become Society's Servant? HASTINGS CENTER REP., June 1986, at 9; Mark Siegler, Ethics Committees: Decisions by Bureaucracy, HASTINGS CENTER REP., June 1986, at 22; Robert M. Veatch, Hospital Ethics Committees: Is There A Role?, HASTINGS CENTER REP., June 1977, at 22. Ethics committees have been characterized as facilitators of consensus decisions, focusing on the process of decision making.


274. See, e.g., L.L. Fuller & William Perdue Jr., The Reliance Interest in Contract Damages: 1, 46 YALE L.J. 52 (1937) (stating that courts identify competing interests and apply normative principles to define rights and protect them with appropriate remedies); Holmes, supra note 119, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.").
2. Increasing Access to Information in the Interest of Reasonableness

Apart from recognition of participation rights for reasons of fairness, broadening participation would permit more parties with an interest in the problem at issue to contribute social policy information to the court and to relate their experiences to the court without having to mold them into abstract legal principles embodied in the plaintiff's or defendant's litigation position.\(^7\) Broadened participation would encourage all of the parties and the court to see the subject of the action from many perspectives, rather than remaining fixed only upon their own interests. Moreover, the constitutional violations at issue in *Roe* and similar suits do not suggest a single resolution. Broadened participation would allow courts to be better informed about what remedies may be appropriate and the cooperation of persons with such interests is often necessary if remedies ordered by the courts are to be effective.\(^7\)

It has been argued that because potential intervenors cannot accurately perceive their interest in a particular case until remedies are proposed, courts should hold hearings and permit comment on consent orders (though perhaps not intervention) at the remedial stage of litigation.\(^7\) Many might participate as amici curiae, asked by the court to supply only specified information.\(^7\) Others might be identified during litigation, be provided notice of a proposed decree, and be given an opportunity to comment upon it.\(^7\) In that way, groups with different perspectives could supply information on the same subject.

Obtaining such participation at the trial level has much advantage over the present practice of waiting until the case is before a court of appeals or the Supreme Court. Although one organization did request permission to make a submission to the trial court in *Roe* prior to a determination of liability, in all probability the opportunity to do so was not widely known among potentially interested groups. Particularly in a suit like *Roe*, regarded from its inception as a test case, courts should use their

\(^{275}\) For a discussion of efforts to reduce the courts' misunderstanding of relevant considerations through disclosure of the full range of class concerns, see Summers, *supra* note 264, at 21-25.

\(^{276}\) See, e.g., *Special Project, supra* note 250.

\(^{277}\) For a discussion of the desirability of intervention and collateral attack in the case of Title VII consent decrees under the Civil Rights Act of 1964, see Schwarzschild, *supra* note 242, at 919-29. See also discussion *supra* notes 266-69 and accompanying text.

\(^{278}\) See *Lincoln Caplan, The Tenth Justice: The Solicitor General and the Rule of Law* 196-99 (1987) (discussing the federal government's use of amicus curiae status to "raise general questions the parties do not always reckon with" and to "spur social change").

\(^{279}\) See *supra* note 269.
prerogatives to seek amici submissions to obtain information that they deem important to their decisions rather than passively await the submissions various organizations decide to provide. Furthermore, amici ought not to have to support any particular party to the case but should be able to submit their views as their own. Had the trial court in Roe done so, it might have had a rich factual record before it about the need for and consequences of prohibiting abortions in Texas, much like the records developed in later abortion litigation. As it was, the court was largely ignorant of the number of women in Texas of child-bearing age, the number of pregnancies terminated legally and illegally in the state, the health reasons for which abortions are sought, the health consequences of illegal abortions, the safety of legal abortions, the economic circumstances of the women seeking abortions, the ages and educational levels of the women seeking abortions, the availability of medical and child care assistance to pregnant women, the psychological consequences of having or not having an abortion in various circumstances, and so on. All of this information would have been relevant to a legislative judgment regarding the desirability of permitting or prohibiting abortions in various circumstances. If, in their exercise of judicial review, courts inevitably make judgments that reflect their assessment of that desirability, at least it should be an informed assessment.

In certain instances, courts have gone further than merely soliciting amici briefs in their pursuit of relevant and necessary information and have appointed special masters to assist litigants in developing the factual predicate for the case and to explore the possibilities for settlement.

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280. See supra notes 89-93 and accompanying text; see also Fed. R. Evid. 706 (authorizing federal courts to appoint expert witnesses).

281. See Hutchinson, supra note 16, at 555 ("Instead of chastising courts for their imperial presumption, commentators celebrate them as the preferred forum for democratic deliberation.") (citing Ronald Dworkin and Laurence H. Tribe).

282. See generally WAYNE D. BRAZIL ET AL., MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS (1983); Vincent Nathan, The Use of Masters in Institutional Reform Litigation, 10 U. Tol. L. Rev. 419 (1979). Delegation of fact finding functions to special masters (and other parajudicials, including administrative agencies) has not been viewed as violative of the due process right of litigants to have their cases and controversies determined by Article III judges, or otherwise prohibited by Article III, so long as the judge retains and exercises authority to deal with matters of law and the issue of whether the findings of the master are supported by the evidence. Crowell v. Benson, 285 U.S. 22 (1932).

Rule 53 of the Federal Rules of Civil Procedure, however, as applied in La Buy v. Howes Leather Co., 352 U.S. 249 (1957), precludes reference of a whole case to a master, such as the antitrust cases involved there, if such reference amounts to "little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." Id. at 256. Out of concern for maintaining respect for judgments and confidence in the outcome of litigation, the La Buy Court held that calendar congestion, complexity of issues, and an anticipated lengthy trial do
Special masters appointed to assist in the discovery stage of complex litigation involving a variety of commercial matters have been asked to participate in document searches, to be present at depositions, to review allegedly privileged documents, and to coordinate stipulations of facts and position papers. Other special masters have been authorized to supervise the whole discovery process, assist the court in fact finding during the trial stage, and assist parties in settlement negotiations. Special masters can break down formal barriers of communication, can spend more time learning about the case, are free of the institutional restraints on judges, and can establish informal procedures, all of which discourage adversarial posturing by attorneys and parties and facilitate candor and cooperation, which are necessary for settlement.

