

3-1-1991

Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?

John Devlin
Louisiana State University Law Center, john.devlin@law.lsu.edu

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the [Law Commons](#)

Repository Citation

John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?*, 51 La. L. Rev. (1991)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol51/iss4/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Privacy and Abortion Rights Under the Louisiana State Constitution: Could *Roe v. Wade* be Alive and Well in the Bayou State?

John Devlin*

Recent opinions by the United States Supreme Court¹ have engendered speculation regarding the possible fate of *Roe v. Wade*² and *Doe v. Bolton*,³ and the continued existence and future contours of the federal constitutional right to choose an abortion that was recognized in those cases.⁴ This article makes no attempt to add to that speculation or to

Copyright 1991, by LOUISIANA LAW REVIEW.

* Associate Professor of Law, Paul M. Hebert Law Center of the Louisiana State University. B.A. 1977, Haverford College; J.D. 1980, Columbia University. I wish to thank my colleagues Lee Hargrave and Jim Bowers for their helpful suggestions, and David Hilburn for his research assistance.

1. Though the United State Supreme Court has not to date overruled the core holdings of *Roe* and *Doe*, certain justices have already gone on record as disfavoring their fundamental principles. See, e.g., *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3056-58, 3064-67 (1989) (opinions of Chief Justice Rehnquist and Justice Scalia); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2984 (1990) (Scalia, J., concurring). See also *Bowers v. Hardwick*, 478 U.S. 186, 193, 106 S. Ct. 2841, 2844 (1986), redefining the federal constitutional right of privacy as protecting only "fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed' and which are 'deeply rooted in this nation's history and tradition.'" (citations omitted).

2. 410 U.S. 113, 93 S. Ct. 705 (1973), holding that the right of "privacy" implicit in the federal Constitution limits the power of a state to interfere with a pregnant woman's right to choose an abortion.

3. 410 U.S. 179, 93 S. Ct. 739 (1973), holding unconstitutional several procedural restraints on the ability of a pregnant woman to obtain an abortion.

4. In the wake of *Webster*, anti-abortion activists in Louisiana moved in the Federal District Court for the Eastern District of Louisiana, alleging that *Webster* had undercut the foundations of *Roe* and, on that ground, seeking overturn of the injunction that that court had in 1976 applied against Louisiana's criminal anti-abortion laws. The court dismissed the action without reaching the issue of the extent to which *Webster* had in fact modified *Roe*. *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990). On the effect of *Webster* on abortion laws generally, see, e.g., Smith, *Abortion: From Roe to Webster*, 33 Cath. Law., 237 (1990).

A number of commentators have also raised the possibility that state constitutions may independently protect abortion rights if and when *Roe* is overruled. See, e.g., Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived From Federal Sources*, 3 *Emerging Issues St. Const. Law* 195 (1990); Ezzard, *State Constitutional Privacy Rights Post Webster—Broader Protection Against Abortion Restrictions?*, 67 *Den. U.L. Rev.* 401 (1990); Johnson,

the continuing and already voluminous debate over the merits of *Roe* and *Doe*. Instead, this article considers a separate issue that has been obscured for almost two decades by the dominance of federal law in this area—whether and to what extent the Louisiana State Constitution of 1974 may independently protect a woman's right to choose an abortion regardless of how the federal Constitution may be interpreted now or in the future. Part I initiates this inquiry by considering the legal background, drafting history and current interpretation of article I, section 5 of the Louisiana Constitution of 1974 which, unlike the federal Constitution, does specifically guarantee that persons shall be free from "unreasonable . . . invasions of privacy." Part II explores and defends the thesis that this provision should be understood as having adopted by reference the federal law of constitutional "privacy" as it existed in 1974, including the limited right to an abortion recognized in *Roe* and *Doe*, and that the state constitution thus incorporates and independently protects the limited right to choose to abort that was recognized in those cases. Part III considers how Louisiana courts should interpret article I, section 5 in light of this incorporation, and in light of post-1974 developments in the federal courts' interpretation of abortion and other "privacy" rights under the federal Constitution.

PROLOGUE: ON THE INDEPENDENT ROLE OF STATE CONSTITUTIONS IN PROTECTING RIGHTS

Before turning to specifics concerning the history and interpretation of the Louisiana constitution, a few principles governing the respective roles of federal and state constitutions for the protection of rights should be briefly restated. First, because of federal supremacy, all state law—constitutional, statutory and decisional—is subordinate to, and thus may not be applied to detract from, federal statutory or constitutional rights.⁵ Thus if a court were to conclude that its state constitution provides less protection for particular rights than does the federal Constitution, its ruling would have little practical significance; the federal constitutional right would control. This principle of federal supremacy does not, however, work in reverse. State Declarations of Rights may provide additional or heightened protections of individual rights—protections that go beyond the necessary "floor" of rights mandated by the federal Constitution. To be sure, in an era when the federal Supreme Court takes the lead

Abortion, Personhood, and Privacy in Texas, 68 Tex. L. Rev. 1521, 1538-43 (1990); Tepker, Abortion, Privacy and State Constitutional Law: A Speculation If (or When) *Roe v. Wade* is Overturned, 2 Emerging Issues St. Const. Law 173 (1989); Comment, State Constitutions: The New Battlefield for Abortion Rights, 10 Harv. Women's L.J. 284 (1987).

5. U.S. Const. art. VI, cl. 2.

in defining new or expanded individual rights or in adapting the underlying principles of the Constitution to changing factual circumstances, state constitutional rights guarantees tend to receive little independent attention or construction. But when the federal Supreme Court chooses to construe federal rights narrowly and thus to leave to other bodies the task of articulating and vindicating fundamental interests, the potential of state constitutions to provide independent protection for individual rights again becomes relevant. As long as the additional rights granted one litigant do not detract from the federally protected rights of another, the state's constitutional draftsmen and its courts remain free to provide protections which go beyond those provided by the federal Bill of Rights.⁶

Second, state courts of last resort are the final authorities for the interpretation of their respective state constitutions and are free to interpret those state charters in ways that diverge from interpretations of the federal Constitution, even if the language being interpreted in the two documents is exactly the same. *A fortiori*, where the texts of the relevant federal and state provisions diverge, or where the state constitution explicitly mentions rights that are only implicitly embodied in the federal Constitution, a state court applying that state law may provide different protections than would a federal court applying federal law.⁷

6. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035 (1980), affirming *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), holding that the California courts were free to interpret their state constitutional rights of free speech and petition to preclude the owner of a large private shopping center from closing that facility to otherwise orderly persons soliciting signatures on a petition addressed to the President and Congress, and that such an interpretation did not infringe on any federally protected property right of the mall owner. The last fifteen years have witnessed an explosion of cases and commentary on the power of state constitutions to provide protections for rights which go beyond those afforded by the federal Constitution. See Maltz, Williams & Araten, *Selected Bibliography on State Constitutional Law*, 20 Rutgers L.J. 1093 (1989).

7. Three propositions regarding how state courts should approach the task of state constitutional interpretation appear to garner general agreement: 1) as noted in text, state courts are ultimately free to construe their respective state constitutions in ways that diverge from the construction given to cognate provisions in the federal Constitution or in sister state constitutions, and may do so even where the terms of the federal and state guarantees are identical; but 2) state courts should nevertheless pay respectful attention to the rationales and results of United States Supreme Court decisions construing cognate federal rights guarantees, regarding those decisions as particularly persuasive precedent; and 3) divergence from authoritative federal precedent, while always within the state court's raw power, is most justifiable when the state court can point to some specific unique local factor—such as a difference in the language or drafting history of the relevant state and federal guarantees, some unique aspect of local history or culture which differs from the that of the rest of the nation, some previously established body of state law,

The Supreme Court of Louisiana has on numerous occasions expressed its agreement with these general principles and held that the state constitution provides greater protection of individual rights than does the federal Constitution. Louisiana courts have reached this result both with respect to state rights guarantees phrased identically to their federal counterparts⁸ and, *a fortiori*, with respect to state rights phrased more broadly than the corresponding federal right⁹ or state rights that

or an evident flaw in the federal majority's reasoning—as a non-result oriented reason for its divergence from the federal model. To be sure, courts and commentators differ as to the relative weight and rigidity they ascribe to these factors. However, even advocates of widely differing approaches to state constitutional interpretation do appear to accept these propositions or their equivalents, at least in principle. See generally, Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. Cin. L. Rev. 317, 325 (1986) (noting that the bulk of state decisions start from a presumption of deference to federal precedent but feel able to diverge where that divergence is justified); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980) (advocating the primacy and independence of state constitutions); Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. Fla. L. Rev. 653 (1987); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. Rev. 353 (1984).

The state court cases expressing these principles (with greater or lesser emphasis on particular elements) are legion. A small sampling might include, e.g., *State v. Gunwall*, 106 Wash. 2d 54, 61-63, 720 P.2d 808, 812-13 (1986) (articulating the factors that must be considered before sustaining a claim that the state constitution should be interpreted independently); *People v. Tisler*, 103 Ill. 2d 226, 469 N.E.2d 147 (1984) (Illinois court will generally follow federal precedents unless the text or history of the state provision demonstrates a different intent); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) (examining federal precedents before independently interpreting the state constitution); *People v. Brisendine*, 13 Cal. 3d 528, 548-52, 531 P.2d 1099, 1111-14, 119 Cal. Rptr. 315, 327-30 (1975) (en banc, per Mosk, J.); *Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro*, 285 N.C. 467-74, 206 S.E.2d 141, 146 (1974); *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972). But see *Right to Choose v. Byrne*, 91 N.J. 287, 301, 450 A.2d 925, 932 (1982) (emphasizing the persuasiveness of federal precedent and "the general advisability in a federal system of uniform interpretation of identical constitutional provisions").

As long as the state court makes clear that it is not relying on federal precedents, and the state's interpretation violates no federal rights, the United States Supreme Court will not interfere. *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469 (1983).

8. One good example of this is that portion of La. Const. art. I, § 5 that requires warrants and precludes unreasonable searches and seizures. Though the language employed is virtually identical to that of the fourth amendment to the federal Constitution, the Louisiana Supreme Court has been quite willing to interpret the state guarantee in ways that diverge from, and provide greater protections to individuals than, its federal counterpart. *State v. Church*, 538 So. 2d 993 (La. 1989); *State v. Hernandez*, 410 So. 2d 1381 (La. 1982); *State v. Breaux*, 329 So. 2d 696 (La. 1976).

9. See, e.g., *Sibley v. Bd. of Sup'rs of La. State Univ.*, 477 So. 2d 1094 (La. 1985) (guarantee of equality of La. Const. art. I, § 3 differs from and must be interpreted independently of federal fourteenth amendment "equal protection" analysis).

have no explicit federal analogue at all.¹⁰ Because the federal and Louisiana constitutions do differ with respect to the right of "privacy"—that right is explicitly protected in the text of the state constitution¹¹ but has only been inferred into the federal Constitution¹²—it is a particularly likely candidate for independent interpretation under the two documents.

I. THE CONCEPT OF "PRIVACY" UNDER THE LOUISIANA STATE CONSTITUTION: ORIGIN, DRAFTING HISTORY AND INTERPRETATION

Though dispute continues to rage over the possibility and desirability of "originalist" approaches to interpretation of the federal Constitution,¹³ no equivalent debate currently afflicts the parallel questions of state constitutional interpretation. The standard view, long agreed upon by courts and commentators, is that the intentions and understandings of the ratifiers of state constitutions comprise a necessary starting place and touchstone for interpretation of such documents.¹⁴ To be sure, such

10. See, e.g., *State v. Spooner*, 520 So. 2d 336 (La. 1988) (protections of private property in La. Const. art. I, § 4 required invalidation of statutory presumption that currency found in proximity to controlled substances is derivative contraband, and is thus forfeitable); *Title Research Corp. v. Rausch*, 450 So. 2d 933 (La. 1984) (right of access to public records guaranteed by La. Const. art. XII, § 3 requires court clerk to permit microfilming of conveyance and mortgage records); *Fox v. Bd. of Sup'rs of La. State Univ.*, 559 So. 2d 850 (La. App. 1st Cir. 1990) (guarantee of access to courts of La. Const. art. I, § 22 requires that dismissal of action on forum non conveniens grounds be without prejudice); *Harleaux v. Wood*, 542 So. 2d 747 (La. App. 4th Cir. 1989); *Duroncelet v. Doley*, 530 So. 2d 653 (La. App. 4th Cir. 1988) (guarantee of La. Const art. V, § 22 that all judges shall be elected limits the conclusory effect of credibility determinations by unelected court commissioners).

11. La. Const. art. I, § 5, quoted *infra*, note 48.

12. See discussion *infra*, notes 23-35.

13. Briefly, "originalist" approaches to Constitutional interpretation are those that ascribe conclusive weight to the understanding of the document that prevailed at the time it was adopted. Originalists are further subdivided into "textualists," who give primary weight to the words of the document, and "intentionalists," who endeavor to determine from extra-textual sources what the constitution's framers intended their words to mean. "Non-originalist" approaches look instead or in addition to other, generally present-day, sources of meaning. For critical summaries of these various approaches made with reference to the federal Constitution, see, e.g., Simien, *It Is a Constitution We Are Expounding*, 18 *Hastings Const. L.Q.* 67 (1990); and Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. Rev.* 204 (1980), from whom the terminology used here is taken.

14. The lack of debate regarding the utility of originalist approaches to interpretation of state constitutions appears to result, at least in part, from the differences in form and function between state constitutions and their federal counterpart, most of which favor greater reliance on originalist approaches to interpretation of state charters. Since the current Louisiana constitution was enacted in the recent past, interpretation of its language is not hampered by changes over time in the meanings of words or by changing social

reliance on "intent" should not be misunderstood as referring to the unexpressed purposes, agendas or subjective understandings of any person or group of people. Rather, as the Louisiana Supreme Court has repeatedly emphasized, the relevant intent is the "public" intent that could be gathered by a knowledgeable but objective observer from such non-subjective sources as the text itself,¹⁵ the structure of the document as a whole,¹⁶ the drafting history of particular provisions,¹⁷ extrinsic sources for defining ambiguous phrases or "terms of art,"¹⁸ and the

and political realities. Extensive and reliable record evidence is available from which the intentions of state draftsmen can be discerned. Since state constitutions such as Louisiana's are more readily amended than their federal counterpart, there is less need for courts to take it upon themselves to adapt the document to changing times. And since state charters are typically far longer, more detailed and "statute-like" than is the United States Constitution—relatively less concerned with basic issues and more devoted to enshrining particular policies or detailing government operations—it makes sense to construe them with more regard for their drafters' particular purposes and perhaps with less concern for natural law, grand issues of fundamental justice or other philosophical verities. See generally, Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 195-201 (1983); Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 Fla. St. L. Rev. 567, 569-71 (1978) (noting the general consensus among commentators that for state constitutions, the "original intent [of the people who adopted the constitution] should be ascertained and respected"); T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Power of the States of the American Union* 68-70 (5th ed. 1883).

By way of clarification, it should be noted that the reference to "ratifiers" was intentional. Before ratification, the draft constitution of 1974 was a mere proposal, without force or effect. The political act that made the constitution of 1974 binding was the vote of the people; it is the understanding that can be reasonably ascribed to that voting population as a whole that controls. Arguments from the constitution's "plain text" or the convention debates are useful primarily for the light they may shed on how the people would have understood the document.

15. See, e.g., *Bd. of Comm'rs v. Dep't of Natural Resources*, 496 So. 2d 281, 298 (La. 1986) (construction should be guided by "a fair interpretation of the language employed"); *State ex rel. Guste v. Bd. of Comm'rs*, 456 So. 2d 605, 609 (La. 1984) ("unambiguous" constitutional language precludes resort to other techniques of interpretation); *Aguillard v. Treen*, 440 So. 2d 704, 707 (La. 1983) (same); *Bank of New Orleans and Trust Co. v. Seavey*, 383 So. 2d 354, 356 (La. 1980) (same); *City of Baton Rouge v. Short*, 345 So. 2d 37, 40 (La. 1977).

16. 496 So. 2d at 278-88 (looking to the overall structure of the 1974 constitution, among other factors); *Barnett v. Develle*, 289 So. 2d 129, 146 (La. 1974) (same).

17. *New Orleans, etc. v. Civil Serv., etc.*, 422 So. 2d 402, 407-09 (La. 1982) (relying on convention records); *Bd. of Elementary and Secondary Educ. v. Nix*, 347 So. 2d 147, 150-51 (La. 1977) (interpreting a disputed provision by examining its history and development); *Jones v. LaBarbera*, 342 So. 2d 1125, 1127 (La. 1977) (same).

18. *State Bond Comm'n v. All Taxpayers*, 510 So. 2d 662, 666 (La. 1987) (treating the word "debt" as a term of art and looking to decisions of other jurisdictions to define that term); 422 So. 2d at 412 (looking to federal jurisprudence to define whether a scheme of compensation constituted a "minimum wage law"); *State ex rel. Kemp v. City of Baton Rouge*, 215 La. 315, 323-27, 40 So. 2d 477, 480-81 (1949) (interpreting state constitution by examining decisions regarding similar provisions in other state constitutions).

perceived evil which the constitutional drafters were seeking to correct.¹⁹ Accordingly, it is to such objective sources of the meaning of "privacy" that one must first turn to determine the status of abortion rights under the state constitution.

A. Legal Background: the Concept of Constitutional "Privacy" in 1973-1974

By the period from January 1973 through April 1974, when the present Louisiana constitution was drafted, debated and ultimately ratified, the concept of "privacy" had already acquired a number of divergent legal meanings. As a concept in private law, the right of privacy was already well rooted in the jurisprudence of virtually all states, including Louisiana.²⁰ As a concept in constitutional law, the right of privacy was of more recent origin. Nevertheless, by that time, the right of privacy in its constitutional sense had already been generally conceived as potentially protecting three related but distinguishable types of interests: the right to be free of unreasonable surveillance and intrusion ("search and seizure" rights);²¹ the right to prevent the accumulation

19. *Bd. of Comm'rs v. Dep't of Nat. Res.*, 496 So. 2d 281, 287-88 (La. 1986) (looking at, among other things, the evil sought to be remedied by the constitutional provision at issue); 342 So. 2d at 1127 (looking to "the nature and object of the provision under consideration").

20. The right of privacy in this sense has deep roots in Louisiana jurisprudence. As long ago as 1905, the Louisiana courts adopted the classic Warren and Brandeis formulation of the right protected by the tort of invasion of privacy as a right to be "let alone." *Itzkovitch v. Whitaker*, 115 La. 479, 482, 39 So. 499, 500 (1905). Compare Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The Louisiana law of privacy in its sense as a private tort (or delict) has been rooted primarily in La. Civ. Code art. 2315. *Parish Nat'l Bank v. Lane*, 397 So. 2d 1282 (La. 1981), citing *Pack v. Wise*, 155 So. 2d 909 (La. App. 3d Cir. 1963) and *Quina v. Robert's*, 16 So. 2d 558 (La. App. Orl. 1944).

In analyzing the parameters of the concept of privacy in this sense, the Louisiana courts have "adopted, in wholesale fashion, the four branch analysis of Dean Prosser and the Restatement (Second) of Torts." *Easter Seal Soc'y v. Playboy Enterprises*, 530 So. 2d 643, 647 (La. App. 4th Cir. 1988), citing *Jaubert v. Crowley Post-Signal, Inc.*, 375 So. 2d 1386, 1387-89 n.2 (La. 1979). See also *Roshto v. Hebert*, 439 So. 2d 428, 430 (La. 1983); *Ballaron v. Equitable Shipyards*, 521 So. 2d 481 (La. App. 4th Cir. 1988); *Norris v. King*, 355 So. 2d 21, 23 (La. App. 3d Cir. 1978). For an overview of the current jurisprudence see generally, W. P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* 849-68 (5th ed. 1984).

21. The concept of constitutional privacy in this sense, as a shield against surveillance and intrusion, is enshrined in the federal fourth amendment and was also first articulated long ago. See, *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) (Brandeis, J., dissenting from the Court's decision upholding the constitutionality of a wiretap, and arguing that the federal constitution protects a fundamental "right to be let alone" by the government); *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532

and dissemination of certain kinds of information about oneself ("disclosural" rights);²² and the right to make certain choices about one's personal or family life—including but not limited to the right to decide to terminate a pregnancy—free from undue or unnecessary government interference ("autonomy" rights).

Though hints of things to come can be found in earlier decisions,²³ the United States Supreme Court first clearly articulated the right of constitutional privacy in its autonomy sense in *Griswold v. Connecticut*,²⁴ some eight years before the current Louisiana constitution was drafted.

(1886) (noting that the federal fourth and fifth amendments operate to protect "the privacies of life").

In its modern incarnation the right of privacy in this sense appears to have two branches. One, originating from *Stanley v. Georgia*, 394 U.S. 557, 564-65, 89 S. Ct. 1243, 1247-48 (1969), ascribes a special significance to the home as a place where government cannot intrude without sufficient reason. A second branch originates from *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), in which the Court held that federal fourth amendment protections against unreasonable searches and seizures apply where, but only where, the person has a "reasonable expectation of privacy" in the particular activity being observed or recorded.

22. The constitutional right of privacy in this sense was frequently litigated in the lower federal courts during this period, and was much on the minds of constitutional draftsmen in this and other states. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 21 (1974) (tracing the Louisiana privacy provision to, among other things, "fear of unrestrained gathering and dissemination of information on individuals through use of computer data banks"); Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla. St. U.L. Rev. 631, 702-04 n.364 (1977) (quoting election brochure distributed to California voters before the California privacy guarantee was ratified); *Id.* at 717-18 (quoting the Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 to the same effect with regard to the South Carolina privacy guarantee). See generally, Peck, *Extending the Constitutional Right to Privacy in the New Technological Age*, 12 Hofstra L. Rev. 893, 907-08 (1984).

23. The substantive concept of "due process," which formed the conceptual linchpin of the ill-remembered *Lochner* era, was not applied only in the service of property rights and entrepreneurial freedom. On the contrary, during that era the Supreme Court of the United States also had occasion to hold that the due process guarantee of the federal fourteenth amendment required invalidation of state statutes which it found to unduly interfere with an individual's right to exercise autonomous control over certain personal and family decisions. See, e.g., *Pierce v. Society of the Sisters of the Holy Names, etc.*, 268 U.S. 510, 45 S. Ct. 571 (1925) (state cannot preclude parents from sending children to parochial schools). Even after the collapse of economic substantive due process, the federal Supreme Court continued to protect some unenumerated rights and "fundamental" liberty interests from unreasonable infringement, under a variety of doctrinal formulations. *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958) (deriving a right of association as a necessary ancillary to the first amendment); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752 (1957) (protecting the right to practice one's profession); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110 (1942) (striking down, on equal protection grounds, a state statute authorizing sterilization for some types of repeat criminal offenders).

24. 381 U.S. 479, 85 S. Ct. 1678 (1965).

In *Griswold*, the United States Supreme Court held that the federal Bill of Rights required invalidation of a Connecticut statute which restricted the ability of a married couple to obtain and use contraceptives. The constitutional right of autonomy privacy that was recognized in *Griswold* does not appear explicitly anywhere in the text of the federal Bill of Rights. Instead this right was derived by various members of the Court from various constitutional sources, including the necessary "penumbras" cast by several specific constitutional guarantees,²⁵ from the Ninth Amendment and its reservation of rights deeply rooted in the American legal tradition,²⁶ from the concept of fundamental rights "implicit in the concept of ordered liberty,"²⁷ or from the special status of marital and familial relationships.²⁸

The inability of the Court in *Griswold* to articulate a consensus regarding the origin or nature of the federal constitutional right of privacy in this autonomy sense made it difficult for courts to come to any clear understanding regarding the precise nature or limits of that right, and inhibited the extension of that right to new contexts.²⁹ The doctrine was in 1974 and remains today characterized by considerable uncertainty as to its proper interpretation, scope and application.³⁰

25. Id. at 482-85, 85 S. Ct. at 1680-82 (Douglas, J., for the Court).

26. Id. at 487-94, 85 S. Ct. at 1683-87 (Goldberg, J., concurring).

27. Id. at 500-01, 85 S. Ct. at 1690-91 (Harlan, J., concurring).

28. Id. at 502-03, 85 S. Ct. at 1691-92 (White, J., concurring).

29. Before 1975, Louisiana courts cited *Griswold* only once, rejecting an attempt by a public schoolteacher to enjoin a school rule requiring him to wear a necktie. *Blanchet v. Vermilion Parish School Bd.*, 220 So. 2d 534, 539 (La. App. 3d Cir. 1969). Federal district courts in Louisiana were, during that period, equally unsympathetic to proposed extensions of *Griswold*, regularly rejecting attempts to extend its holding to a variety of purported autonomy interests. See, e.g., *Louisiana Affiliate of the Nat'l Org. for Reform of Marijuana Laws v. Guste*, 380 F. Supp. 404 (E.D.La. 1974) (rejecting challenge to state laws criminalizing private possession and use of marijuana); *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970) (rejecting challenge to statute authorizing revocation of the license of physicians providing abortions); *Pratz v. Louisiana Polytechnic Institute*, 316 F. Supp. 872 (W.D. La. 1970) (rejecting challenge to parietal regulations at state higher education institution); *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967) (rejecting challenge to school hair-length regulations). But see *Murphy v. Houma Well Service*, 413 F.2d 509 (5th Cir. 1969) (relying in part on *Griswold*'s concern for familial privacy to uphold trial court's refusal to inquire into the legitimacy of child purporting to be a Jones Act beneficiary); *Scott v. District Attorney*, 309 F. Supp. 833, 837 n.9 (E.D. La. 1970) (relying on *Griswold*, among many other cases, as collateral support for decision ruling state criminal loitering statute unconstitutional).

30. Academic writings debating the merits of the *Griswold* line of cases are too numerous to mention. Nonetheless, it is worth noting that by 1974, the issue was already the subject of a strenuous debate. See, e.g., Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410 (1974); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 Mich. L. Rev. 235 (1965); Symms & Hawks, *The Threads of Privacy: The Judicial Evolution of a "Right to Privacy" and Current*

Nevertheless, by the early 1970's, a consensus had emerged that the federal constitutional right of privacy articulated in *Griswold* extended well beyond the facts of that case, and protected a wide range of interests in familial relations,³¹ private sexual conduct,³²

Legislative Trends, 11 Idaho L. Rev. 11, 13-21 (1974) (tracing the failure of the *Griswold* line of cases to expand to the Court's failure to adequately define the rights of "privacy" it announced in that case); Rhoades & Patula, The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since *Griswold v. Connecticut*, 50 Denver L.J. 153, 170 (1973) (same).

31. Prior to 1974, federal courts had relied on *Griswold* as an exclusive or alternate ground to protect "family" rights in a number of contexts. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791 (1974) (striking down overbroad state rules mandating termination of pregnant schoolteachers); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 n.7, 93 S. Ct. 2821, 2826 n.7 (1973) (noting with apparent approval the conclusion of the lower court in that case that if the federal government were to seek to justify its denial of foodstamps to unrelated or unmarried persons living together as a means to foster "morality," it would likely violate the principles established in *Griswold*); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823-24 (1967) (relying on autonomy privacy rights as an alternative ground on which to strike down state laws prohibiting marriage between persons of different races); *Berch v. Stahl*, 373 F. Supp. 412, 423-24 (W.D.N.C. 1974) (protecting the right of prison inmates to communicate with their spouses); *Davis v. Meek*, 344 F. Supp. 298, 300 (N.D. Ohio 1972) (protecting the rights of married high school students to participate in school activities). Since 1974, the federal Supreme Court has continued to expand this aspect of the *Griswold* analysis. See, e.g., *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987) (striking down prison regulation forbidding inmates to marry without consent of warden, on finding of compelling reasons); *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673 (1978) (striking down a Wisconsin statute that required residents under child support obligations to show that they were in compliance with those prior obligations before they would be permitted to marry and start a second family); *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932 (1977) (striking down a zoning ordinance that prohibited even related individuals from sharing living quarters unless they were within a specified degree of consanguinity). But see *Lyng v. Castillo*, 477 U.S. 635, 106 S. Ct. 2727 (1986) (upholding federal regulation that automatically treated parents, children and siblings as a single household for food stamps while permitting unrelated persons living together to get greater benefits by establishing separate households); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974) (upholding a zoning ordinance prohibiting three or more persons living together unless they are related by blood).

32. As with respect to family rights, prior to 1974 federal courts tended to rely on *Griswold* as an exclusive or alternate ground to protect individual choices to engage in private consensual sexual activities that others might consider immoral. *Stanley v. Georgia*, 394 U.S. 557, 564-65, 89 S. Ct. 1243, 1247-48 (1969) (relying on privacy rights as well as the first amendment to hold that states may not criminalize mere possession of allegedly obscene material in the privacy of one's own home); *In Re Labady*, 326 F. Supp. 924, 927 (S.D.N.Y. 1971) (federal government precluded from denying naturalization to an individual solely because he engaged in private homosexual activity with other consenting adults); *Mindel v. United States Civil Serv. Comm'n*, 312 F. Supp. 485, 488 (N.D. Cal. 1970) (federal government could not discharge a postal clerk solely because he was living with a woman to whom he was not married). See also *Lovisi v. Slayton*, 363 F. Supp. 620, 626 (E.D. Va. 1973) (indicating that if petitioners had kept their homosexual relations

and personal autonomy³³ from excessive or unnecessary government interference. In the area of contraceptive rights the federal Supreme Court had, by the time the present Louisiana constitution was drafted and adopted, put to rest an earlier controversy by squarely holding that the right to obtain contraceptives established in *Griswold* extended to unmarried persons,³⁴ and a number of successful challenges had already been mounted to statutes which narrowly restricted how and by whom non-prescription contraceptives could be distributed.³⁵

With regard to the more controversial question of whether the federal constitutional right of autonomy privacy included the right of a pregnant woman to choose an abortion, there was much litigation but, before 1973, little consensus. During the early 1970's, state and federal courts in Louisiana repeatedly heard and rejected constitutional challenges to

truly private they would have been entitled to protection under *Griswold*).

In recent years, however, the federal Supreme Court has significantly cut back on this aspect of federal privacy rights. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986) (rejecting federal privacy rights challenge to state statute prohibiting private acts of homosexual sodomy between consenting adults).

33. Prior to 1974, a number of lower federal courts had held that the right recognized in *Griswold* extended to prevent unreasonable state interference with a person's right to dress or wear his hair as he pleases. See, e.g., *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937, 90 S. Ct. 1836 (1970); *Seal v. Mertz*, 338 F. Supp. 945 (M.D. Pa. 1972); *Black v. Cothren*, 316 F. Supp. 468 (D. Neb. 1970); *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970); *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970); *Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969). However, courts were far from united on the proposition that the rights recognized in *Griswold* applied in this context. See, for cases denying the extension, *Freeman v. Flake*, 448 F.2d 258, 260-61 (10th Cir. 1971) and cases cited. As was the case with respect to sexual activity, after 1974 the Supreme Court significantly limited this particular aspect of the federal constitutional right of privacy. *Kelley v. Johnson*, 425 U.S. 238, 96 S. Ct. 1440 (1976) (upholding against constitutional challenge a police regulation regarding the length of officers' hair).

34. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1971), concluding that drawing a distinction between married and unmarried persons with respect to the fundamental right recognized in *Griswold* would violate equal protection.