For example, in a case involving the petition of Indian tribes for allocation of fishing rights in treaty waters, the district court permitted groups representing some commercial and recreational fishermen to participate as "litigating amici." These amici were permitted to participate in discovery and at trial but were not allowed to veto any settlement. Further, the court appointed a special master selected jointly by the parties and the court to prepare the case for trial and to mediate efforts by the parties to develop their own allocation plan through bargaining.

not constitute "an exceptional condition" as required by Rule 53. Thus, the appointment of masters has been confined to cases in which they are appointed to assist judges in specific judicial duties, including ones in which specialized expertise is required by the technical nature of the issues or where supervision of relief already determined by a court is required. Comment, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779, 795-96 (1975); see also Linda Silberman, Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure, 137 U. Pa. L. Rev. 2131 (1989).


283. Ronald E. McKinstry, Use of Special Masters in Major Complex Cases, in Federal Discovery in Complex Civil Cases: Anti-Trust, Securities and Energy, 211, 225 (1980).

284. Brazil et al., supra note 282, at 12-25. However, special masters participating in the trial stages of litigation must comply with notions of fundamental due process and the Code of Judicial Conduct of the United States Judges, which explicitly states that most of its provisions apply to special masters and preclude ex parte communication. Model Code of Judicial Conduct, Application of the Code of Judicial Conduct § A.


and sharing information between the participants and developed a joint computer analysis that identified solutions satisfying the minimum interests of all parties. Joint fact-finding efforts, directed by the court and coordinated by a special master, are not only efficient in avoiding duplicative efforts and creating incentives for stipulations, but they also enable the court to obtain information the court deems necessary to its determination and thus promote the "reasoned" part of the "reasoned decision making" norm that supports judicial resolutions.

3. Encouraged Settlements in the Interest of Legitimacy

Perhaps most important, an expanded, participatory litigation process would create a forum, like that provided by negotiated rulemaking, in which represented parties could trade off their interests in different aspects of the controversy in order to gain concessions from other participants and to work toward a settlement to be embodied in a consent decree. Issues of participation and settlement need to be kept separate. Involvement of affected groups in the litigation process can be expanded in the interests of fairness and increased information sharing without necessarily permitting affected interests to authoritatively settle their own differences. As discussed more fully below, much of Professor Fiss's often cited critique, Against Settlement, is leveled at the difficulties of representation and resource inequality in complex litigation,

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289. See Sturm, supra note 260, at 1373-76.
290. BRAINT ET AL., supra note 282, at 27. Others have argued that the appointment of special masters at the trial stage of litigation results in unnecessary costs, delays, and an abdication of judicial responsibility. Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809, 815 (7th Cir. 1942); Charles E. Clark, Difficulties Encountered in a System of Masters, 23 F.R.D. 569 (1958).
292. See, e.g., United States v. ITT Continental Baking, 420 U.S. 223 (1975): Consent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency. Because of this dual character, consent decrees are treated as contracts for some purposes but not for others. Id. at 236-37 n.10 (citations omitted).
rather than the legitimacy of settlement. This Article has already noted the lack of legitimacy that haunts constitutional decisions based on judicially selected values, such as decisions made under the Due Process Clause and characterized as substantive due process. If the Constitution does not clearly direct us to a choice of values, then we should use constitutionally derived principles of fairness in process writ small—notice and an opportunity for persons affected to be heard by a disinterested, responsive, and reasonable decision maker—to arrive at these values. Courts should establish procedures first, for the expression of value choices by those who are to be governed by the legal disposition of their interests, and second, for the declaration of law in accordance with those choices to the extent that they can be agreed upon. Such a declaration of law could provide legitimacy in those situations in which the judge’s function is no longer to apply law to particular facts about individual parties, but to make law of general applicability on the basis of judgments about social policy. As discussed above, the consequences of stare decisis, collateral estoppel, and the precedential value of judgments militate in favor of predicing settlements on the broad representation of affected interests.

The legitimacy of settlements rests upon contract principles of individual autonomy, private ordering, bargained-for exchange, and judicial supervision of contract formation in the interest of fairness. The judicial role is thus not to supervise the substance of the bargain struck by the parties in settlement, but to supervise the process of their bargaining and to dismiss the suit at the parties’ behest. However, exceptions to this model of judicial supervision have been made in certain kinds of suits. Thus, courts will decide if the substance of a settlement is fair in cases such as guardians settling suits on behalf of minors, divorce, class actions, antitrust, criminal, and shareholder derivative suits. In these situations, courts review the substantive fairness, adequacy, and reasonableness of the settlement because the situations involve either parties with unequal bargaining power or issues affecting the public interest.

Professor Fiss argues that courts should not permit settlements in public law litigation because the process of contract formation is inherently unfair. Thus, Fiss complains that class action suits should not be settled because parties may not represent the groups they purport to represent nor have equal resources for gathering information, holding out
for better terms, or paying for litigation expenses. Yet, these flaws in representation and inequalities affect litigation performance and judgments as much, or more, than settlements. Nevertheless, Professor Fiss argues that courts can play a greater role in equalizing the parties' positions when they render judgments than they can when presented with a settlement. That is true only if conventional hands-off procedures are used by judges during settlement negotiations, not if courts become involved in supervising the joint fact-finding activities and facilitating the bargaining process either directly or through the appointment of a special master, as is advocated here.

The fundamental difference that Professor Fiss finds between judgment and settlement is the difference between a bargain model and a justice model—the former takes inequality as an integral and legitimate component of the dispute settlement process while the latter struggles against it. The bargain model has as its objective the attainment of private ends and peace. The justice model has as its objective the attainment of public values embodied in authoritative texts and concepts of justice. At the extreme, the difference is a conflict between autonomy reflected in contract law and private law making and justice reflected in public or community law making. For Fiss, even though settlement may be freely consented to by parties who believe the results benefit them more than would the outcome of litigation, the settlement may not embody justice.