35. See, e.g., *Baird v. Lynch*, 390 F. Supp. 740, 745-46 (W.D. Wis. 1974) (indicating that state statute facially restricting exhibits and displays of contraceptives would be unconstitutional, but abstaining so that state courts could impose a limiting construction); *Population Services Int'l v. Wilson*, 383 F. Supp. 543 (S.D. N.Y. 1974) (denying motion to dismiss challenge to state statute precluding sale of contraceptives to minors, allowing only licensed pharmacists to sell them and limiting their advertisement and display). After 1974, the federal courts continued to expand the *Griswold* analysis in this context, striking down laws and practices which unduly restricted access to contraceptives. See, e.g., *Bolger v. Youngs Drug Products*, 463 U.S. 60, 103 S. Ct. 2875 (1983); *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S. Ct. 2010 (1977); *Postscript Enterprises v. Whaley*, 658 F.2d 1249 (8th Cir. 1981); *Arneth v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988); *Planned Parenthood Ass'n v. Matheson*, 582 F. Supp. 1001 (D. Utah 1983).

the state's criminal anti-abortion statute.³⁶ Results in other states were mixed. Some courts found that the federal constitutional right of autonomy privacy articulated in *Griswold* included the right to choose an abortion.³⁷ Others, like the Louisiana courts, rejected such claims.³⁸

In January of 1973, however, the United States Supreme Court put an end to this controversy, holding in *Roe v. Wade*³⁹ and *Doe v. Bolton*⁴⁰ that the federal constitutional right of privacy recognized in *Griswold* provided some protection for the right of a pregnant woman to choose to terminate her pregnancy through an abortion free from unnecessary or excessive government interference. To be sure, these initial decisions did not immediately remove all areas of uncertainty and disagreement regarding the scope and interpretation of the abortion right. Important questions—such as, for example, application of *Roe* to minors, procedural and methodological requirements of *Roe* and the obligation of government to fund abortions for indigents—remained for future de-

36. See, e.g., *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), vacated, 412 U.S. 902, 93 S. Ct. 2285 (1973) (3-judge district court, upholding Louisiana statute authorizing suspension or revocation of M.D.'s license if he is involved in an abortion (except to save the life of the mother) against several federal constitutional challenges, including challenge based on privacy rights in the autonomy sense); *State v. Campbell*, 263 La. 1058, 270 So. 2d 506 (1972) (rejecting federal constitutional "privacy" challenge to state statute criminalizing abortion); *State v. Scott*, 260 La. 190, 255 So. 2d 736 (1971) (same); *State v. Shirley*, 256 La. 665, 237 So. 2d 676 (1970), cert. denied, 401 U.S. 926, 91 S. Ct. 891, reh'g denied, 402 U.S. 925, 91 S. Ct. 1383 (1971); *State v. Pesson*, 256 La. 201, 235 So. 2d 568 (1970).

37. The cases are legion. A representative sampling would include, e.g., *Abele v. Markle*, 351 F. Supp. 224 (D.Conn. 1972); *YWCA v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972), cert. denied, 415 U.S. 989, vacated, 475 F.2d 1398, aff'd, 493 F.2d 1402 (3d Cir. 1974); *Doe v. Scott*, 321 F. Supp. 1385 (N.D.Ill. 1971), vacated, 410 U.S. 950 (1973); *Babbitt v. McCann*, 310 F. Supp. 293 (E.D. Wis.), appeal dismissed, 400 U.S. 1, 91 S. Ct. 12 (1970); *People v. Belous*, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S. Ct. 920 (1970); *State v. Barquet*, 262 So. 2d 431 (Fla. 1972); *Sturgis v. Attorney Gen.*, 358 Mass. 37, 260 N.E.2d 687 (1970).

38. These cases too are many. A sampling would include, e.g., *Crossen v. Attorney Gen.*, 344 F. Supp. 587 (E.D.Ky. 1972), vacated, 410 U.S. 950, 93 S. Ct. 1413 (1973); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), vacated, 410 U.S. 950, 93 S. Ct. 1411 (1973); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), rev'd, 410 U.S. 179, 93 S. Ct. 739 (1973); *Roe v. Wade*, 314 F. Supp. 1217 (N.D.Tex. 1970), rev'd, 410 U.S. 113, 93 S. Ct. 705 (1973); *Thompson v. State*, 493 S.W.2d 913 (Tex. 1971), vacated, 410 U.S. 950, 93 S. Ct. 1411 (1973); *Cheaney v. State*, 259 Ind. 138, 285 N.E.2d 265 (1972); *Spears v. State*, 257 So. 2d 876 (Miss. 1972).

39. 410 U.S. 113, 93 S. Ct. 705 (1973), striking down a Texas statute prohibiting abortion except to save the life of the mother.

40. 410 U.S. 179, 93 S. Ct. 739 (1973), invalidating a number of procedural restrictions on abortions, including a special accreditation requirement for hospitals performing abortions and a requirement of approval by two additional physicians.

cision.⁴¹ Indeed, many of these issues remain unsettled today. However, by January of 1973, when the Louisiana Constitutional Convention was meeting in its first organizational sessions, *Roe* and *Doe* had made clear that the right of "privacy" in its federal constitutional sense extended to and included some significant limits on the power of governments to interfere with the ability of a pregnant woman to obtain an abortion.

In addition to the federal developments, several states had, by 1973, amended or interpreted their respective state constitutions to also provide explicit protection for the right of "privacy."⁴² Though none of the

41. Since 1974, the abortion controversy has continued to generate a large number of cases, in which the federal Supreme Court has made fine distinctions between permissible and impermissible statutory restraints on abortions. See, e.g., *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (parental notification requirement upheld); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (parental notification statute upheld in part, struck down in part); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (upholding statute defining life as beginning at conception, barring state employees or public facilities from performing abortions, and requiring physician to perform tests to determine viability); *Thornburgh v. Am. College of Obstetricians*, 476 U.S. 747, 106 S. Ct. 2169 (1986) (striking down propaganda-laden "informed consent" requirement, detailed and publicly available record keeping requirements and burdensome requirements for salvaging post-viability fetuses); *Simopoulos v. Virginia*, 462 U.S. 506, 103 S. Ct. 2532 (1983) (upholding statute requiring second trimester abortions to be performed in hospitals); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517 (1983) (upholding parental or judicial consent requirement); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 103 S. Ct. 2481 (1983) (striking down statute limiting abortions to hospitals, mandating a waiting period and mandating, under guise of "informed consent," anti-abortion propaganda by physician); *H.L. v. Matheson*, 450 U.S. 398, 101 S. Ct. 1164 (1981) (upholding statute requiring physician to notify parents before performing abortion on an unemancipated minor); *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980) (upholding exclusion of abortions from federal medical aid to indigent women); *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035 (1979) (striking down statute requiring parental consent or judicial proceeding for abortion on juvenile); *Poelker v. Doe*, 432 U.S. 519, 97 S. Ct. 2391 (1977) (city hospital providing maternity services may refuse to perform abortions); *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376 (1977) (government not required to subsidize abortions even though it does subsidize childbirth); *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831 (1976) (upheld so much of state statute as defined fetal viability, required maternal written consent and required keeping certain records; striking down so much as banned saline amniocentesis as abortion method after 12 weeks, required spousal consent in some circumstances, and required parental consent in all cases).

42. Between 1968 and 1973, six states amended their respective state constitutions to provide explicit protection for a right of "privacy." These amendments took several forms. The initial approach, adopted by Hawaii, Illinois and South Carolina—and ultimately by Louisiana as well—simply added language prohibiting "unreasonable . . . invasions of privacy" to each state's respective guarantee of freedom from unreasonable searches and seizures. Haw. Const. art. I, § 7; Ill. Const. art. I, § 6; S.C. Const. art. I, § 10. California pursued a unique approach, adding "privacy" to the list of fundamental rights declared to be basic and inalienable. Cal. Const. art. I, § 1. The final approach, adopted by Montana and Alaska, involved the enactment of wholly new, free-standing sections of

early 1970's decisions interpreting these provisions specifically addressed the question of abortion rights, some do provide additional evidence that the concept of constitutional privacy was already generally understood to potentially protect autonomy rights of the sort articulated in *Griswold* and its progeny.⁴³

B. Drafting the Guarantee: How "Privacy" Entered the Louisiana Constitution

By the early 1970's, the existing Louisiana constitution of 1921 had evolved into a massive, unwieldy and outdated document, full of detailed rules and restrictions more appropriate for legislative treatment and burdened by 536 separate amendments.⁴⁴ In 1972, in response to the pressures caused by the inadequacies of the existing constitution and the unwillingness of Louisiana's voters to continue passing large numbers of amendments every year, the state legislature passed a measure authorizing and organizing a convention charged with drafting a new, streamlined charter for the state.⁴⁵ Although dissatisfaction with the individual rights provisions of the prior state constitution played no discernable role in the events leading to the calling of the convention of 1973-74, the convention's mandate was plenary. All aspects of the

the states' respective declarations of rights, each of which explicitly protected some right of "privacy." Alaska Const. art. I, § 22; Mont. Const. art. II, § 10.

43. See, e.g., *Gray v. State*, 525 P.2d 524 (Alaska 1974) (explicit state constitutional right of privacy limited ability of state to criminalize private use of marijuana); *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972) (right of privacy inferred into state constitution precluded enforcement of student hair length regulations); *State v. Silva*, 491 P.2d 1216 (Haw. 1971) (statutory rape prosecution, Levinson, J., dissenting, suggested that the right of privacy invalidated some laws regulating consensual sex); *State v. Rocker*, 475 P.2d 684 (Haw. 1970) (deciding on the merits that state right of privacy did not protect nude sunbathing on a public beach); *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972) (upholding Illinois Government Ethics Act; taking a broad view of privacy but concluding that there was a compelling state interest). Other state courts reached similar results on the basis of an unexpressed right of "privacy" which they found to be implicit in their state constitutions. See, e.g., *Yoo v. Moynihan*, 28 Conn. Supp. 375, 262 A.2d 814 (Conn. Super. Ct. 1969) (school dress code struck down); *Murphy v. Pocatello School Dist.* No. 25, 94 Idaho 32, 480 P.2d 878 (1971) (same); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (zoning ordinance limiting family units struck down).

44. On the origin of the Constitutional Convention of 1973, see generally W. Hargrave, *The Louisiana State Constitution: A Reference Guide* 16-18 (1991); Carleton, *Elitism Sustained: The Louisiana Constitution of 1974*, 54 Tul. L. Rev. 560, 561-65 (1980).

45. 1972 La. Acts No. 2. To a limited but still significant degree, the Louisiana Constitutional Convention of 1973-74 fulfilled the hopes of its advocates, greatly reducing the constitution's bulk and successfully excising a number of matters more appropriately left to legislative judgment. W. Hargrave, *supra* note 44, at 18-19; Carleton, *supra* note 44, at 571-77.

state constitution, including its rights provisions, were to be scrutinized. As revised and adopted, the Declaration of Rights of the new constitution retained, with relatively minor amendment, both the overall plan and many specific provisions from its 1921 predecessor. However, the drafters of the Declaration of Rights of the Louisiana constitution of 1974 did go beyond the prior charter to include several wholly new provisions⁴⁶ and a number of revisions to preexisting guarantees,⁴⁷ all of which significantly expanded the protections given to individual rights. Among these innovations was an amendment to the search and seizure provisions of the previous constitution, adding a new and explicit guarantee that "Every person shall be secure . . . against unreasonable invasions of privacy."⁴⁸

The 132 delegates to the Louisiana Constitutional Convention of 1973 initially convened in January 1973 for the purpose of electing officers, adopting rules of procedure and organizing themselves into eight committees, each of which was given responsibility for initially drafting one or more articles of the new constitution.⁴⁹ One of those

46. See, e.g., La. Const. art. I, § 3 (titled the "Right to Individual Dignity," guaranteeing equal protection of the laws); La. Const. art. I, § 10 (guaranteeing the right to vote); La. Const. art. I, § 12 (prohibiting private discrimination in facilities open to the public); La. Const. art. I, § 14 (guaranteeing the right to preliminary examination in felony cases not commenced by grand jury indictment); La. Const. art. I, § 16 (guaranteeing the presumption of innocence); La. Const. art. I, § 19 (guaranteeing judicial review upon a record). See generally Hargrave, *supra* note 22, at 6-10, 31-35, 37-40, 48-53, 60-62.

47. See, e.g., La. Const. art. I, § 4 (private property); La. Const. art. I, § 21 (the writ of habeas corpus). See generally, Hargrave, *supra* note 22, at 14-20, 65.

48. As finally adopted, La. Const. art. I, § 5 provides in full as follows:

Right to Privacy

Section 5. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

49. The Louisiana courts have frequently taken judicial notice that the Louisiana Constitutional Convention of 1973 did its work by committees, and that the expressed intentions and deliberations of those drafting committees can shed important light on how the constitution should be interpreted. See, e.g., *Sibley v. Bd. of Sup'rs*, 477 So. 2d 1094, 1108 (La. 1985) (relying on statements by drafting committee spokesman to the full convention to elucidate the intended meaning of La. Const. art. I, § 3); *State v. Reeves*, 427 So. 2d 403, 405-406 (La. 1982) (considering the drafts and debates of the Committee on Bill of Rights and Elections to interpret La. Const. art. I, § 5); *South Cent. Bell Tel. Co. v. Louisiana, etc.*, 412 So. 2d 1069, 1072 (La. 1982) (relying on statements of drafting committee spokesman regarding La. Const. art. IV, § 21(B)); *State v. Culotta*, 343 So. 2d 977, 981-82 (La. 1977) (relying on report of the Committee on Bill of Rights and

committees, the Committee on Bill of Rights and Elections, was charged with the responsibility to "consider the Preamble, Bill of Rights, Human Rights, Obligations of Citizenship, distribution of powers, suffrage and elections, the amendment process, and future constitutional conventions."⁵⁰ On January 31, 1973, the full convention adjourned *sine die* so that its various committees could hear witnesses, debate proposed language, and draft proposals for their respective portions of the new constitution.

Though no verbatim transcripts of the deliberations of the various drafting committees were preserved, there is evidence that the Committee on Bill of Rights and Elections was aware of the significance and possible ramifications of including an express guarantee of privacy in the state constitution. Given the time period when the committee met—during the months immediately following the United States Supreme Court's controversial and well publicized decisions in *Roe* and *Doe* which held that the federal constitutional right of "privacy" included a limited right to an abortion—it seems scarcely possible that the committee members could have failed to appreciate the potential import of a state constitutional right of "privacy."⁵¹ This conclusion does not, however, rest on inference alone. There is also evidence that these issues were explicitly presented. Witnesses before the committee specifically recommended that the new Declaration of Rights include an explicit guarantee of privacy that would go beyond the traditional prohibition of unreasonable searches and seizures already embodied in the federal fourth amendment and the

Elections to the Convention regarding the meaning of La. Const. art. I, § 5). See also *Jones v. LaBarbera*, 342 So. 2d 1125, 1128 (La. App. 2d Cir. 1977), taking judicial notice that the work of the convention was accomplished by separate committees, and for that reason refusing to place determinative weight on a slight difference of language between two sections drafted by different committees.

50. 1 Official Journal of the Proceedings of the Constitutional Convention of 1973 of the State of Louisiana [hereinafter "Official Journal"], 4th Days Proceedings, 31 (January 16, 1973). Delegates were allowed to choose the drafting committee on which they would serve. The ten members of the Committee on Bill of Rights and Elections were delegates Judy Dunlap, Anthony Guarisco, Alphonse Jackson, Louis (Woody) Jenkins, Chris Roy, Mrs. Novyse Soniat, Ford Stinson, Kendall Vick, Shady Wall & Dr. Gerald Weiss. Id., 8th Days Proceedings at 61 (January 30, 1973). The members of the Committee on Bill of Rights and Elections elected delegate Alphonse Jackson as Chairman of the Committee. Id., 9th Days Proceedings at 66 (January 31, 1973).

51. The decisions of the United States Supreme Court in *Roe* and *Doe* were, not surprisingly, well reported by Louisiana newspapers. See, e.g., *Baton Rouge Morning Advocate*, January 23, 1973, at 1, col. 1, noting explicitly that the *Roe* decision could "nix" the Louisiana anti-abortion laws. In 1973, the issue of abortion rights was a matter of widespread public debate, and public support for an expanded right of abortion was growing. By January 1973, polls indicated that the Louisiana public was evenly divided on the question of legalizing abortion. *Baton Rouge Sunday Advocate*, January 28, 1973, at B3, col. 1.

Louisiana Constitution of 1921.⁵² The background materials prepared for the committee by the convention's research staff included copies of rights declarations of several states, nations and international organizations, many of which—including the rights provisions then recently incorporated into the Montana,⁵³ Illinois⁵⁴ and Hawaii⁵⁵ state constitu-

52. X Records of the Louisiana Constitutional Convention of 1973: Committee Documents [hereinafter "Records: Committee Documents"] 7, April 7, 1973, recording the testimony of Dr. Francine Merritt, representing Common Cause and the American Association of University Women, in favor of several proposals for inclusion in the new Declaration of Rights, including the following:

"The Right To Privacy"

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

See also, *id.*, recording the testimony of Ms. Debra Millenson, representing the Council for a New State Constitution, in favor of, among other things, "a strong right to privacy."