This analysis is premised on the notion that we can know “justice” and can hold settlements up to that standard to determine whether justice is served. Litigation, however, is initiated by parties to determine what is just in their particular case. If they agree in their settlement on what is justice for them, does not the settlement reflecting that agreement constitute justice for them? It would seem to do so in a positive sense in that those with authority to arrange their affairs through contract have determined the rule of law for their own case. But Fiss would seem to argue that settlement is not law in the transcendent sense—it does not comport with principles of justice that should be embodied in the law. Thus, the parties should be deprived of the legal authority that they would otherwise have to determine their relationships through judicially

295. Id.
296. Id. at 1077; cf. Judith Resnick, Managerial Judges, 96 HARV. L. REV. 374 (1982) (discussing the evolving nature of the judicial role, from disinterested deliberator to active manager, and its legal consequences).
297. See infra note 331 and accompanying text.
298. Fiss, supra note 293, at 1085-86.
299. Id. at 1089.
enforceable contracts. The law-making authority of private parties to create legally binding obligations through contracts is, of course, circumscribed by public policy limitations. The question is where those boundaries should be drawn.\textsuperscript{300} In litigation asserting constitutional claims, the courts should grant the parties considerable latitude to create law through settlement while still retaining judicial authority to set outside constitutional boundaries.

\section*{4. The Possibility of Compromise}

More fundamentally, commentators such as Judge Harry Edwards would argue that abortion is an issue that implicates such fundamentally different values that people cannot negotiate with regard to them. Thus, the hope of legitimacy through compromise and settlement is illusory. Judge Edwards observes:

\begin{quote}
It is a fact of political life that many disputes reflect sharply contrasting views about fundamental public values that can never be eliminated by techniques that encourage disputants to "understand" each other . . . One essential function of law is to reflect the public resolution of such irreconcilable differences; lawmakers are forced to choose among these differing visions of the public good. A potential danger of ADR [alternative dispute resolution] is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers and may as a result ignore public values reflected in rules of law.\textsuperscript{301}
\end{quote}

The problem posed by judicial review, however, is that the court must assess the choice of fundamental public values made by lawmakers. My proposal is that the court's evaluation should reflect the values of the litigants to the extent that there is agreement among them. Consent decrees approved by the court in such cases would bind only the parties and would provide a nonbinding precedent that might be followed by others.

However, Judge Edwards's point has force. People may be in favor of or be against legal abortion under certain circumstances for various reasons. Some people oppose abortion because of a religious view that the fetus has a soul created by God, and that only God is entitled to control

\textsuperscript{300} See Marc Galanter, \textit{The Day After The Litigation Explosion}, 46 MD. L. REV. 3, 32-37 (1986).

its fate.\textsuperscript{302} Other people recognize a fetus not as an entity having a soul, but as a human being, or as an entity with the potential to become a human being. To the extent that arguments in favor or against abortion are grounded in the existing or potential humanity of the fetus, they are not relevant to the fundamental values of people who regard the fetus as an element of divinity—a soul. For these religious people, the discussion is about apples and oranges, and there is no common ground for compromise. However, for the rest, and probably the majority of us, there is a shared value—maximizing the element of humanity. We share a common goal of making the lives of people—men, women, and children—as meaningful and moral as possible. We are talking only of apples and how best to maximize them—qualitatively and quantitatively.

Even so, if litigation challenging the constitutionality of state abortion legislation were to be enlarged to permit the representation of persons other than women seeking abortions and the state, is it realistic to expect that any kind of compromise could be struck with regard to their positions? It is realistic if we conceive of their interests as multiple and particular. For example, suppose Norma McCorvey's interest was seen not simply as an interest in obtaining a legal abortion, but as a variety of interests: an interest in obtaining information about abortion, including information about the feasibility of travel to procure an abortion where it was legal; an interest in the means to purchase a psychiatric examination to determine whether her distress at being pregnant rendered her suicidal so that she came within the exception of the Texas statute for abortions to preserve the life of the mother; an interest in obtaining medical benefits for prenatal care or child birth if she chose to go to term; an interest in adoption alternatives; an interest in child care if she chose to keep the baby; an interest in child support, job training, welfare payments; and so on. Her request for relief might have reflected these interests, and she might have sought not simply an injunction against enforcement of the anti-abortion statute, but a mandatory injunction requiring the state to perform any statutory duties it might have had to further these other aspects of her interest. Suppose the state were represented, not just by its

attorney general, but by the director of its human services department. Suppose the state's interests were viewed as broader than its interest in strict enforcement of the Texas statute against physicians and others who procure abortions, to include its interest in providing needed job training, medical and subsistence assistance, counseling, contraceptives, and child care benefits to women like Norma McCorvey. Suppose the following groups were also represented: private and public prenatal clinics, the Medical Society, the local hospital association, private adoption agencies, child welfare agencies, welfare rights organizations, and organizations of fathers asserting an interest in providing for and raising their children. Suppose these interests were broadly viewed to include not just an interest in supporting or opposing the abstract right to abort, but interests in providing services and benefits to mothers and children who want and need them.

These parties might have sat down together and admitted that the situation was a mess—a status quo that none of them had an interest in preserving. And they might have argued over the facts they thought important—how many women were in Ms. McCorvey's situation, what alternatives were available to improve it, and so forth—and agreed to secure those facts together. Someone might have made a list of existing programs and a list of programs that all parties would agree should exist, such as educational, contraception, and counseling programs. They might have agreed to the principle that decisions to continue pregnancies should be informed; that women seeking legal abortions should have access to psychiatric examinations; that regulations further defining the exception in the Texas statute should be issued; that women determined by their physicians to be pregnant be given information about prenatal care as well as abortion, adoption, and foster care alternatives to raising their children; that contraceptive information, devices, and assistance be made more readily available, particularly the means to purchase them. Perhaps the state would have decided it was more expedient to provide better contraception, counseling, information, maintenance, medical care, and a liberal construction of the statute's exception, than to risk having its abortion law struck down in its entirety.

Perhaps the other participating parties might have agreed to provide certain information and services needed and wanted by the plaintiff and others similarly situated. If agreement were reached on even some of these matters, they might have been embodied in an agreement between the parties and submitted to the court for its approval. The price of the state's agreement would have been withdrawing the complaint, but Norma McCorvey might have decided that the benefits obtained from the state
and the private litigants made it worthwhile to forego a declaration that she had an abstract right to abortion on demand and the risk of a determination that she had no such right. Other interested women in different situations who were not parties to the suit or who were not represented by a class representative would still have been free to raise new challenges, present new information, and seek new remedies, including a judicial determination that the statute as construed and enforced under the circumstances created by the consent decree was unconstitutional. Such a scenario is not unimaginable.\(^{303}\)

\(^{303}\) A similar scenario is imaginable in the Pennsylvania suit, where individuals and organizations with interests in informed consent and counseling, minors seeking abortions, and notification of husbands, might have been invited to participate along with the impressive array of expert witnesses who provided valuable information to the district court. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1334-68 (E.D. Pa. 1990), \textit{aff'd in part and rev'd in part}, 947 F.2d 682 (3d Cir. 1991), \textit{aff'd in part and rev'd in part}, 112 S. Ct. 2791 (1992). Instead of only physicians and clinics, private parties might have included individual minors and associations representing their interests, organizations providing counseling to battered women, welfare rights organizations, religious groups, allied health professionals, and others. They might have been able to agree, for example, on when the twenty-four-hour waiting period might be waived or when the information required for informed consent could be imparted so that the waiting period did not impose a hardship on women who had to travel to abortion clinics.

Such an effort to depolarize and settle litigation seems to have been successful in United States v. Michigan, the fishing rights case discussed earlier. See discussion supra notes 287-92 and accompanying text. For a full discussion of the case, see McGovern, supra note 287, at 456-68. In that case, brought against the State of Michigan by Indian tribes seeking to enforce a treaty granting them fishing rights in Lake Michigan, the initial litigation set up a zero-sum game in which the parties were competing for a limited resource—one party could gain only at the expense of the other parties. The Indians’ reduced catches had resulted in a lower standard of living, anger, and rioting, and they believed fundamental political as well as economic values were at stake. The treaty provided little guidance on the allocation issues (prior judicial interpretation had assured the Indians a “reasonable living standard”), and the issue affected all Michigan citizens because of its impact on commercial fishing, sport fishing, and tourism.

However, rather than being treated as a bifurcated issue, the allocation problem was viewed by the court as polycentric; that is, the solution to any particular aspect of the problem was seen as dependent on the solution reached on other aspects. See generally Fuller, supra note 63. The court therefore encouraged the five parties (three Indian tribes and the United States as plaintiffs and the State of Michigan as defendant) and “litigating amici” (individually named commercial and sports fishermen and fishing associations) to engage in “integrative bargaining” over an expanded array of issues about which the parties had different value preferences. The parties bargained over the determination of such issues as the kinds and quantity of fish to be taken, the fishing gear to be used, the place and time of catches, the replenishment of fishing beds, and so on. The court asked the parties to propose management plans and appointed a special master to facilitate their settlement efforts throughout the joint generation and sharing of information, the development of computerized decision models, and mediation.

Although one of the three tribes rejected the negotiated settlement, the court ordered the agreement after a trial on the merits. No party appealed the court’s action and no violence occurred. The process itself was regarded by the parties and the masters as a valuable educational process and a means of respecting the dignity and autonomy of the participants. McGovern, supra note 287, at 468. While the utilization of abortion technology does not present a competition for scarce resources, it does present polycentric problems in which many persons have separate interests reflecting different value preferences to be traded off in integrated bargaining over a solution that maximizes as many of those interests as
Yet, even after such agreement, dispute might well remain over whether the Constitution permits states to prohibit abortion under any circumstances. There are those who maintain that, at the core, compromise between pro-life and pro-choice advocates is impossible because pro-life arguments are fundamentally deontological (an ethic of duty that defines moral behavior as compliance with intrinsically moral rules that apply universally without regard to their consequences in any given situation) while pro-choice arguments are fundamentally teleological (an ethic of aspiration directed at the attainment of certain goals which recognizes gradations of right and wrong depending on circumstances). The former fosters concepts of moral absolutism while the latter accepts the concept of moral relativism and situational ethics. Pro-life advocates assert the rule “thou shalt not kill innocent life” as an intuitively perceived, absolute, and universal moral rule that prohibits abortion even where all would agree that other peoples’ welfare is enhanced by the deed. On the other hand, pro-choice advocates would not admit any such absolute rules, but rather assert that the rightness or wrongness of any particular abortion must be judged by its furtherance of other goals, such as the welfare of existing persons.

While this analysis is helpful to understanding the seemingly intractable abortion debate, like the abstraction of legal rights in Roe, this antithetical characterization of the positions of pro-life and pro-choice advocates is overdrawn. There are few pro-life advocates who do not admit an exception in the rare but instructive situation in which it is certain that the mother will die without an abortion. And there are few pro-choice advocates who would not claim that violent rape, for example, is universally immoral. Neither position, then, is completely unqualified.

possible and respects the integrity of all parties’ moral positions.

304. Randall A. Lake, The Metaethical Framework of Anti-Abortion Rhetoric, 11 SIGNS 478, 480-81 (1986); see Carter, supra note 176 (concluding that in the absence of political consensus, litigation and protest are all we can expect in the abortion controversy).

305. Professor Ruth Colker builds on the aspirational nature of theology to suggest that theology in combination with feminist theory explaining obstacles to the realization of aspirational goals can be used to interpret the Due Process Clause and the Equal Protection Clause in such a way as to permit a compromise of pro-life and pro-choice positions. Colker, supra note 302, at 1041-74.

306. Even the Catholic Church, which regards the fetus as having a soul, takes the position that in such situations, although every effort should be made to save the lives of both, the death of the fetus is not sinful if not intended as the objective of the actions taken. See Pius XII, Allocation to the Association of Large Families, ACTA APOSTOLICAE SEDIS 855 (1951) (“Never and in no case has the Church taught that the life of the child must be preferred to that of the mother . . . .”); SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD 51 (1965); Paul VI (Congregation for the Doctrine of the Faith), Declaration on Procured Abortion III, at 12 (Dec. 5, 1964); HARDON, supra note 302, at 334-42.
More fundamentally, both positions depend for their validity on the existence of alternatives: alternatives to compelled childbirth and alternatives to abortion. For the pro-life advocate, the law is an instrument of the state, whose purpose it is to promote a good and just society.\(^ {307} \) Yet, there can be no morality or virtue in a woman adhering to the “thou shalt not kill” rule if compliance is compelled, for virtue requires freedom to choose the good and the bad.\(^ {308} \) Furthermore, to the extent that the objective of the pro-life position is not the promotion of virtue, but the protection of fetuses believed to be persons, the morality of the position depends on a choice between principles other than “thou shalt not kill,” as discussed shortly. Thus, justified as a rule to protect human lives, the pro-life position becomes more like the position of Civil War abolitionists who condemned the enslavement of human beings they believed to be persons. But the liberation and protection of slaves did not require the enslavement of others. In contrast, the absolute prohibition against abortion would require the sacrifice of another human life when a