53. Constitutional Convention of the State of Louisiana of 1973—Documents Supplied to the Committee on Bill of Rights and Elections Committee [hereinafter "Committee Document"] No. 10, "Additional Rights Articles in Proposed, Adopted and Rejected State Constitutions Arranged in Reverse Chronological Order," presented March 30, 1973. The relevant provision of the Montana Constitution provides as follows:

Section 10. Right of Privacy

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const. art. II, § 10, ratified June 6, 1972.

54. Committee Document No. 1, "Background Materials for the Committee on Bill of Rights and Elections," presented March 16, 1973. The relevant provision of the Illinois Constitution provides as follows:

Section 6. Searches, Seizures, Privacy and Interceptions

The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Ill. Const. art. I, § 6, ratified December 15, 1970 (emphasis added).

55. Committee Document No. 10, *supra* note 53. The relevant provision of the Hawaii Constitution provides as follows:

Searches, Seizures and Invasions of Privacy

Section 7. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and *invasions of privacy* shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Haw. Const. art. I, § 7; amended by constitutional convention of 1968 and ratified November 5, 1968 to add "privacy" language (emphasis added).

In addition to the three state constitutional privacy guarantees presented to the committee, three other states also had, by 1973, adopted state constitutional guarantees of privacy. Alaska Const. art. I, § 22; Cal. Const. art. I, § 1 (amended to add "privacy" language in 1972, rewritten into present form in 1974); S.C. Const. art. I, § 10. See generally Devlin, *supra* note 4, at 210-17 (1990).

tions, the Universal Declaration of Human Rights,⁵⁶ the European Declaration on Human Rights,⁵⁷ and the American Convention on Human Rights⁵⁸—provided, in one form or another, for a guarantee of individual “privacy.” Although the Montana, Hawaii and Illinois provisions had not, as of 1973, been authoritatively interpreted to protect autonomy rights, it has since been made clear that the latter two at least were intended to do so.⁵⁹ In any event, the language of these various pro-

56. Committee Document No. 7, “The Bill of Rights and Human Rights: Representative International Documents,” presented March 17, 1973. The Universal Declaration of Human Rights was adopted by the United Nations in 1948. It reads, in relevant part, as follows:

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to any attacks upon his honor and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

2 United Nations Resolutions, Series I, General Assembly 1948-49, 137-38 (1973).

57. Committee Document No. 7, *supra* note 56. The European Convention on Human Rights was adopted by the Council of Europe and entered into force in 1953. It reads, in relevant part, as follows:

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others.

European Convention on Human Rights: Collected Texts 5 (7th ed. 1971).

58. Committee Document No. 7, *supra* note 56. The American Convention on Human Rights was adopted under the auspices of the Organization of American States. It was drafted in 1969, but had not yet, as of 1973, entered into force. It reads, in relevant part, as follows:

Article 11. *Right to Privacy*

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

59. The drafting history of the Montana privacy provision indicates that it was intended to incorporate some *Griswold*-type autonomy privacy provisions. See Elison & Nettik Simmons, *Right of Privacy*, 48 Mont. L. Rev. 1, 13 n.83 (1987). However, the courts of that state have not yet had occasion to interpret that provision to do so.

In Illinois, in contrast, the state constitutional privacy provision was initially and for many years interpreted narrowly, as protecting only traditional rights against unreasonable searches and seizures. See, e.g., *People v. Tisler*, 103 Ill. 2d 226, 242, 469 N.E.2d 147, 155-56 (1984) (Illinois privacy amendment “does no more than specifically provide for

visions, which is all that the drafting committee had before it, could well have been understood to embrace a broad definition of the right of privacy. The international model provisions, in particular, make reference to and were apparently intended to protect, among other things, privacy in the family and personal autonomy sense of that term.

The specific drafting history of section 5 also indicates that the crucial language was intended by the committee to incorporate a broad range of privacy interests, including autonomy rights in the *Griswold* sense. In April 1973, the committee began to consider specific proposals and language. Several delegates had prepared individual drafts for a declaration of rights which were, together with a draft drawn from the earlier Project,⁶⁰ collated and presented to the committee as a single

fourth amendment protection with regard to eavesdropping and invasion of privacy'); Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974) (relying on the placement of the privacy guarantee within the general search and seizure provision to narrow its application). However, recent decisions of the Illinois courts show that the privacy guarantee is presently construed to apply to a significant number of autonomy interests. Family Life League v. Dep't of Pub. Aid, 112 Ill. 2d 449, 454, 493 N.E.2d 1054, 1057 (1986) (announcing that state provision incorporates rights of the type recognized in *Griswold* and *Roe*). As the Illinois courts and commentators have come to realize, the drafting history of that provision does indicate that the crucial language was originally intended to incorporate some protection for interests in personal autonomy as well as for other sorts of privacy rights. Note, Privacy Rights in State Constitutions: Models For Illinois, 1989 U. Ill. L. Rev. 215, 275 (1989); Comment, Does the Illinois Cannabis Control Act Violate the Right to Privacy Enunciated in the Illinois Constitution?, 9 J. Marshall J. of Prac. & Proc. 280, 290 (1975).

In Hawaii, the first attempt to protect rights of autonomy privacy under the state constitution, the 1968 amendment cited at *supra* note 55, was narrowly construed. The state courts rejected claims that that provision protected privacy rights. See, e.g., State v. Rocker, 52 Haw. 336, 475 P.2d 684 (1970) (nude sunbathing). In Hawaii, however, the constitutional framers and the people reacted directly, without waiting for the state courts to reverse their initial narrow interpretation. In direct response to the narrow construction given the privacy guarantee of the 1968 constitution, Hawaii's 1978 constitutional convention proposed and the voters ratified a second, freestanding state constitutional guarantee of privacy. Haw. Const. art. I, § 6. This time, the framers made clear their intention to protect "autonomy" rights, as those had been defined in federal caselaw. State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983) (quoting the Report of the Convention sitting as a committee of the whole, adopting the committee report as the consensus of the assembly, Comm. Whole Rep. No. 15, Proceedings of the Constitutional Convention of Hawaii of 1978, Vol. I at 1024). The Hawaii courts have since then respected that intention, interpreting section 6 to protect a wide variety of autonomy privacy interests. State v. Kam, 748 P.2d 372, 377-80 (1988) (finding state constitutional protection for in-home possession of pornography); State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983) (noting that state constitution protects autonomy rights, but rejecting a claim that it extends to discreet commercial sex). See generally, Note, *supra* note 59, at 241-44.

60. Louisiana Law Institute, The Project of a Constitution for the State of Louisiana (1950).

working document.⁶¹ One of the proposed drafts for the Declaration of Rights that the committee considered and debated, the draft prepared by delegate and committee member Dr. Gerald Weiss, included a free-standing guarantee of privacy that clearly would have included a right of privacy in the "autonomy" sense of *Griswold* and its progeny.⁶² Other drafts and proposals considered by the committee did not refer to privacy at all.⁶³ The available records of the committee do not indicate whether its members explicitly discussed the substantive scope of the state guarantee of privacy, or whether it would include abortion rights of the sort recognized in *Roe*. Nevertheless, it does appear that the language finally adopted by the committee was intended to be a compromise between the competing drafts by Dr. Weiss and others, incorporating the substance of the broader Weiss proposal without the need for a separate section.⁶⁴

61. Committee Document No. 23, reproduced in X Records: Committee Documents, *supra* note 52, at 97-107.

62. *Id.* at 100-01. Section 5 of proposed draft of delegate Weiss would have provided as follows:

§ 5. *Right to Privacy*

(A) Everyone has the right to privacy. No law shall authorize arbitrary or abusive interference with one's private life, family, home or communications.

(B) No warrant shall be issued without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

63. *Id.*, reproducing the draft "search and seizure" articles drawn from the Projet, and from the proposed drafts prepared by delegates Jenkins and Roy.

64. X Records: Committee Documents, *supra* note 52, at 10, 54-55, Minutes of the meeting of the Committee on Bill of Rights and Elections [hereinafter "Minutes"] of April 17, 1990. As initially adopted by the committee, the provision read as follows:

Section _____. *Searches and Seizures*

Every person shall be secure in his person, houses, papers, and other possessions against unreasonable searches, seizures, or *invasions of privacy*. No warrant shall issue without probable cause, supported by oath or affirmation particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise the illegality of that search or seizure in the appropriate court of law. No law shall permit the interception or inspection of any private communication or message. (emphasis added.)

Committee Document No. 28, "Tentative Preamble and Sections of a Rights Article for the New Louisiana Constitution Adopted by the Committee on Bill of Rights and Elections of CC/73 as of April 17, 1973," *id.* at 55. The committee later modified this guarantee in accord with staff suggestions. Committee Document No. 45, "Analysis of Second Draft Proposal on the 'Declaration of Rights,'" reproduced at *id.* at 121-23; *id.* at 68, Minutes of June 14, 1973.

The only source of the "privacy" language proposed to the committee on the day it met and initially drafted this provision was the draft of Dr. Weiss. Since the term was apparently drawn from his draft, it makes sense to conclude that it was intended to be

In July 1973, the Louisiana Constitutional Convention reconvened in plenary session to consider the drafts prepared by its various committees.⁶⁵ In late August, the convention took up the proposed Declaration of Rights. On August 31 it debated and passed section 5, the privacy guarantee.⁶⁶ Although comments made a few days later on another subject indicate that the delegates were aware of the substance of the then recent decisions in *Roe* and *Doe*,⁶⁷ the plenary debate on section 5 focused almost exclusively on the last sentence of the proposed guarantee, which would grant standing to raise the illegality of a search to any person adversely affected thereby.⁶⁸ There was little discussion

understood in the same way as it was intended to have been understood in his draft. The actual form of the compromise language for the search and seizure (privacy) guarantee adopted by the committee was quite similar to and may have been modeled after like guarantees in the Illinois and Hawaii constitutions. See *supra* notes 54 and 55.

65. The proposals of the Committee on Bill of Rights and Elections regarding a state Declaration of Rights were presented to the full convention as Committee Proposal No. 2. 1 Official Journal, *supra* note 50, at 85-88, 11th Days Proceedings, July 6, 1973. The official "Comment" to section 5 made no mention of the right "privacy" in its autonomy sense:

Comment: The 1921 provisions have been changed to stress that communications and property are included in the right to privacy. A search warrant is to include the lawful purpose or reason for the search. In addition, persons protected against illegal searches and seizures include not only the person whose house or property has been illegally searched but also any other person adversely affected by the illegal search.

Id. at 86. Later, after further amendment, the committee presented a substitute which was read and submitted as Committee Proposal No. 25. The substitute was adopted and ordered engrossed and passed to its third reading. 1 Official Journal, *supra* note 50, at 357-58, 34th Days Proceedings, August 22, 1973.

66. 1 Official Journal, *supra* note 50, at 420-21, 40th Days Proceedings, August 31, 1973. As introduced and passed, the proposal read as follows:

Section 5. Every person shall be secure in his person, property, communications, houses, papers and effects against unreasonable searches, seizures or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise the illegality of this search or seizure in the appropriate court of law.

67. Brief references to abortion were made during the later debate on section 20 of the proposed Declaration of Rights, which would preclude euthanasia as well as "cruel, unusual or excessive punishments." Some of the comments made reference to the "law" that a six month old fetus is considered viable and a legal "person." These comments appear to be a slightly garbled reference to the trimester analysis of *Roe*. VII Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, 1190-92 (1977) [hereinafter "Records: Convention Transcripts"], 44th Days Proceedings, September 8, 1973, especially the comments of delegates Fontenot, Roy, Lanier & Jenkins.

68. VI Records: Convention Transcripts, *supra* note 67, at 1072-77, 34th Days Proceedings, April 7, 1973. The specific issues raised in the debate included whether this

of the substantive scope of the express guarantee of "privacy" and no discussion at all concerning autonomy rights in general, or of abortion rights in particular.⁶⁹

After final technical amendment by the Committee on Style and Drafting,⁷⁰ the proposed constitution—including the privacy guarantee of section 5—was finally passed by the convention and presented to the voters for ratification. The issues of whether the state constitution did or should provide expanded privacy rights and, if so, how those rights would be defined, apparently played no part in the ratification debate. Neither contemporary newspaper accounts and editorials⁷¹ nor voter materials prepared and distributed by such organizations as the Public Affairs Research Council,⁷² made any reference to abortion rights what-

sentence would grant a private right of action against officers, whether it would apply to private infringers, and whether it would hamper law enforcement. A motion to delete the last sentence was defeated by the convention. *Id.* at 1077.

69. *Id.* at 1072-77. The only comment that appears to have touched on these issues was that of delegate Vick, introducing this section on behalf of the committee. He described the overall purpose of the guarantee in broad terms which could be interpreted as referring to, among other things, autonomy rights of the sort recognized by the federal Supreme Court in *Griswold* and *Roe*:

[O]ne of the geniuses responsible for our Federal Constitution and the Bill of Rights said that "there is a circle around every individual human being which no government ought to be permitted to overstep, that there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritarian intrusion."

Id. at 1072. The same delegate described the proposed new privacy section as being "very very similar to" both the federal Fourth Amendment and the search and seizure provisions of the Louisiana Constitution of 1921. Nevertheless, the comments made in debate do show that the convention understood that the state privacy guarantee would grant rights beyond those provided by the federal Constitution. See, e.g., colloquy of delegates Lanier and Vick, *id.* at 1073.

70. II Official Journal, *supra* note 50, at 1155 (1973), 114th Days Proceedings, January 10, 1974. These stylistic amendments put section into its final form, as quoted at *supra* note 48. They were not intended to make any substantive change and were adopted by the convention without objection. IX Records: Convention Transcripts, *supra* note 67, at 3552, 114th Days Proceedings, January 10, 1974.

71. Review of the New Orleans Times-Picayune, the Baton Rouge Morning Advocate and State-Times and the Shreveport Times during the period of the ratification campaign for the new constitution, i.e. from January 20, 1974 through April 20, 1974, reveals no article, editorial or letter to the editor either attacking or defending the proposed constitution based upon the protection or lack of protection which it would extend to autonomy rights in general or abortion rights in particular.

72. The explanatory materials available to voters generally praised the proposed new constitution for having expanded the generally heightened protection for individual rights contained in its Declaration of Rights, noting that in many respects those protections should and did go beyond the protections available under the federal Bill of Rights. See, e.g., Public Affairs Research Council, *Philosophies in the Proposed Constitution* 11-12

soever. Relatively few voters chose to vote on the proposed charter and only a slim majority of those who voted cast their ballots in its favor.⁷³ Nevertheless, the new constitution was duly ratified and entered into force as of midnight, December 31, 1974.⁷⁴

C. Interpreting the Guarantee: Constitutional Privacy in the Louisiana Courts

Since 1974, Louisiana courts have interpreted the "privacy" guarantee of section 5 of the state constitution to incorporate and protect a wide range of individual interests. By far the most common use that has been made of this provision has been in the area of search and seizure rights, where it has been interpreted to grant protections against arbitrary arrest and against unreasonable searches and seizures that are similar to, but that go beyond, the protections offered by the Fourth Amendment to the federal Constitution.⁷⁵ In two less common, but no less important, series of cases, courts have also relied on section 5 as a textual source for vindicating rights against invasion of privacy in the tort senses of the term,⁷⁶ and for protection against unreasonable compilation or disclosure of information about individuals.⁷⁷

(1974).

To the extent to which such materials made reference to the privacy guarantee of the proposed constitution at all, they referred only to interests in "informational" privacy and to the heightened protection it would provide against illegal searches and seizures. See, e.g., Public Affairs Research Council, PAR's Voter's Guide to the 1974 Proposed Constitution 3 (1974) explaining the "highlights" of the proposed Declaration of Rights. The comment on the privacy guarantee, quoted in full, stated only that the proposal would, "[m]odify present restrictions on illegal searches and seizures to include communications, and provide that any person adversely affected by an illegal search or seizure would have standing to raise the illegality of the search in court."

73. On the relative apathy of the voters toward the Louisiana Constitution of 1974, see generally Public Affairs Research Council, Special Election on the Constitution—April 20, 1974 (1974), reprinted in condensed form in Readings in Louisiana Politics 508 (M. Carleton, P. Howard & J. Parker, eds. 1975); Carleton, *The Louisiana Constitution of 1974, in Louisiana Politics: Festival in a Labyrinth* 15 (J. Bolner, ed. 1982).