307. The premise that the purpose of government is the promotion of a virtuous citizenry, the fostering of good relations between citizens, or the establishment of justice, is not new. Aristotle, for instance, found the aim of all legislation to be the training of citizens in “habits of right action.” ARISTOTLE, NICHOMACHEAN ETHICS Book 10, ch. 9, § 14.2 (Terence Irwin trans., 1985), quoted in 1 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 352 (1946). In fact, it was the prevailing political premise prior to the seventeenth century. WALTER BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 228-31 (1957). John Locke, Thomas Hobbes, and Jean Jacques Rousseau posited a different premise, that the purpose of government was to assure the greatest amount of personal liberty consistent with peace and order. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 3-10 (J.W. Gough ed., 1946) (1698); THOMAS HOBBES, LEVIATHAN 2-21 (Michael Oakeshott ed., 1946) (1651); JEAN J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES, 10, 18 (Everyman’s Library ed. 1913). See generally 5 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 44-46, 128 (1960); 6 id. at 91.

308. John Milton’s Areopagitica is sometimes cited in support of the notion that there can be no moral virtue without liberty. Thus, Milton is quoted as stating:

As therefore the state of man now is; what wisdome can there be to choose, what continence to forebear without the knowledge of evil? . . .

I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed that never sallies out and sees her adversary . . . .

JOHN MILTON, Areopagitica, in COMPLETE ENGLISH POEMS 574, 590 (Gordon Campbell ed., 4th ed., J.M. Dent & Sons 1990) (1874). However, some scholars argue that Milton never contended that liberty, though necessary to virtue, was the object of government. Rather, he may have intended liberty only for people educated, through constraint, to know the good. BERNS, supra note 307, at 237. More modern, libertarian views conceive of law and the United States Constitution as systems for maintaining personal liberty, individual rights, and the processes for peaceful change, devoid of substantive moral principles. See generally ELY, supra note 159. The classical political premise is not without its spokesmen in modern politics, however. See Justice Official Sees Weakening of Moral Fiber, N.Y. TIMES, Oct. 8, 1992, at A20. Attorney General William P. Barr, speaking to the Catholic League for Religious and Civil Rights argued recently that “The founders believed that popular government and its laws necessarily rested upon an underlying moral order that was antecedent to both the state and to man-made laws.” Id.
mother’s life is endangered by her pregnancy. Yet, neither the Constitution nor religious authorities prohibit the state from exacting innocent life itself in order to save or improve other life, as the constitutionality of military draft laws and the Catholic position on abortion would indicate.309 Thus, even as a moral imperative justified as necessary, not to the virtue of the actor or society, but to the preservation of other lives as a good in itself, the moral validity of the “thou shalt not kill” rule depends on the resolution of such a choice in accordance with some other moral principle. That is, when a zero-sum game is presented—when there are two lives, neither one of which can exist if the other exists—the principle “thou shalt not kill” is not decisive, for one or the other must be killed. The choice between the two provides the freedom of choice necessary to its morality or the virtuous resolution of the question in accordance with a separate, perhaps higher order principle.310 And thus, alternatives are again essential to the morality of the resulting decision.

Similarly, for the pro-choice advocate, there can be no exercise of a right to autonomous decision making, whether protected by the Constitution or not, if no options are present. Just as there can be no autonomous choice in favor of childbirth when abortion is proscribed, neither can there be autonomous choice in favor of abortion if there are no viable alternatives to it, such as subsidized child care or adoption. Autonomy is the freedom to choose between alternatives. Therefore, in order for there to be action which is moral or autonomous, there must be alternatives.

On this basis, pro-life and pro-choice opponents may be able to come to some accommodations, such as supporting measures that make both abortion and childbirth more a choice and less a necessity, in the name of maximizing autonomy and virtue. Paradoxically, we may find that true autonomy is the freedom to make a choice to compromise autonomy in certain situations in order to further other values. If so, pro-choice advocates might consent to limiting their future right to choose abortion in order to further other values, such as preservation of a fetus whose father is ready, willing, and able to assume full and exclusive

309. See, e.g., United States v. Griglio, 467 F.2d 572 (1st Cir. 1972); United States v. Spencer, 473 F.2d 1009 (9th Cir. 1973); Smith v. United States, 424 F.2d 267 (9th Cir. 1970).

310. For example, in the classic case where a mother in childbirth will die unless the fetus is destroyed, the choice between the two lives could be made in accordance with a rule that prefers young lives over older lives or one which prefers lives in which society has made investments of education and training over lives in which it has not.
responsibility for its support and care. And, we may find that true virtue lies in permitting others to freely choose the good under most circumstances. If so, pro-life advocates might agree to support legal abortion in more situations, such as when pregnancies present serious health problems other than death or will result in serious social problems that destroy the meaning, if not the existence, of other lives.311.

C. The Participatory Model and Legitimacy in Process Writ Small

1. Principles Embodied in the Constitution

One can make the argument that the participatory procedures advanced here are necessary to provide due process to persons affected by a court’s judgment.312 That is, the Constitution itself can be read to embody principles of representation and participation that inform the interpretation of due process requirements governing process writ small as well as large. Thus, when interests in life, liberty, and property are adjudicated, the procedural process which one is due must provide for the representation and participation of those with affected interests, whether before a civil court or an administrative agency.313 As discussed above, Professor Ely

311. See, for example, the German and French abortion laws discussed in GLENDON, supra note 12, at 27.
312. Leubsdorf, supra note 188, at 614-15 (arguing that litigation should be brought to establish constitutional requirements for civil procedure in state as well as federal courts).
313. These two procedural values, Ely argues, should provide the basis for judicial review of legislation challenged as unconstitutional. John H. Ely, Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures, 77 VA. L. REV. 833, 834 n.4 (1991). Thus, Supreme Court decisions that protect freedom of political advocacy and association under the First Amendment are based in, and defensible as necessary to promote, democratic participation in government. Professor Ely also finds participation and representation values in other clauses of the Constitution, including the dormant power aspect of the Commerce Clause, which protects unrepresented out-of-state interests, the Bill of Rights’ assurance of a forum in which the socially marginal are represented, and the Privileges and Immunities Clause. Id. Similarly, the doctrine of strict scrutiny developed under the Equal Protection Clause can be seen as necessary to assure that racial and other minorities are not unduly burdened by legislatures in which they are not represented. Id. Aside from certain substantive constraints contained largely in the Bill of Rights, Ely argues that courts are not given license by the Constitution “to create or ‘discover’ further rights” not necessary to effectuate representation and participation in democracy. Id.