74. La. Const. art. XIV, § 35.

75. See, e.g., *State v. Church*, 538 So. 2d 993 (La. 1989) (holding that DWI roadblocks, though permissible under the search and seizure provisions of the federal fourth amendment, nonetheless violate the more stringent requirements of the state constitutional guarantee of privacy, La. Const. art. I, § 5); *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982) (and cases cited, treating federal precedent as persuasive, but holding warrantless search violative of the more stringent requirements of the state constitution's affirmative guarantee of privacy); *State v. Kinneman*, 337 So. 2d 441 (La. 1976) (same).

76. As is noted at *supra* note 20, the Louisiana law of privacy in its sense as a private tort predated enactment of section 5, and is rooted primarily in Civil Code art. 2315. Since 1974, however, courts have also looked to section 5 as additional textual support for the proposition that invasion of privacy constitutes an actionable tort in this

Though reference was occasionally made to state constitutional rights of privacy in the autonomy sense,⁷⁸ Louisiana courts had, until recently, no occasion to consider whether the state constitutional guarantee also protected rights of that type. Finally, however, in last term's decision in *Hondroulis v. Schuhmacher*,⁷⁹ the Louisiana Supreme Court squarely held that the state constitutional right of privacy also incorporates and independently protects autonomy-type privacy rights from unreasonable legislative interference. In *Hondroulis*, the court explicitly recognized that the federal constitutional "right of personal privacy includes 'the interest in independence in making certain decisions,'"⁸⁰ including, though not limited to, "personal decisions 'relating to marriage, procreation, contraception, family relationships and child rearing and education.'"⁸¹ The court further interpreted the privacy guarantee of article 1, section 5 of the Louisiana Constitution of 1974 as having been "intended to establish an affirmative right to privacy impacting non-criminal areas of law and establishing the principles of [those federal] Supreme Court decisions in explicit statement instead of depending on analogical development."⁸² On the merits of the specific case before it, the *Hondroulis* court noted that several other states have interpreted the decision to obtain or reject medical treatment as falling within the express or implied guarantees of autonomy privacy of their respective state constitutions, and concluded that section 5 should likewise be read to include and protect such rights.⁸³

state. See, e.g., *Easter Seal Soc'y v. Playboy Enterprises*, 530 So. 2d 643, 647 (La. App. 4th Cir. 1988); *Parish Nat'l Bank v. Lane*, 397 So. 2d 1282, 1286 (La. 1981); *Roshto v. Hebert*, 439 So. 2d 428, 430 (La. 1983); *Jaubert v. Crowley Post-Signal, Inc.*, 375 So. 2d 1386, 1387-89 n.2 (La. 1979).

77. See, e.g., *Trahan v. Larivee*, 365 So. 2d 294, 300 (La. App. 3d Cir. 1979).

78. See, e.g., *Arsenaux v. Arsenaux*, 428 So. 2d 427 (La. 1983), indicating that rights of autonomy privacy incorporated within section 5 provided additional support for its holding that testimony regarding a wife's abortion fell within the physician-patient privilege and was inadmissible.

79. 546 So. 2d 466, 475-77 (La. 1989), holding that, in order to avoid conflict with the state constitutional right of patients to choose to reject or obtain medical treatment freely, without undue government interference, consent forms signed pursuant to La.R.S.40:1299.40 could not be interpreted to create an irrebuttable presumption of informed consent. The case is noted and the non-constitutional aspects of the decision are discussed at Note, *Hondroulis v. Schuhmacher*: The Crusade Back to Canterbury, 50 La. L. Rev. 1195 (1990). See generally Devlin, *Developments in the Law—Louisiana Constitutional Law*, 51 La. L. Rev. 295, 297-304 (1990).

80. *Hondroulis v. Schuhmacher*, 546 So. 2d 466, 472 (La. 1989) (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869, 876 (1977)).

81. *Id.* at 472 (quoting *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S. Ct. 705, 726 (1974) (citations omitted)).

82. *Id.* at 473.

83. *Id.* at 472-74.

Though some objections could be raised,⁸⁴ the basic point made by the Louisiana Supreme Court in *Hondroulis*—that section 5 should be interpreted to incorporate and protect autonomy rights as well as other types of privacy interests—is well founded. As noted above, the drafting history of the privacy guarantee of the state constitution supports such a reading.⁸⁵ Moreover, while the bulk of section 5 relates primarily to the criminal procedural aspects of search and seizure, the placement of this whole section in the first part of the Declaration of Rights, apart from the other criminal procedural guarantees, further indicates the framers' intentions to extend its protections to such non-criminal areas of privacy law.⁸⁶ Secondary sources contemporaneous with the drafting of the 1974 constitution also stressed that the state privacy guarantee was intended by its drafters to be interpreted broadly in order to protect a wide range of individual interests in disclosural and autonomy privacy.⁸⁷

Finally, the court's result in *Hondroulis* can be defended on the basis of standard methods of objective analysis of the state constitutional text and, in particular, the meaning of the word "privacy." The Louisiana Supreme Court has, like other courts, often resolved difficult issues of state constitutional interpretation by treating the crucial language in the document as "a term of art or technical term" which must be "interpreted according to its received meaning and acceptance with those

84. One potentially troubling objection could be based upon the similarity in language between section 5 of the Louisiana constitution and the parallel privacy provisions of the Hawaii and Illinois constitutions, parallel provisions that were not understood, in 1974, as applying to autonomy privacy interests. See *supra* note 59. However, while the texts of the Hawaii and Illinois privacy guarantees were presented to the Louisiana Committee on Bill of Rights and Elections, there is no indication in the record that that committee ever received any information regarding how they had been interpreted on this point. There is thus no reason to conclude that the decision of the Louisiana drafting committee to write its privacy provision in a form similar to that the Hawaii and Illinois constitutions reflects any decision to incorporate the narrow constructions which those provisions received at that time. On the contrary, there is every reason to conclude, as did the court in *Hondroulis*, that the Louisiana framers' understanding of the concept of constitutional "privacy" was based instead on the much more widely publicized federal cases defining that term to include autonomy rights in the *Griswold* sense.

85. See *supra* text accompanying notes 51-69.

86. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 21 (1974).

87. *Id.*, at 20-21, explaining the purpose of section 5 as "accelerating the tentative steps of *Griswold*" and tracing the origin of its "invasions of privacy" language to "*Griswold*'s establishment of a right of privacy and to fear of unrestrained gathering and dissemination of information on individuals through use of computer data banks." See also, Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9, 28 (1975), explaining the same language as "intended to give the courts wide latitude in invalidating state laws and actions," particularly those that would violate individual desires to refuse to disclose information about themselves.

learned in the field. . . ."⁸⁸ By 1973, "privacy" had certainly become a "term of art" in the field of constitutional law, thus providing the premise for this cannon of construction. Though I have elsewhere criticized the Louisiana courts' use of this doctrine as a mechanical approach to constitutional interpretation in cases where the drafters were in fact unlikely to have been consciously aware of the supposed "technical" meaning of their words,⁸⁹ the argument certainly has validity in situations such as this, where the timing and notoriety of the decisions defining the relevant term make it much more likely that the drafters of the state constitution understood the import of the language they chose.

Nonetheless, while the conclusion that section 5 was intended to protect some sort of autonomy rights appears strong, the fact remains that no Louisiana court to date has squarely held that this provision has any relevance to the issue of abortion. Determining whether the protections embodied in article I, section 5 extends to the abortion issue requires further analysis.

II. INTERPRETING THE LOUISIANA CONSTITUTIONAL RIGHT OF "PRIVACY": SHOULD IT BE INTERPRETED TO PROTECT ABORTION RIGHTS AT ALL?

Assume that the Louisiana legislature passes, and the governor signs, a statute criminalizing abortions except in narrow circumstances. Such a bill would clearly limit a woman's ability to obtain an abortion in this state in a manner violative of the federal constitutional rights announced in *Roe* and *Doe*.⁹⁰ Assume further that the statute is challenged in state court as violative of the state constitutional guarantee of autonomy privacy recognized in *Hondroulis*.⁹¹ The issue then will be

88. *State Bond Comm'n v. All Taxpayers, et al.*, 510 So. 2d 662, 665 (La. 1987) (citing La. Civ. Code art. 15).

89. Devlin, *Developments in the Law—Louisiana Constitutional Law, 1986-1987*, 48 La. L. Rev. 335, 348-54 (1987).

90. The possibility is not farfetched. During the summer of 1990, the Louisiana legislature passed several bills that would have forbidden all abortions except where necessary to save the life of the mother or, in a later version, in limited circumstances in cases of rape or incest. They were vetoed by the governor only because they did not, in his view, give victims of rape or incest sufficient real opportunity to exercise the rights the bill purported to grant. Abortion opponents plan to introduce similar bills in the coming term. Whatever the scope of the special privileges that the legislature and governor eventually agree to give rape and incest victims, it certainly appears that any such statute would derogate from the scope of the abortion rights granted federal constitutional protection in *Roe* and *Doe*.

91. As was briefly discussed at *supra* note 4, several federal Supreme Court justices are on record as opposed to the principles or analysis of *Roe*. With the ascension of Justice Souter it is possible, though by no means certain, that *Roe* will be overturned or substantially modified on the federal level, leaving state constitutions as the only grounds

whether that state right should extend to independently protect rights of the type originally recognized in *Roe* and *Doe*—rights of pregnant women to choose, without undue state interference, whether to end their pregnancies through abortion. For the reasons set forth below, the argument in favor of such an interpretation is strong. Nonetheless, in light of the lack of evidence that the bulk of the convention delegates or the ratifiers understood that the state constitution incorporated independent protection for such rights—indeed, considering the possibility that any overt discussion of such issues might have doomed the proposed constitution to rejection at the polls—acceptance of this interpretation will require analysis of the merits of competing approaches to state constitutional interpretation.

A. The Argument in Favor: Drafting History, Precedent and Terms of Art

In light of the circumstances outlined in Part I of this article, the arguments in favor of recognizing a state constitutional right to reproductive choice are both straightforward and well grounded. The drafting history of section 5, the few applicable Louisiana precedents, ordinary rules of interpretation of constitutional texts and the decisions of sister state courts facing similar issues, would all lead to a conclusion that the guarantee of privacy in the Louisiana constitution does incorporate and independently protect the right to choose an abortion, as that right was understood in 1974.

In the first place, such a result appears to be supported by the drafting history of the state constitution, which indicates that the Committee on Bill of Rights and Elections, at least, knew and intended that their compromise draft would incorporate a broad range of autonomy rights.⁹² Such a result would also be consistent with the sparse precedents interpreting the state constitutional guarantee of privacy. Louisiana courts have on several occasions reiterated that section 5 should be interpreted broadly to protect a broad range of citizens' interests in privacy.⁹³ More

on which such statutes may be challenged. In any event, even if *Roe* remains good law, the Louisiana Supreme Court might well choose, as it did in *Hondroulis*, to analyze such a statute under the state constitution instead of or in addition to analyzing it under the federal constitution. See generally Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980), urging state courts to analyze constitutional challenges first under their respective state constitutions.

92. See *supra* text accompanying notes 51-64.

93. See, e.g., *Moresi v. State of Louisiana, Dep't of Wildlife & Fisheries*, 567 So. 2d 1081 (La. 1990) (indicating that the protections of section 5 "go beyond limiting state action," and holding that a violation of section 5 may give rise to a private cause of action for damages); *Hondroulis v. Schuhmacher*, 546 So. 2d 466 (La. 1989); *State v. Church*, 538 So. 2d 993 (La. 1989) (holding that DWI roadblocks, though permissible

specifically, in its only statement touching on the subject of abortion, the Louisiana Supreme Court indicated in dictum eight years ago that section 5 probably does provide some protection for reproductive privacy.⁹⁴ And surely nothing in the language or reasoning of *Hondroulis* suggests that the state constitutional right of autonomy privacy recognized in that case should not extend to abortion rights as well. On the contrary, the Louisiana Supreme Court in *Hondroulis* relied heavily on and quoted extensively from *Roe v. Wade* to define the nature and scope of the right of privacy incorporated into the state constitution.⁹⁵ No apparent reason suggests that this reliance should stop short of including within the meaning of "privacy" the specific rights that were at stake in *Roe*.

Moreover, the textual argument that abortion rights should be included within the meaning of constitutional "privacy," as that technical term of art was understood in 1974, is much stronger than the parallel argument regarding the right to individual decision making regarding medical treatment impliedly accepted by the court in *Hondroulis*. As of 1974, when the state constitution was adopted, no case had yet squarely held that the decision to accept or reject medical treatment fell within the scope of constitutional autonomy privacy in the *Griswold* sense of that term.⁹⁶ In contrast, the decision of the United States Supreme Court in *Roe v. Wade*, explicitly recognizing that abortion rights *did* fall within the concept of constitutional privacy, was handed down on January 22,

under the search and seizure provisions of the federal Fourth Amendment, nonetheless violate the more stringent requirements of the state constitutional guarantee of privacy, La. Const. art. I, § 5; *State v. Wood*, 457 So. 2d 206 (La. App. 2d Cir. 1984) (art. I, § 5 goes beyond federal constitution); *State v. Hernandez*, 410 So. 2d 1381 (La. 1982) (same); *Trahan v. Larivee*, 365 So. 2d 294, 300 (La. App. 3d Cir. 1979) (disclosural rights).

94. *Arsenaux v. Arsenaux*, 428 So. 2d 427 (La. 1983), stating that the right of privacy guaranteed by section 5 provided additional support for its holding that testimony regarding a wife's abortion fell within the physician-patient privilege and was inadmissible in a divorce suit.

95. *Hondroulis v. Schuhmacher*, 546 So. 2d 466, 472-73 (La. 1989). The court's choice of *Roe* as its principal source for interpretation of the concept of "privacy" is fully in accord with the argument that the state constitution should be interpreted as that "term of art" was generally understood by lawyers and informed citizens in 1973 and 1974. At the time when the state constitution was being drafted and ratified, *Roe* was the most recent, and hence the most authoritative, case explaining the meaning of "privacy" in its federal constitutional sense. It would thus be the source that lawyers and laymen would then have looked to for definition of that term.

96. It appears that the first cases to find a constitutionally-based autonomy right to refuse medical treatment were decided in 1976. *Price v. Sheppard*, 307 Minn. 250, 257, 239 N.W.2d 905, 910 (1976) (relying on the federal Constitution only); *In re Quinlan*, 70 N.J.10, 39-42, 355 A.2d 647, 663-64, cert. denied, 429 U.S. 922, 197 S. Ct. 319 (1976) (relying on both federal and New Jersey state constitutions).

1973—while the convention was meeting in its first plenary session, months before the Committee on Bill of Rights and Elections drafted section 5, and several months before the convention reconvened in plenary session to debate and adopt that language. It is therefore reasonable to presume that the drafters of the Louisiana constitution were or should have been aware of *Roe* and of its holding that the right of “privacy” as defined under the federal Constitution included some protection for reproductive choice.⁹⁷ Thus, ordinary principles of constitutional interpretation provide ample grounds to regard the decision of the framers and ratifiers of the Louisiana Constitution to include “privacy” language in the state constitution as implicitly incorporating protection for reproductive rights, among others.

Such a reading of the state constitutional guarantee of privacy is also in accord with the reading given by courts in other states to similar privacy provisions in their own constitutions. For example, in its recent decision in *In Re T.W.*,⁹⁸ the Florida Supreme Court held that the express guarantee of privacy in the Florida constitution⁹⁹—a guarantee which, like Louisiana’s section 5, was derived from federal models and adopted after *Roe* was decided—did indeed include and independently protect women against undue state interference with a woman’s decision to obtain an abortion. As the concurring opinion of Chief Justice Ehrlich pointed out, because “the privacy provision was added to the Florida Constitution by amendment in 1980, well after the decision of the United States Supreme Court in *Roe v. Wade*,” it “can therefore be presumed that the public was aware that the right to an abortion was included

97. Moreover, as is discussed at *supra* note 67, there is at least indirect indication from the convention records that the members of the Louisiana Constitutional Convention of 1973 were indeed aware of at least the broad outlines of *Roe*.

98. 551 So. 2d 1186, 1190-96 (Fla. 1989), striking down a statute requiring parental consent to a minor’s abortion as violative of the state constitution’s express guarantee of privacy, even though such restrictions would probably pass muster if challenged under the federal constitution as interpreted in *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035 (1979). Though the plurality opinion noted the origin of state constitutional protection for abortion rights in federal law, it chose to address the issue solely under the express privacy guarantee of the Florida constitution. Construing that state guarantee, the plurality concluded that it does protect abortion rights, that those rights extend to minors, and that regulations purporting to limit minors’ abortion rights must be judged by a “strict scrutiny” standard. Applying the strict state standard to the regulation at issue, the court found that the state’s interests were not “compelling,” and that the means chosen to obtain those ends were not the least restrictive available; other mechanisms that provided greater procedural safeguards for minors’ privacy interests were available.