The Supreme Court’s due process analysis provided in Mathews v. Eldridge, 424 U.S. 319 (1976), would seem to confirm that observation as it applies to procedural rights. Under Mathews, the Due Process Clause does not constitute a statement or prioritization of values other than accuracy; rather it provides a utilitarian calculus for weighing the costs and benefits of procedures. Jerry L. Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. CHI. L. REV. 28 (1976). If, as Ely postulates, the
has argued that the text of the Constitution and the framers' intentions as revealed in the Federalist Papers instruct us that the principles of representation and participation essential to democratic government must inform judicial interpretation of the document.\textsuperscript{314} Ely argues that judicial review undertaken to enforce these overarching principles of representation and participation is also defensible in terms of institutional competence, because courts are better able to police matters of procedure than matters of substance, such as the discovery of fundamental rights.\textsuperscript{313} Ely's deference to judicial aptitude for process is even more appropriately invoked when the policing to be done is of the adjudicatory process rather than the legislative process.

Although Ely and his critics do not develop the idea, perhaps the principles animating the Constitution's provisions regarding procedural fairness and the Supreme Court's decisions interpreting them are also principles of participation and representation.\textsuperscript{316} For example, inherent in the framing of the Fifth and Fourteenth Amendments and, indeed, deeply ingrained in Anglo-American jurisprudence, is the concept that the procedures most likely to reduce the risk of adjudicatory error (the erroneous application of law to facts) are notice to persons with interests affected by the proceeding and an opportunity to be heard.\textsuperscript{317} The threshold issue in due process adjudication is a determination of which interests affected by the proceeding are constitutionally cognizable.\textsuperscript{318}

\begin{itemize}
\item \textsuperscript{314} Ely, \textit{supra} note 313, at 840 n.15.
\item \textsuperscript{315} Id. at 834 n.4; Ely, \textit{supra} note 159, at 102.
\item \textsuperscript{316} Cf. Leubsdorf, \textit{supra} note 312, at 597-98.
\item \textsuperscript{318} The Constitution does not require that due process be provided whenever personal interests are affected by government action. O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980). Rather, it requires due process only in cases where certain property or liberty interests found by the Supreme Court to be constitutionally protected are involved. Board of Regents v. Roth, 408 U.S. 564 (1972). \textit{See generally} William Van Alstyne, \textit{Cracks in the “New Property”: Adjudicative Due Process in the Administrative State}, 62 \textit{CORNELL L. REV.} 445 (1977); Peter N. Simon, \textit{Liberty and Property in the
Case law construing the Due Process Clause holds that an interest must be defined by positive law—state or federal constitutional provisions, statutes, or common law—in order to be protected by due process. ³¹⁹ Many of the interests at stake in cases like Roe, such as the interests of spouses, health professionals, parents, and others, may not be so defined. Broadening the concept of constitutionally cognizable interests to permit the participation of persons whose interests are affected by the utilization of the particular medical technology in question would increase the number and the procedural complexity of such suits, but need not expand the substantive rights ultimately defined. ³²⁰ The process to which interested persons would be entitled is notice and a hearing. Notice permits the representation of affected interests in the proceeding. ³²¹ An opportunity to be heard also assures at least some participation in the fact-finding and deliberative aspects of adjudication. ³²² To the extent that the text of the Constitution and the Supreme Court’s declarations of its requirements support a claim that the participatory and deliberative procedures recommended here are legitimate, that claim is a positive one grounded in the Court’s institutional authority to interpret the Constitution.

Surely, it cannot be said that the principles of representation and participation advocated here were respected in Roe, where the substantial interests of millions of women, millions of their male partners, millions of relatives, doctors, childless persons, and unborns were adjudicated in


³²⁰ Cynthia R. Farina, Conceiving Due Process, 3 YALE J.L. & FEMINISM 189 (1991) (urging reformation of procedural due process in the government benefits context based on feminist theory in order to pursue the connection between people and government rather than their separation; seeking to improve solutions within the context of particularized programs rather than abstractions; creating a culture of government care rather than government intrusion). With regard to interests constitutionally protected by due process in such a framework, Professor Farina notes: “Our thinking about what interests ‘trigger’ due process would not be caught in the positivist trap, for we would neither fear the perils nor yearn for the solutions that made the trap so fatally seductive for liberal legalism.” Id. at 270.


³²² Considerable litigation has been generated around the question of when such an opportunity to be heard must be afforded. See, e.g., Barry v. Barchi, 443 U.S. 55 (1979); Mackey v. Montrym, 443 U.S. 1 (1979); Mathews v. Eldridge, 424 U.S. 319 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974). There has also been considerable litigation concerning the attributes of such a hearing. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). The requirement that the decision be rendered by a neutral decision maker can be regarded as necessary to the effectuation of the other two values. See Gibson v. Berryhill, 411 U.S. 564, 579 (1973); In re Murchison, 349 U.S. 133, 136 (1955).
a Texas courtroom in which only four parties (one of which was dismissed) and one amicus curiae participated; where no discovery had taken place except a single deposition of the unnamed plaintiff; where no witnesses or evidence were presented;\textsuperscript{323} and where three lawyers spoke for the multitudes for about thirty minutes each.