99. Fla. Const. art. I, § 23 provides, “Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” This new section was proposed as an amendment and ratified by the voters on November 4, 1980.

under the federal constitutional right of privacy and would therefore certainly be covered by the Florida privacy amendment."¹⁰⁰ Fidelity to that presumed understanding and intent thus required the court to hold that the state guarantee extends to those general classes of rights, such as the right to obtain an abortion, that were protected as a matter of federal law at the time the state constitution was amended.¹⁰¹ Similar results interpreting a state constitutional guarantee of abortion rights to include and independently protect abortion rights have also been reached by the highest courts of California¹⁰² and Massachusetts,¹⁰³ among others.

B. *The Argument Against: The Dog That Didn't Bark*

Such arguments in favor of construing the Louisiana constitution to provide independent protection for abortion rights may, however, be subject to significant objection. For there is absolutely no evidence—in the documents and minutes of the Committee on Bill of Rights and Elections, in the transcripts of the plenary debates of the full convention, in newspapers or in the other materials distributed to the voters during

100. *In re T.W.*, 551 So. 2d 1186, 1197 (Fla. Sup. Ct. 1989) (Ehrlich, C.J., concurring).

101. Justices Overton and Grimes, each of whom concurred in part and dissented in part, agreed with Chief Justice Ehrlich that the Florida privacy guarantee should be understood as codifying the principles of *Roe* into the state constitution, and that any future recession by the federal Supreme Court from those principles would not effect or diminish the protection to be given to abortion rights in Florida. *Id.* at 1201-02 (Overton, J., concurring in part and dissenting in part; Grimes, J., concurring in part and dissenting in part). However, both justices emphasized that when the state constitution was amended, the United States Supreme Court had decided not only *Roe v. Wade*, but also *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035 (1979), which indicated that parental consent requirements would be constitutional under the federal Constitution under some circumstances. Each argued that it was *that* understanding of abortion rights, *Roe* as modified and limited by *Bellotti*, that was effectively adopted by the voters of Florida when the state constitution was amended in 1980. Turning to the challenged statute, the justices concluded that it was, or could be construed to be, consistent with the principles of *Bellotti*. *In re T.W.*, 551 So. 2d at 1201-04.

Since the Louisiana constitution was enacted in the immediate aftermath of *Roe*, before any further decisions were rendered, similar problems do not arise in interpreting the Louisiana privacy guarantee.

102. See, e.g., *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. Sup. Ct. 1981) (holding that the express state constitutional right of autonomy privacy in Cal. Const. art. I, § 1, precluded the state from interfering with indigent women's decisions to abort by funding births while withholding funds for abortions); *American Academy of Pediatrics v. Van de Kamp*, 214 Cal. App. 3d 831, 263 Cal. Rptr. 46 (1989) (parental consent statute held unconstitutional).

103. *Moe v. Secretary of Admin.*, 382 Mass. 629, 417 N.E.2d 387, 397-404 (1981), like the California decision in *Myers*, holding that refusal of state authorities to fund abortions for indigent women violated the state constitution's penumbral guarantee of privacy. See also, *Doe v. Maher*, 40 Conn.Supp. 394, 515 A.2d 134, 146-57 (Conn. Super. Ct. 1986) (same).

the ratification campaign—of any recognition or explicit discussion by anyone of the possibility that section 5 might be construed to independently protect any rights to reproductive autonomy in general or to abortions in particular. While this lack of discussion can doubtless be explained to some extent on the basis of historical factors,¹⁰⁴ it is nonetheless difficult to conceive—if the framers did indeed intend to grant such rights, or if the ratifying public understood that the new constitution would do so—that such an emotional issue would have aroused no debate at all. Like the silence of Sherlock Holmes' dog that did not bark,¹⁰⁵ this lack of debate may speak volumes. The inescapable conclusion appears to be that the Louisiana Constitutional Convention as a body and the voters as a whole did not consider the question of whether the general right of privacy they adopted would provide independent protection of abortion rights, particularly in the then unforeseeable event that federal protection of such rights might weaken or cease in the future.¹⁰⁶ Indeed there is, if anything, some reason to suppose

104. Three possible historical reasons for such silence come to mind. First, proponents of the new constitution had every incentive to avoid divisive issues and would have tended to soft pedal such questions. Second, it appears that organized opposition to abortion rights had not by 1974 reached the pitch of intensity it achieved thereafter, thus further tending to mute debate. Finally, and I suspect most importantly, the tendency at the time was to see such issues of human rights as essentially "federal" issues governed by the United States Constitution and courts, to which the state constitution was simply not relevant. It was only after the mid 1970's that the "new federalism" revolution in state constitutional interpretation, which caused state constitutions once again to be regarded as primary guarantors of individual rights, gathered any significant following or popular recognition.

105. "Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

A. Conan Doyle, "Silver Blaze," in *I Sherlock Holmes: The Complete Novels and Stories*, 455, 472 (Bantam Classic ed. 1986). From the failure of the watchdog to bark, Holmes deduced that the person who stole the racehorse, "Silver Blaze," was no stranger to the dog, or to the missing horse.

106. An alternative approach to this problem of lack of discussion or conscious intent regarding abortion may be found through a kind of "agency" theory of constitutional drafting. Briefly, it could be argued that the Louisiana electorate delegated a significant portion of their constitution-making power to their elected delegates to the Constitutional Convention of 1973, reserving only their power to reject the work of their agents. According to ordinary principles of agency law, principals who ratify the acts of their agents are bound thereby, even if the principals are not consciously aware of all of the implications of the agents' acts. A similar argument could also be raised with respect to the convention's "sub-delegation" of primary drafting responsibility to the various committees into which the delegates resolved themselves. Like the electorate, the full convention reserved to itself the power to ratify the work of its agents, the committees, and could be considered bound by that ratification even if many members of the convention were not consciously

that if the people had been fully informed that the proposed state constitution would limit the ability of the legislature to outlaw abortions, it would not have passed.¹⁰⁷

The hard questions are therefore whether and, if so, how this lack of conscious understanding and intent on the part of the framers or ratifiers should modify the otherwise compelling argument that the state constitution's guarantee of privacy should be interpreted to incorporate and protect abortion rights. To be sure, one cannot claim that state constitutions generally only apply to those particular matters actually considered, debated or subjectively intended by its framers and ratifiers. Such a subjective view of "intent"—one that would apply constitutional prohibitions only in those circumstances that were specifically foreseen by the framers or ratifiers—has been repeatedly and correctly rejected by courts¹⁰⁸ and commentators.¹⁰⁹ Rather, the interpretive problem posed by the lack of demonstrable public understanding of the state constitutional guarantee of "privacy" results from our common constitutional theories of how and why constitutional guarantees limit the otherwise plenary power of a state legislature.

aware of the full implications of constitutional "privacy" in 1974.

For the reasons set forth below, the issue of interpretation of article I, section 5 need not depend on this kind of "agency" analysis; other arguments, including those drawn from the "interpretive intent" of the constitution's drafters, appear to be sufficient to justify interpreting the state constitution to protect at least some degree of abortion rights. However, it is worth noting that many aspects of the process which resulted in the 1974 constitution—particularly the election of most delegates from individual districts, provisions for drafting committees, and provisions for a ratification election, all of which were specifically provided for in the statute which called the convention—appear to support this interpretation.

107. As was noted at *supra* notes 73-74, the state constitution was opposed by many powerful groups within the state and was ratified by only a slim majority of the voters. It certainly seems likely that injection of additional controversial issues such as abortion into the debate might well have tipped the balance against ratification.

108. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 13, 105 S. Ct. 1694, 1702 (1985) (because of technological change, attempts to interpret the fourteenth amendment solely with respect to the practices of the time when it was adopted, "would be a mistaken literalism"); *United States v. Chadwick*, 433 U.S. 1, 9, 97 S. Ct. 2476, 2482 (1977) ("[T]he Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth").

109. See generally, T. Cooley, *supra* note 14, at 68-70; Simien, *It is a Constitution We Are Expounding*, 18 *Hastings Const. L.Q.* 67, 102-06 (1990) (and authorities cited). Even the most noted defenders of "strict interpretation" and fidelity to "framers' intent" reject this form of "subjective" originalism. See, e.g., R. Bork, *The Tempting of America*, 162-63 (1990); Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 694 (1976).

1. Ratifiers Intent and State Constitutional Interpretation

Approaches to constitutional interpretation must serve two related but analytically separable functions. First, as a matter of pure linguistics, any such theory must provide a workable approach to understanding the constitutional text and reasonably convincing justifications for resolving issues of interpretation of obscure passages—it must, in other words, provide a workable theory of the constitution's "meaning" as a pure text. Second, and perhaps more important, any interpretive model must provide theoretical justification for the limits that constitutional provisions impose on the choices that can be made by future legislative majorities or executive officers—it must, in other words, provide a workable theory of the constitution's "bindingness" as a political act. This latter function, though often overlooked or assumed, is also important. It is not enough for constitutional interpreters to argue why, as an academic matter, one understanding of an ambiguous phrase should be preferred to another. Rather, one must demonstrate why a particular interpretation of the text, however derived, should be considered binding upon political actors.

This latter function is not necessarily easy to achieve. It is a fundamental principle of constitutional law in Louisiana (as elsewhere) that the state legislature derives from the people and wields original sovereign powers. Thus, unlike the federal Congress, a state legislature is potentially omnipotent, and may do anything not forbidden by the state or federal constitutions.¹¹⁰ Although the power of a state constitution to impose substantive restraints upon the legislature is often taken as if it were self evident, that power in fact rests, according to standard theories, upon a prior presumption—a presumption that the original source of political power, the people themselves acting in a state of heightened political activity and awareness, chose in some meaningful sense to restrict the freedom of their otherwise omnipotent agents by placing

110. This point has been frequently reiterated by Louisiana courts. See, e.g., *Director of La. Recovery Dist. v. Taxpayers*, 529 So. 2d 384, 387 (La. 1988) (the state legislature wields original sovereign power and may thus do anything not expressly forbidden by the state (or federal) constitution); *Board of Comm'rs v. Dep't of Natural Resources*, 496 So. 2d 281, 286 (La. 1986) (same); *Aguillard v. Treen*, 440 So. 2d 704 (La. 1982) (same, and cases cited). This principle is of great antiquity and continues to be accepted by modern commentators as a first principle of state constitutional interpretation. See, e.g., T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 106-10 (4th ed. 1878); Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 178-79 (1983). The hard part, of course, lies in determining whether a particular constitutional provision does or does not apply to a particular legislative or executive action. See generally, Devlin, *Developments in the Law, 1986-87—Louisiana Constitutional Law*, 48 La. L. Rev. 335 (1987).

upon them the particular restraints embodied in a particular constitution.¹¹¹ Though such presumptions may be difficult to justify as a matter of historical fact, they remain the standard ground on which courts rely to justify their power to declare an act of the political arms of government invalid.

This then is the problem. Purely textual or inferential arguments about the derivation or technical meaning of words such as "privacy" may be quite compelling as theories of meaning. But it may be argued that in the context of state constitutional interpretation they may not, standing alone, be sufficient to provide a foundation for the courts' power to declare an act of the legislature trenching on abortion rights unconstitutional.¹¹² As was noted above, there is little historical reason to suppose that in 1974 the people of Louisiana had any conscious intent to bind their legislature regarding the abortion issue. It is therefore not obvious how a court can, except by resort to legal fiction, rely on that non-existent political act, standing alone, as authority to prevent the legislature from interfering with abortion rights. Some additional argument may be required to justify the courts' authority to enforce this correct but somewhat technical understanding of the state constitution's guarantee of "privacy" against the otherwise plenary power of the legislature to determine issues of public policy. For that, one must return to the Louisiana Constitutional Convention and ask how the drafters and ratifiers of the 1974 constitution intended that document to be interpreted.

2. *Original Interpretive Intent and the Louisiana Constitution*

As commentators on the federal constitution have pointed out, those who would be true to the original intentions of the framers of a

111. This point has been most frequently made with respect to the federal Constitution, see, e.g., Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1049 (1984), but applies to state constitutions as well.

112. An interesting and potentially meaningful contrast can be drawn in this regard between an interpretation of the section 5 which would disable the legislature from enacting strict anti-abortion regulations and other cases where the Louisiana Supreme Court has relied on close textual analysis and the "technical" meanings of words to interpret the state constitution. In cases such as *State Bond Comm'n v. All Taxpayers*, 510 So. 2d 662 (La. 1987) (construing the term "debt" in La. Const. art. VII, § 6) and *American Lung Ass'n v. State Mineral Bd.*, 507 So. 2d 184 (La. 1987) (construing the term "sold" in La. Const. art. IX, § 4), where the court has interpreted the state constitution by explicit or implicit resort to such extrinsic sources of definition and presumptions regarding the drafters' understanding of the nuances of the relevant terms, the result of the court's analysis has been to empower the legislature by narrowly construing a purported constitutional limitation on the legislature's power. It could be argued that such techniques are less appropriate when the result is to impose restraints on the legislature; that, in other words, proponents of restraints on the political bodies of the state must show some level of conscious understanding on the part of the framers and ratifiers that such restraints are in fact being imposed. But see *infra* text accompanying notes 113-22.

constitution must take into account not only the framers' understandings of particular substantive constitutional provisions; they must also consider and respect the framers' expectations regarding the methods by which that constitution would be interpreted in the future.¹¹³ Indeed, since it is clear that the drafters of the Louisiana constitution had certain expectations regarding how their words would be understood and interpreted by others, and that those expectations clearly did influence their choice of language,¹¹⁴ it is only by attempting to understand their original interpretive intent that we can hope to understand correctly how the state constitution should operate. Fortunately, while the issue of the original interpretive intent of the drafters of the federal Constitution is a matter of intense academic debate, the question of how the drafters of the Louisiana state constitution expected their handiwork to be interpreted is somewhat easier to answer.

Since *Marbury v. Madison*,¹¹⁵ it has been a standard tenet of American constitutional law, state and federal, that courts are the final arbiters

113. Again this point has been made most clearly by commentators on the federal Constitution. Compare, for example, Berger, "Original Intention" in Historical Perspective, 54 Geo. Wash. L. Rev. 296, 308-15 (1986) (arguing that the framers of the federal Constitution of 1787 intended that the document be interpreted according to their substantive "original intent"), with Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 902-13 (1985) (arguing that the framers and ratifiers of the Constitution intended that its substantive provisions be interpreted according to its text, without reference to extra-textual indicia of the framers' intentions). While the commentators disagree as to what the framers' original intent was, they do agree that the framers' interpretive intent—that is, their understanding of how future judges should approach the task of construing their words—should guide those future judges in their task.

114. It is certainly clear that the Committee on Bill of Rights and Elections was well aware of the fact that their work product would be construed by courts in the future, and acted accordingly. See, e.g., Committee Document No. 39, "Judicial Construction of the freedom of speech guarantee of the First Amendment to the United States Constitution," presented May 14, 1973 at p. 5 (discussing how certain language in the proposed state speech guarantee might be construed by courts and how the Committee might modify its language in order to make particular results more likely); Committee Document No. 44, "Comments to Proposed Sections" by Lee Hargrave, presented June 1, 1973 (discussing the use made by Louisiana courts of "interpretive comments" to the Civil Code and predicting how courts might use, or refuse to use, similar comments to the new constitution); Committee Document No. 46, "Comments and observations on the first working draft of the Declaration of Rights," presented June 7, 1973 at p. 2 (discussing possible judicial construction of draft language of Art. I, § 3).

It is equally clear that the full Convention also expected the courts to take an active role in interpreting the new constitution, and chose its language with one eye cocked to influence that future interpretation. See discussion at *infra* note 118.