2. Claims to Legitimacy

Even if the Constitution does not require broadening representation and participation in proceedings such as \textit{Roe} and \textit{Casey} in the positivistic sense, process reforms may be necessary to establish the legitimacy of the resulting judicial action in the transcendent sense.\textsuperscript{324} One cannot argue that the trimester regulations announced by Justice Blackmun are illegitimate in the positivistic sense. The Justices were all duly appointed and sworn, the case was within the Court’s subject matter jurisdiction, and the Court had personal jurisdiction over the parties. It has been argued, though, that the \textit{Roe} decision was illegitimate because it failed to embody transcendent moral principles as a substantive matter. My critique of \textit{Roe}, however, is about the legitimacy of the \textit{process} by which the Court fashioned law in the case, rather than the substance of that law. Such a view of legitimacy avoids the conundrums of foundational theories of judicial review, for under the process theory posited in this Article, the legitimacy of judicial declarations of constitutional restraints lies not in the correctness of the imposition of judicial value judgments in the name of fundamental rights and substantive due process, but in the Court ordering a settlement of such disputes in accordance with, or at least with an understanding of, the values of those whose interests are affected and who have been represented in and participated in the suit. As explored in Part III, consensus settlements (negotiated and entered into with court encouragement and facilitation and with approval by representatives of affected interests and the state) privilege the substantive values of


\textsuperscript{324}As discussed above, I regard as legitimate those judicial rules formulated and declared in compliance with normative principles of adjudicatory fairness (namely that the representation and participation of affected interests are fundamental in our Constitution and political heritage), but which transcend formal criteria for authoritative rulemaking in the positive sense.
participants over those of the judicial decision maker. Where settlement cannot be reached, judicial declarations of law are at least informed by the values and policy preferences of those who will be affected and of those who were allowed to participate.

Professor Ely argues that the "broad participation in the process" required by the Constitution legitimizes legislative value selections at the general law-making level. Ely also suggests that the "decisional values" the Court should pursue in its own process are "participational" values because they are values with which the Constitution is largely concerned, they are consistent with and supportive of democratic government, and they are values which courts are institutionally well suited to impose. This Article has argued that such legitimacy can be provided by participation in law making on a particular or adjudicatory level. However, this does not mean that the Constitution necessarily requires such a participatory process whenever the Court is required to exercise judicial review over legislation affecting individual interests. It does mean that the legitimacy which compliance with express constitutional requirements might otherwise provide may be based on compliance with constitutionally derived process norms in the course of adjudication.

Proponents of the traditional adversary model of adjudication, such as Professor Fuller, have grounded that model's legitimacy in norms of participation, reasoned judgment, and neutral decision makers; they have decried departures from the adversarial model as illegitimate. However, as the task required of the court in constitutional adjudication differs from the traditional, private dispute model, so these same norms require procedures different from those of the adversarial model to effectuate them. Participation and reasoned judgment are certainly enhanced by the process advocated here. To the extent that resolution of litigation is accomplished through settlement, the ideal of a neutral decision maker is effectuated only as the ideal provides a background premise for resolution when settlement fails. Professor Fiss recognized the shift in adjudicatory tasks where courts were asked to give meaning to constitutional values in remedial litigation and found Fuller's private dispute model inadequate for the task posed by institutional reform litigation. However, Fiss missed the implications of that shift for the

325. Ely, supra note 159, at 76-77.
326. Id. at 240 n.75.
328. Fiss, supra note 8, at 5.
liability-determining process.\textsuperscript{329} I argue that we should acknowledge the implications of the public law model in constitutional judicial review at the liability and remedial stages and adopt procedures that permit courts to perform competently and legitimately at each stage.\textsuperscript{330}

In addition to implementing legitimating process norms, the participatory model advocated here casts the court in the role of mediator, facilitator, and referee of the rules of the game, not in the role of sovereign awarding victory on the merits to one side or the other. This supervisory role is one to which the courts are institutionally better suited. It is true that difficult issues will arise concerning what interests are affected, who can represent them, what is consensus, and whether representatives have sufficient resources to participate effectively in the litigation. However, these are matters that courts have traditionally policed through class representation procedures, the approval of consent decrees, and the doctrines of standing, intervention, and mootness.\textsuperscript{331} Judges seem to be more capable of determining whether a group claiming to represent poor, single, pregnant women has such a constituency among its membership or has other means of knowing and conveying their common concerns, than determining abstract interests in abortion and weighing those interests against interests of the state as required by \textit{Roe} and \textit{Casey}.

A full exploration of the philosophical basis of a legitimacy claim based on participation in judicial law making is beyond the bounds of this Article. Nevertheless, it is interesting to note its affinity to libertarian political tradition. Traditional libertarian political theory holds that individuals are the original repositories of natural rights.\textsuperscript{332} The contractual, libertarian theory of democratic government holds that government may legitimately interfere in private lives because abstract, hypothetical individuals have collectively agreed to such loss of liberty in exchange for certain benefits.\textsuperscript{333} It is not clear to many people that our

\begin{thebibliography}{99}
\item \textsuperscript{329} Id. at 12-16; see also Fiss, \textit{supra} note 293.
\item \textsuperscript{330} See \textit{supra} notes 268-91 and accompanying text.
\end{thebibliography}
Constitution, the reflection of such a bargain, provides for interferences by the Supreme Court—hence the problem of legitimacy debated in *Casey*. Yet Supreme Court decisions which intrude upon the lives of women, their partners, doctors, social service agencies, and others could be seen as based in consent if those who were affected by such judicial action, or their representatives, had agreed through a participatory adjudicative process to the law established in the proceeding. Thus, the participation and consent by representatives of affected individuals provide a good second-best basis for the legitimacy which is usually provided by legislative accountability.

Furthermore, libertarian concepts developed through law and economics analysis underlie the settlement rationale supporting the process advocated here. Basic to the concept of negotiated rulemaking is the belief that affected parties bring to the bargaining table positions on several issues to be resolved. In the negotiating process, parties trade off their lesser-valued positions in order to gain ones they value more highly. In accordance with the microeconomic premise that people will rationally maximize their own self-interests, parties who are permitted to exchange their preferences will arrive at a resolution that is optimally efficient—the result which best accommodates the highest values of those at the bargaining table. Thus, the bargain model for policy formation, either through administrative rulemaking or judicial law making, draws heavily on the normative appeal of the contract analogy and law and economics analysis.