115. 5 U.S. (1 Cranch) 137 (1803), establishing the principle that the United States Supreme Court possessed the authority to bindingly interpret the federal Constitution. Similar authority had previously been asserted by state courts to interpret state constitutions. See, e.g., Nelson, Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 120 U. Pa. L. Rev. 1166, 1167 (1972), and cases cited.

of what a constitution "means." It has become equally well understood that in fulfilling this function, courts may and do read certain constitutional terms broadly, as expressions of basic principles which should be applied not only to the particular issues and controversies with which the constitution's framers and ratifiers were familiar, but also to other similar issues with which they may not have been familiar or which they did not consider. Though justices and commentators differ as to whether such approaches are appropriate in particular instances, most agree that they should be used to some extent, in at least some cases.¹¹⁶ By 1973, the courts of Louisiana had embraced these principles and interpreted various provisions of the prior state constitution in ways that were true to its underlying principles but clearly beyond the specific conceptions of its framers.¹¹⁷

116. Even some of the best known proponents of strict "originalist" approaches to constitutional interpretation acknowledge that this form of judicial creativity can be appropriate, at least in some cases. See, e.g., Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 694 (1976) ("Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct").

117. Though Louisiana courts have not often articulated such principles overtly, many examples can be found where the courts did interpret various provisions of the Louisiana Constitution of 1921 as applying to particular circumstances which were almost certainly not consciously considered by the drafters or ratifiers of the 1921 constitution or its amendments. See, e.g., *Lewis v. State*, 244 La. 1039, 156 So. 2d 431 (1963) (construing article IV, § 2 of the 1921 Constitution, which prohibits transfer of mineral rights owned by the state, to apply to a warrant issued as replacement for a defective patent); *Public Housing Admin. v. Housing Auth. of Bogalusa*, 242 La. 519, 137 So. 2d 315 (1961) (construing article IV, § 12 of the Louisiana Constitution of 1921, which prohibited the state from engaging in private enterprise, applied to also prevent a state agency from purchasing insurance through a non-assessable policy issued by a mutual insurance company).

This doctrine was by 1974 equally established as a guiding principle of federal constitutional interpretation, and had been applied in cases with which the delegates to the Louisiana constitution were likely familiar. See, e.g., *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031 (1941), ruling certain Louisiana practices governing primary elections for representatives to the United States Congress unconstitutional. As the Court in *Classic* remarked:

But we are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, sec. 2. We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it

The records of the debates of the Louisiana Constitutional Convention show that the delegates, many of whom were attorneys, were well aware of this tradition of judicial interpretation of generally phrased constitutional provisions, and that they knew and intended that at least some provisions of the new Louisiana constitution should be construed by the Louisiana courts in just such a creative and expansive fashion.¹¹⁸

is one with which the framers were not familiar.

Classic, 313 U.S. at 315-16, 61 S. Ct. at 1038. It may be argued, in response, that since state constitutions can be far more easily amended than can the federal Constitution, there is correspondingly far less need to interpret state constitutional provisions broadly, in the *Classic* manner. However, as the cases noted above demonstrate, Louisiana courts have never refrained from applying the logic of state constitutional provisions to situations not contemplated by the framers. Moreover, the constitution of 1974 requires, if anything, a somewhat greater willingness to interpret its provisions not merely as commands directed to specific situations but as statements of general principle which courts may apply to novel situations. One aim of the drafters of the 1974 constitution was to reduce its bulk by, among other things, substituting general provisions for multiple detailed precursors. See L. Hargrave, *The Louisiana State Constitution: A Reference Guide* 17 (1991), comparing the 30,000 words of the 1974 constitution to the ultimate 250,000 words of its 1921 predecessor. If the state constitution is to provide an effective check on the political branches, the state courts will have to be willing to interpret the new constitution's general phrases fairly, as principles which can be applied to new situations.

118. The transcripts of the debates at the Louisiana Constitutional Convention of 1973 demonstrate that the delegates were well aware of the prevailing judicial precedents that future courts would rely upon in interpreting that constitution. The total number of such references are too many to reproduce, but a few examples may suffice to give the flavor. See, e.g., VI Records: Convention Transcripts, *supra* note 67, at 992, 37th day's proceedings, August 28, 1973 (comments of delegates Jenkins and Jackson, indicating that whatever the convention might wish, judicial precedents had already established that the constitution's preamble would not be construed as legally binding substantive law); *id.* at 1002, 38th day's proceedings, August 29, 1973 (comments of delegate Pugh that the specific language guaranteeing that due process be afforded *before* a deprivation was unnecessary in light of judicial precedents which had already established the point); *id.* at 1004, 38th day's proceedings, August 29, 1973 (comments of delegate Thistlethwaite that the phrase "just and adequate compensation" did not need explicit definition since it had already been well defined and tested by the courts); *id.* at 1020, 1027, 38th day's proceedings, August 29, 1973 (comments of delegates Burson, Pugh, and Lanier, referring to prior federal caselaw as providing the operative definition of phrases such as "equal protection" and "unreasonable discrimination"); *id.* at 1030, 1036, 39th day's proceedings, August 30, 1973 (remarks of delegate Jenkins, referring to the phrase "police power" as a legal "term of art" that would be construed by reference to judicial precedent). Where the delegates disagreed with prior judicial precedents, they adopted specific language intended to overturn those precedents. See, e.g., *id.* at 1003, 1011-12, 38th day's proceedings, August 29, 1973 (remarks of delegate Avant in favor of including specific language insuring that the question of whether a "taking" of property was for a "public purpose" would always be open to judicial determination, in order to overturn Louisiana precedents holding that the legislature could foreclose inquiry into this issue).

The transcripts make it equally clear that the delegates understood and intended that the state Bill of Rights would and should be interpreted expansively by Louisiana courts,

Those records are full of colloquies to the effect that various provisions of the state constitution would require significant judicial construction before their meanings would be clarified. Delegates several times made it clear that they did not know how certain proposed constitutional language would be applied by the courts to various hypothetical situations, but that they were willing to leave some questions of interpretation to future development by the courts.¹¹⁹ This understanding extended to article I, section 5. As to that provision too, it appears that the original intention of the drafters of the state constitution was not that the state courts would interpret the constitution in accordance with some pre-existing fixed understanding on the part of the delegates as to what they "intended," but rather that those courts would and should continue to employ the standard techniques of interpretation in order to supply a precise meaning that the drafters were unable to supply themselves.¹²⁰

to guarantee Louisianians protection of rights that would extend beyond the protections available under the federal Constitution. Again, a few examples will suffice. See, e.g., VI Records: Convention Transcripts, *supra* note 67, at 989-90, 994, 37th day's proceedings, August 28, 1973 (remarks of delegate Jackson); *id.* at 1000-01, 38th day's proceedings, August 29, 1973 (remarks of delegate Vick, explaining the intent of the Committee on Bill of Rights and Elections to include open ended and incompletely defined terms in the Bill of Rights in order to leave open the possibility of expansive interpretations in the future, interpretations that the delegates could not then foresee); *id.* at 1016-17, 38th day's proceedings, August 29, 1973 (remarks of delegate Roy, indicating the committee's intent to expand on restrictive federal interpretations of equal protection).

119. Again, a brief selection of passages should suffice to make the point. See, e.g., VI Records: Convention Transcripts, *supra* note 67, at 1000-01, 38th day's proceedings, August 29, 1973 (remarks of delegate Vick, particularly those reciting Judge Tate's advice that the framers not try to limit the state Bill of Rights to their present concerns but rather write it "for the future" as well); *id.* at 1004, 38th day's proceedings, August 29, 1973 (remarks of delegate Stagg, noting that "each word, each phrase, and yes, each clause" of the new constitution will be "subjected to interpretation by the courts"); *id.* at 1014, 38th day's proceedings, August 29, 1973 (remarks of delegate Roy, defending the drafting committee's original decision to include broad "other rights" language in the state "due process" guarantee as enabling future courts to define as "rights" some activities now considered mere "privileges"); *id.* at 1016-17, 38th day's proceedings, August 29, 1973 (remarks of delegate Roy, noting that courts would have to decide what sorts of distinctions were "reasonable," and thus not violations of the state equality guarantee, on a case-by-case basis); *id.* at 1020-21, 38th day's proceedings, August 29, 1973 (remarks of delegate Burson, noting that the federal courts had interpreted the federal equal protection guarantee in ways that went beyond the understandings of its framers, and advocating that the Louisiana constitution and courts should develop the meaning of the state equality guarantee in a similarly "organic" fashion).

120. The full convention debate on section 5 focused almost entirely upon its last sentence, which states that "any person" adversely affected will have standing to raise the issue of the illegality of a search. Nevertheless, the comments of the delegates regarding this section illustrate many of the same general themes and intentions—including that section 5 should be construed broadly, that federal precedents provided the background law against which the state Declaration would be defined; and that the section was

Moreover, while the understandings of the ratifiers are more difficult to establish, no evidence appears to suggest that their understandings were substantially different from those of the convention delegates.

For these reasons, the failure of the drafters and ratifiers of the state constitution to engage in any express debate regarding whether its guarantee of "privacy" would include abortion rights should not preclude the state courts from concluding that it does, or from declaring unconstitutional any state statute that derogates from the rights recognized in *Roe* and *Doe* in 1973. There can be no doubt that the framers of the state constitution possessed the power to limit the state legislature in any way they saw fit including, among other techniques, by adopting broadly worded provisions to which the courts would later give specific content.¹²¹ The interpretive techniques that courts had employed and would continue to employ in this endeavor, including the methods of textual interpretation outlined in part A of this section, were well established and known to the framers and ratifiers of the state constitution. So long as state courts continue to use these methods to interpret these broadly worded constitutional provisions, they will be doing what the framers intended, even if they might reach results that the framers themselves could not foresee.

In any event, alternative approaches that would restrict state constitutional rights guarantees to the particular application that the ratifiers had in mind at the time they acted would be unworkable. First, reliable

intended to liberalize pre-existing law—as characterized by the convention's discussion of the Declaration of Rights generally. See, e.g., VI Records: Convention Transcripts, *supra* note 67, at 1072, 40th day's proceedings, August 31, 1973 (remarks of delegate Vick, introducing the section by quoting Thomas Jefferson's assertion "that there is a circle around every human being which no government ought to be permitted to overstep, that there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritarian intrusion."); *id.* at 1073, 40th day's proceedings, August 31, 1973 (colloquy of delegates Lanier and Vick, indicating that section 5 was intended to adopt federal jurisprudence regarding the necessary specificity of warrants); *id.* at 1073, 40th day's proceedings, August 31, 1973 (colloquy of delegates Sandoz and Vick, that section 5 was intended to "insert some additional rights" beyond those guaranteed by the 1921 constitution); *id.* at 1075, 40th day's proceedings, August 31, 1973 (remarks of delegate Warren that the purpose of the convention was to rewrite the old constitution and "not stick to the old rules").

121. Although courts which rely on broadly worded constitutional provisions to overturn legislation are often accused of usurping legislative powers, the analysis proposed here, if accepted, would violate no doctrine of separation of powers. The people of Louisiana are the ultimate source of all governmental powers, which they can freely delegate to any branch or organ of government they see fit. If one accepts the argument that the drafters and ratifiers expected and intended that the state courts would interpret the broadly worded constitution of 1974 in accord with what were then well accepted techniques, and that those expectations were thus implicitly made part of that constitution, then exercise of those powers by the courts is no usurpation. On the contrary, courts which do so are merely doing their duty and exercising powers which the people delegated to them.

evidence of what precise applications the framers or ratifiers did or did not "intend" would be impossible to obtain. And even putting aside problems of proof, insuperable difficulties are posed by the probability that framers and ratifiers simply did not consider, and thus had *no* intentions regarding, most "hard questions" of constitutional interpretation. Arguments relying on the ratifiers specific intentions thus really amount to asking the hypothetical question of what the voters *would* have done in the counterfactual situation that they had been asked to decide the issue before the court. Such questions can never be answered by anything better than a guess, and thus can never provide a sufficient foundation for constitutional interpretation.¹²²

III. INTERPRETING THE LOUISIANA ABORTION RIGHT: QUESTIONS ANSWERED AND UNANSWERED IN *ROE* AND *DOE*

Assuming that the Louisiana courts were to conclude, for the reasons sketched in Part II above, that the state constitutional guarantee of privacy incorporates and protects some sort of abortion rights against legislative interference, questions would still remain as to how these state constitutional abortion rights should be defined. This question has several parts, three of which will be outlined briefly. First, courts will have to determine what specific degree or kinds of abortion rights were recognized in or can be fairly inferred from *Roe* and *Doe*, and can thus be deemed to have been incorporated into the state constitution when it was adopted in 1974. Second, Louisiana courts will have to decide whether the state constitution may be construed to include any abortion rights *beyond* those expressly or implicitly contained in *Roe* and *Doe*. Third, courts interpreting section 5 of the state Declaration of Rights will be required to determine whether and, if so, to what extent its interpretation of the state constitutional right of "privacy" should be affected by post-1974 federal decisions interpreting the implied federal rights of reproductive autonomy. The final question—that of how, in light of these points, the Louisiana courts should construe the state's guarantee with regard to issues left open in 1974—is beyond the scope of this article. Nevertheless, though each of these questions could well each be the subject of a separate article, a few preliminary thoughts on the first three issues may be usefully offered here.¹²³

122. It is interesting to note that, at the time when the state constitution was being drafted and ratified, Louisiana appeared to be more or less evenly divided on the question of whether abortions should be legalized. See, e.g., *Sunday Advocate*, Jan. 28, 1973, at B3, col. 1, reporting the results of a poll showing that 46% of those Louisianans polled in favor of legalization, 45% opposed, and 9% undecided.

123. On the general issue of the interpretation of state constitutional rights derived from federal sources, and the relevance of post-adoption federal precedent, see Devlin,

A. The Adopted Minimum: What Reproductive Rights Were Incorporated in 1974

The decisions of the United States Supreme Court in *Roe v. Wade* and *Doe v. Bolton* established certain basic principles regarding abortion rights which, according to the arguments sketched above, can be presumed to have been incorporated into the Louisiana Constitution's express guarantee of privacy. Neither *Roe* nor *Doe* purported to rule that any person enjoyed a general right to "abortion on demand," or that the state does not have legitimate interests which may justify certain restraints on how, when, and by whom abortions may be obtained.¹²⁴ However, those decisions did significantly limit the ability of states to restrict abortions by recognizing only the asserted state interests "in safeguarding health, in maintaining medical standards, and in protecting potential life"¹²⁵ as of sufficient legitimacy and importance to justify interference with a woman's decision whether to abort, and by holding that even these interests could be relied upon to limit abortions only at or after the point when they became "compelling."¹²⁶ This analysis necessarily places significant limits on the extent and nature of operative restraints which states can impose on a woman's choice to seek an abortion. First, while subsequent cases may have cast some doubt on the issue,¹²⁷ *Roe* is explicit in its holding that a state may not override a pregnant woman's rights in this area by the simple expedient of declaring an embryo to be a "person" endowed with full legal rights.¹²⁸ Moreover, while *Roe*'s "trimester" framework has been the subject of much criticism in its details,¹²⁹ *Roe* and *Doe* nonetheless made clear that the legitimacy of state imposed restrictions on abortions depend on both the stage of pregnancy and the medical realities operative at that stage.¹³⁰

State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived From Federal Sources, 3 Emerging Issues St. Const. Law 173 (1990), from which much of the material in parts "B" and "C" of this section are derived.

124. *Roe v. Wade*, 410 U.S. 113, 153-54, 93 S. Ct. 705, 727 (1973); *Doe v. Bolton*, 410 U.S. 179, 189, 93 S. Ct. 739, 746 (1973).

125. *Roe*, 410 U.S. at 154, 93 S. Ct. at 727.

126. *Id.* at 154-55, 163, 93 S. Ct. at 727-28, 731-32.

127. See, e.g., *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3049-50, (1989) (upholding Missouri abortion statute which in its preamble set forth "findings" that the "life of each human being begins at conception," and that "unborn children have protectable interests in life, health and well being"); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461, 103 S. Ct. 2481, 2508-09 (1983) (O'Connor, J., dissenting, arguing that the state's interest in protection of life is no less "compelling" in the first weeks of pregnancy than it is later, when the fetus becomes viable).

128. *Roe*, 410 U.S. at 162, 93 S. Ct. at 731.

129. See, e.g., *Webster*, 109 S. Ct. at 3056-57 (Rehnquist, C.J., with two other Justices joining).

130. *Roe v. Wade*, 410 U.S. 113, 162-65, 93 S. Ct. 705, 732-33 (1973).