At the same time, the participatory adjudication model is responsive to those who criticize the view that law is a rational system. Some legal scholars regard judicial interpretations of indeterminate text and judicial choices between contradictory legal doctrines as nonrational determinations by those with power, reflecting the judge’s own value perspective determined by his or her age, sex, race, time, place, and life experience. If judicial declarations are power speech, settlements empower persons other than judges to speak the law—at least the law to

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334. *But see* JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 202-215 (1988) (arguing that permitting parties to trade off justice (the hypothetical judgment that a court would render) for efficiency may not be desirable where settlement affects unrepresented third party interests and fails to produce legal precedents as public goods).


govern their own case in accordance with agreed-upon values that reflect a more collective perspective.\textsuperscript{337}

The participatory process proposed here accommodates a feminist concept of law to the extent that it includes a vision of the judicial process more respectful of individual dignity and relational interests. In addition, it facilitates participation in policy formation, as well as fact finding, through deliberation, bargaining, mediation, and conciliation rather than by prioritizing a hierarchy of rights by judicial declaration.\textsuperscript{338} This multi-party, participational, and consensual process for resolving even constitutional disputes comports with the allegedly feminist perception of policy dilemmas as an adjustment of relationships bringing about the realization of shared values and responsibilities. Other feminists worry that, unprotected by equalizing formal procedures and the concept of rights, women will be subordinated to men in the participatory dispute resolution processes recommended here.\textsuperscript{339}

CONCLUSION

If abortion raises questions about how relationships between people should be arranged--about the creation of ourselves in the mirrors provided by others,\textsuperscript{340} about responsibilities to other people to whom we are already connected,\textsuperscript{341} about the origination of new lives with which to associate,\textsuperscript{342} and about the interests of others in those new lives\textsuperscript{343}--then the wisdom of many disciplines should be brought to bear on it: history, philosophy, religion, sociology, psychology, and economics.


\textsuperscript{338} This participatory, deliberative, problem-solving approach to dispute resolution is suggested by Professor Carol Gilligan's landmark work on female moral development. \textit{Gilligan}, \textit{supra} note 37, at 16-23; \textit{see also} Paul J. Spiegelman, \textit{Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web}, 38 \textit{J. Legal Educ.} 243, 247 (1988). Professor Gilligan's studies indicate that women conceive of the problems posed by certain moral choices as ones involving networks of relationships rather than polarized and prioritized rights and duties; as susceptible to a variety of solutions rather than right and wrong answers; and as having emotional implications that must be taken into account. \textit{See generally Gilligan}, \textit{supra} note 37.

\textsuperscript{339} Trina Grillo, \textit{The Mediation Alternative: Process Dangers for Women}, 100 \textit{Yale L.J.} 1545 (1991). \textit{See generally} MacKinnon, \textit{supra} note 7 (suggesting that male dominance skews the ability of organizational representatives to reflect the views of mixed gender membership and prevents the formation of consensus).

\textsuperscript{340} \textit{See supra} notes 40-44 and accompanying text.

\textsuperscript{341} \textit{See supra} note 37 and accompanying text.

\textsuperscript{342} \textit{See supra} note 38 and accompanying text.

\textsuperscript{343} \textit{See supra} note 39 and accompanying text.
Law is none of these—and all of these. While the legal realists have taught us to appreciate the reflection of all areas of inquiry on the formation of judge-made law, such law, supported by the authority and power of the state, is still something apart from them.

What contribution, then, can judge-made law in this separate sense make to the discourse about the use of new technologies to destroy, create, and perpetuate life? In the abortion cases, at least, its contribution to date has been procedurally divisive and substantively inconclusive. This Article suggests that the contribution that can be made through judicial review is not the settlement of the substantive moral, economic, political, and social issues that medical technologies pose, but the establishment of a judicial process through which they can be worked out. Judges should not tell us when, where, and how women may have abortions or how people may die, but how we must decide these things for ourselves. Since our entrenched system of judicial review requires judges to establish limits on a legislative determination of these issues, the judicial branch must establish for itself procedures by which these limits will be determined. This Article also suggests that the Constitution may require, or at least instruct, that those procedures be both participatory and representative. Courts have a variety of doctrines and mechanisms available to expand participation and to supervise representation in proceedings that invoke judicial review: standing, mootness, class actions, intervention, amicus curiae practice, special masters, magistrates, approval of consent decrees, and remedial orders among others. While the abortion cases may present the very most difficult issues to settle through a participatory, consensual process, courts would do well to implement this process in order to help change the emotionally charged conflict into simply heated discussion.

Were such a process to be implemented for issues on which consensus might be reached, the function of the court would shift from awarding victory to moderating and facilitating compromise. Litigation would become less a forum for combat and more a forum for bargaining, exchange, and conciliation under the supervision of a judge who sets and enforces procedural rules to promote fairness. Consensual resolution of individual disputes would govern the parties to the litigation as a matter of contract and would provide an example that future litigants might follow. Such a participatory, consensual model permits different bargains to be struck in different courts by different parties, just as the originalist model would permit different state legislatures to arrive at different

344. GILMORE, supra note 113, at 87-90.
accommodations of the interests involved. Nonparties would be left to pursue their interests in other courts or other forums. The judicial resolution of the parties' unresolvable issues would mark the constitutional boundaries for future bargaining. In turn, the virtues of the process would create better informed and more highly respected resolutions. As for those judicially imposed resolutions, the court has at its disposal a number of dispositional devices that permit the substantive issues to be resolved through process writ large in accordance with the participatory representational principles applied at that level.\textsuperscript{345}

Would a participatory process provide a "fairer" process? In order to make that determination, one must know why the question is posed. We must ask, "Fair for the accomplishment of what purpose or objective?" Procedures that might be fair for the accomplishment of one purpose may not be fair for the accomplishment of another purpose. If the objective is to make social policy determinations through the judicial branch of government, we need procedures that are fair with regard to the accomplishment of that goal. Even if we assume that fairness entails notice to persons affected and an opportunity to be heard, procedures that provide those things in disputes between individual citizens may not provide them in suits between masses of citizens and the state that are brought for the purpose of making prospective social policy prescriptions. This Article urges courts to tailor their procedures to the purposes of the litigation at hand. If that litigation requires broad-gauged judicial legislation, the court should use procedures that take into account the information and values of affected persons, because the Constitution instructs us that participation and representation in the determination of generally applicable, social policy prescriptions are the legitimating principles of our governance. If Roe and Casey have taught us anything, it is that once the chasm between opponents has been defined, widened, and solidified by the adversary process, it will be difficult to recapture the middle ground.

\textsuperscript{345} See BURT, supra note 118.