Finally, restrictions allegedly based on a state's desire to maintain medical standards must be legitimately connected to that end, and not mere pretexts for discouraging abortion in general.¹³¹

While any exhaustive discussion of the precise holding and implications of *Roe* and *Doe* are beyond the scope of this article, it is worth noting that those cases also provide clear answers to at least some of the specific issues that have arisen with respect to abortion. For example, those cases make clear that states may not discriminate against citizens of other states who may seek abortions within their borders,¹³² that states may not completely prohibit abortions of non-viable fetuses,¹³³ and that, at least until the medical risks of abortions approach the risks of live birth, the decision whether to abort must be left up to the patient and her physician, exercising his best clinical judgment.¹³⁴ Moreover, the cases make clear that the physician's clinical judgment regarding the best interests of his pregnant patient cannot be unduly trammelled by the state, either by restrictive statutory limitations on the circumstances which might justify an abortion,¹³⁵ or by procedural requirements such as requiring concurrence by other physicians.¹³⁶ The woman's physician must remain free to consider all factors—including the patient's age, her emotional, psychological and familial situation, as well as her physical health—in reaching a decision.¹³⁷ On the other hand, *Roe* and *Doe* make equally clear that certain restrictions, such as requiring that abortions be performed only by physicians licensed to practice in the state,¹³⁸ and reasonable regulations and licensing procedures regarding the facilities where such procedures may take place¹³⁹ will be permitted.

Despite the importance of their holdings, however, many important questions regarding the availability of abortions were left undecided by *Roe* and *Doe*. Among these were such issues as whether the state or federal government could discriminate by providing funds for indigent women seeking to give birth while withholding funds from indigents seeking abortions, whether and to what extent the rights recognized in those cases extend to pregnant minors, and whether parents, spouses or other interested persons were entitled to be notified of or to participate in a woman's decision to seek an abortion. While the United States

131. *Doe v. Bolton*, 410 U.S. 179, 192-99, 93 S. Ct. 739, 747-51 (1973) (discussing various procedural restrictions on abortions).

132. *Id.* at 200, 93 S. Ct. at 751-52.

133. *Roe*, 410 U.S. at 163-64, 93 S. Ct. at 731-32.

134. *Id.* at 163, 93 S. Ct. at 731-32.

135. *Doe*, 410 at 191-92, 93 S. Ct. at 747-48.

136. *Id.* at 195-99, 93 S. Ct. at 749-51.

137. *Doe v. Bolton*, 410 U.S. 179, 192, 93 S. Ct. 739, 747 (1973).

138. *Roe v. Wade*, 410 U.S. 113, 165, 93 S. Ct. 705, 732-33 (1973).

139. *Id.* at 163, 93 S. Ct. at 731-32.

Supreme Court has continued to wrestle with these issues,¹⁴⁰ and others, none of the relevant cases in these areas were decided by 1974 and thus none can be deemed to have been directly incorporated into the state guarantee of privacy. As to these issues, important interpretive questions remain: 1) whether the state courts are entitled to interpret the privacy guarantee of section 5 to extend in any fashion beyond the specific issues clearly dealt with in *Roe* and *Doe*; and 2) whether and to what extent state courts should rely on the analyses and results of post-1974 federal cases as a guide to interpreting section 5 with respect to issues left undecided in *Roe* and *Doe*.

B. Beyond the Adopted Minimum: May State Courts Go Beyond Roe and Doe?

It may be argued that even if section 5 must be interpreted to include abortion rights as they existed under *Roe* and *Doe*, there is still no warrant for state courts to interpret the state constitutional guarantee of privacy to extend beyond the particular holdings of those cases or to provide any abortion rights not clearly articulated therein. While the adoption of section 5 may be perhaps construed as an implicit adoption of the construction actually put on that right by contemporaneous federal cases, that act cannot necessarily be taken to imply any approval of or desire to adopt subsequent developments in federal jurisprudence.¹⁴¹ Thus, it could be argued that the most that Louisiana's adoption of an express right of privacy could be taken to have accomplished would be to have "frozen" into the state constitution the federal law of constitutional privacy as it existed in 1974, without creating any mandate for further expansion or development of those rights by state courts interpreting the state guarantee.

While this "freeze" approach may seem plausible as a way to limit the courts' freedom to expand upon the implied "intentions" of the framers and ratifiers, practical and theoretic problems make any strict version of the "freeze" model inappropriate for interpretation of the state constitution. For example, it would be impossible as a practical matter for the Louisiana courts—even those which might attempt to restrict their interpretation of section 5 in accordance with this approach—to arrive at any definite consensus regarding exactly what the

140. The major post-*Roe* federal abortion cases are listed and briefly annotated at *supra* note 41.

141. But see *Bernie v. State*, 524 So. 2d 988 (Fla. 1988), holding that the 1983 amendment to the Florida constitution, which explicitly tied interpretation of the state constitution's search and seizure protections to federal interpretation of the Fourth Amendment, should be interpreted to require adherence to both pre-adoption and post-adoption federal precedent.

relevant federal precedents held, or how broadly or narrowly those precedents should be interpreted. While *Roe* and *Doe* do clearly indicate that some specific types of restrictions on abortions are clearly permissible or impermissible, those cases are not and cannot be completely self explanatory. Some questions—such as whether states may mandate particular procedures for determining fetal viability or require physicians to provide certain information to patients seeking abortions—may or may not be fairly encompassed within those cases. As to these issues, there will always be uncertainty regarding what the people who adopted that right understood the precedents to mean.¹⁴² *A fortiori*, any state court called upon to interpret section 5 with respect to issues such as these simply cannot avoid at least a certain degree of “interpretation” and “development” of those basic federal precedents.

Moreover, any approach that has the effect of “freezing” rights poses significant theoretic difficulties. Any such attempt to restrict state courts to the four corners of the pre-1974 federal cases both deprives the state courts of their traditional functions of interpreting the law of the state and adapting that law to changing social conditions, and ignores basic structural and institutional differences between state and federal law. As judges and commentators have pointed out, federalism concerns and other institutional constraints often result in systematic underenforcement of federal rights. Since many of these institutional constraints apply differently or not at all to state courts interpreting state rights, there may be good reason to expect that a state constitutional right might have somewhat different, presumptively broader and more protective, application than its federal cognate.¹⁴³ Any model that would require strict adherence to federal precedent would necessarily prevent the state courts from taking account of these differences in any meaningful way.

For all these reasons, state courts cannot be precluded from attempting to interpret section 5 and the federal cases on which it was based in order to determine whether that section should apply to novel issues not clearly dealt with in *Roe* and *Doe*. The final question concerns how this process of interpretation should be pursued.

C. Independence in Interpretation: The Impact of Post-1974 Federal Cases

At the outset, it should be noted that the issue of interpretation presented with respect to section 5 is distinguishable from the more

142. See Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 Tex. L. Rev. 1095, 1112-14 (1985).

143. See, e.g., Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 960-62 (1985); Williams, *In the Supreme Court's Shadow*, *supra* note 7, at 389-402.

common situation, where a state constitutional right was originally derived from indigenous state sources. Most constitutional rights are of this type.¹⁴⁴ In such cases, the argument that a state court should conform its interpretation of a state provision to the federal Supreme Court's interpretation of a parallel federal provision is relatively weak.¹⁴⁵ Numerous state supreme courts, including Louisiana courts, have accordingly held that arguments for conformity with federal interpretation deriving only from the mere fact of parallel language or the "unseemliness" of different high courts differing over the meanings of phrases, are insufficient to deprive a state supreme court of the right and the duty to exercise their independent judgment in interpreting their respective state charters, and that federal precedents are to be regarded as no more than possibly persuasive authority.¹⁴⁶

In the case of the right of privacy, however, the argument that state courts should, at least to some extent, conform their interpretation of the state constitution to federal construction of the parallel federal right is stronger than it would be with respect to other types of rights guarantees. Since the state right was derived from an originally federal source, it could be argued that the federal courts' interpretation of that right reflects a unique level of experience and understanding, and accordingly that state courts interpreting the derived federal right should closely follow the results and reasoning of post-adoption federal cases interpreting that federally-derived right.¹⁴⁷ However, while state consti-

144. See, e.g., *People v. Brisendine*, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975); *Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 496-97 (1984); *Linde, First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 380-82 (1980); *Dumbauld, State Precedents for the Bill of Rights*, 7 J. Pub. L. 323 (1958). See generally *Rutland, The Birth of the Bill of Rights 1776-1791* (1962).

145. See, *Right to Choose v. Byrne*, 91 N.J. 287, 301, 450 A.2d 925, 932 (1982), emphasizing the persuasiveness of federal precedent and "the general advisability in a federal system of uniform interpretation of identical constitutional provisions."

146. See, e.g., cases cited at *supra* notes 7 and 8.

147. This approach to interpretation of state rights is not without arguments in its favor. As Professor Maltz has pointed out, divergence between state and federal courts on issues of constitutional rights imposes costs no matter what type of constitutional issue is at stake. Divergence creates additional uncertainty for officials charged with the duty to conform their actions to the commands of both charters, results in duplication of effort without, in many cases, any noticeable improvement in the quality of the resulting analysis, and can create at least the appearance of unprincipled decision making on the part of one or both courts. *Maltz, The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995, 1002-06 (1985). Moreover, the unique role which the United States Supreme Court enjoys in our polity—as the one body with the institutional prestige and national scope to enable it to assume leadership in articulating a common moral and legal basis for nation—should entitle its decisions to even greater respect than courts typically pay

tutional draftsmen can explicitly enact such an approach to interpretation if they so choose, and while a few state courts have in fact chosen to adopt such an approach with respect to certain state rights,¹⁴⁸ this "lockstep" approach also fails to provide an appropriate model for interpretation of the state constitution's express guarantee of privacy,¹⁴⁹ for several reasons.

In the first place, this "lockstep" approach suffers from the same practical difficulty as the "freeze" approach discussed above. Current

to arguably persuasive precedent from other jurisdictions. See generally Sager, *supra* note 143, at 960-62. These concerns seem particularly cogent in the context of state rights originally adopted from federal sources, where none of the factors usually relied upon to justify state divergence from federal precedent—such as differences in text, or a unique local historical or cultural basis for the right—will generally apply. Interpreting federally-derived state rights so as to follow the evolution of federal interpretation of cognate rights would alleviate these concerns by providing some greater degree of certainty and simplicity in constitutional law. The appearance of agreement among courts, and the institutional authority of all, would be maximally preserved.

148. For example, the current version of the Florida state constitution's guarantee against unreasonable searches and seizures explicitly provides that the rights it grants must, "be construed in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court," and that evidence obtained in violation of the state constitution may only be suppressed, "if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution." Fla. Const. art I, § 12. This amendment has been the subject of considerable controversy. See generally, Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. Fla. L. Rev. 653 (1987) (criticizing and urging narrow construction of the amendment); Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 Stetson L. Rev. 241, 275-79 (1989) (disagreeing with Slobogin). The Florida Supreme Court has not followed Professor Slobogin's suggestions for narrow construction of the amendment, but has instead given it its full force. *Bernie v. State*, 524 So. 2d 988 (Fla. 1988) (rejecting argument that section 12 should be interpreted to require adherence *only* to pre-adoption precedent, concluding instead that the electorate clearly evinced an intent for the provision to apply to all decisions of the U.S. Sup. Ct. regardless of when they were rendered.); *State v. Hume*, 512 So. 2d 185 (Fla. 1987) (rejecting argument that a different section of the state constitution permitted Florida to provide more protection against unreasonable searches and seizures than does the federal constitution).

A number of other state courts have also adopted the "lockstep" approach to interpretation of other state rights, consciously endeavoring to interpret their state Declarations so as not to diverge from federal precedent. See Collins, *supra* note 142, at 1108-11, 1111 n.131; Collins & Galie, *supra* note 7, at 323-24.

149. Of the states with express privacy guarantees, Illinois has been the most consistent adherent of the lockstep approach. The Illinois Supreme Court generally will not depart from federal precedents absent a compelling showing that the drafters of the state's 1970 constitution intended a different result, *People v. Tisler*, 103 Ill. 2d 226, 245, 469 N.E.2d 147, 156 (1984), and has yet to render a decision departing from federal interpretations in any case involving autonomy rights.

federal law may well be unsettled or in dispute, particularly where novel or difficult issues are raised, and will provide no simple or mechanical way for courts to resolve state constitutional issues.¹⁵⁰ In addition, theories which presumptively bind state courts to federal interpretations of cognate rights will have the practical effect of preventing the use of states as "laboratories" where multiple alternative approaches to constitutional issues can be worked out, thus depriving the nation of the state courts' constructive participation in the process.¹⁵¹ Even with respect to rights originally derived from federal sources, structural or "strategic" considerations may legitimately lead state courts to systematically different results,¹⁵² and there is no *a priori* reason to presume that state justices are any less capable of discerning how best to apply those rights in novel and difficult situations than are their federal colleagues.¹⁵³

Moreover, such an approach would deprive section 5 of any practical effect. Principles of federal supremacy mandate that federal interpretations of federal rights bind state courts regardless of those state courts' interpretation of state law. Thus, if state rights are interpreted to do no more than track federal precedents, they will add nothing to the effective protection of rights. To be sure, the mere fact that a state constitutional provision exists does not mean that it must therefore be interpreted more broadly than federal law. But where state constitutional draftsmen went to the trouble of creating a new provision covering rights not previously protected by the state constitution, it seems reasonable to conclude that they, and the voters who enacted that provision, intended their handiwork to have some practical effect. Courts which rely too heavily on post-adoption federal precedents to interpret their state constitutions run the risk of ceding effective interpretive authority over the state constitution to another body, the United States Supreme Court. While such a delegation may be permissible when done by the people of the state acting as a political body,¹⁵⁴ it is inappropriate when

150. Collins, *supra* note 142, at 1113-14.

151. See generally Slobogin, *supra* note 148, at 679-80. As Professor Williams has argued, decisions on rights issues tend function, as a practical matter, not as final answers to difficult issues of constitutional rights, but rather as intermediate—though weighty—steps in an ongoing dialogue involving state and lower federal courts, legislators, constitutional amenders and the people. See Williams, *supra* note 2, at 359-62. When state courts, as participants in this ongoing process, disagree with the federal Supreme Court's interpretations, it is something of an exercise in federal chauvinism to assume that because the state court's result is different it is therefore unprincipled or merely result oriented.

152. See generally Sager, *supra* note 143, at 959.

153. See Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7, 8 U. Puget Sound L. Rev.* 331, 353 (1985).

154. Compare, Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 *Stetson L. Rev.* 241, 275-83 (1989), arguing that the 1983 amendment to section 12 of the Florida Declaration of Rights, which required state courts

imposed by state courts upon themselves. Absent express constitutional direction to the contrary, state courts have a non-delegable constitutional duty to consider both state law and those local factors that might influence interpretation of that law. That duty abides regardless of the source from which a particular constitutional provision was derived. While federal precedents—especially those which predated amendment of the state constitution—may be legitimately considered particularly persuasive as precedent, no other court, not even the federal Supreme Court, can fulfill a state court's interpretive duty on that court's behalf.¹⁵⁵

For all of these reasons, Louisiana courts interpreting the state constitution's guarantee of privacy as it relates to abortion rights should certainly look upon relevant post-adoption precedents from both the federal courts and from other states as potentially persuasive authority. However, none of those precedents can do more than guide the state courts in their work. The hard questions of what the state constitutional guarantee of privacy means with respect to abortion-related issues left open by *Roe* and *Doe* must be determined by the state courts exercising their right and duty to independently interpret the state constitution.

CONCLUSION

The express guarantee of "privacy" in article I, section 5 of the Louisiana Constitution of 1974 has been correctly interpreted by the state Supreme Court to protect a broad range of autonomy rights. It should also be interpreted to incorporate and independently protect abortion rights of the sort recognized by the federal Supreme Court in *Roe v. Wade* and *Doe v. Bolton*, regardless of whether those rights continue to be protected under federal law. With respect to abortion-related issues not resolved by *Roe* and *Doe*, the state courts must exercise their independent interpretive authority, guided, but not controlled, by post-1974 federal or sister-state precedents.

to construe the state's search and seizure provision in exact conformity with the decisions of the United States Supreme Court, constituted a perfectly legitimate act on the part of the Florida electorate. Since it was done by the voters, Professor Cooper argues, the Florida delegation constitutes no derogation from principles of federalism, but rather "a classic illustration of participatory democracy in action in a federalist system."

155. See generally Slobogin, *supra* note 148, at 723-25.