Introduction

Roe v. Wade under Attack

The Supreme Court decisions in Roe v. Wade\(^1\) (1973) and its companion case, Doe v. Bolton,\(^2\) increased enormously the availability in the United States of legal abortions. Since those decisions, people on opposite sides of the abortion issue have often focused on Roe v. Wade. Those (generally) opposed to abortions have called for the reversal of that decision, whether through constitutional amendment, congressional action, or judicial overturn. In contrast, people favorable to legal abortions have tended to rally round the Roe v. Wade decision as a judicial precedent that should remain in force. An examination of the rationale and decision in that case is thus a good place to begin a discussion of the constitutional status of abortion.

An understanding of the constitutional status of abortion requires a reexamination of Roe v. Wade also because the majority that decided the case has been eroded by retirement.\(^3\) Some of their replacements have openly criticized the decision. One example is Justice O'Connor's dissent in City of Akron v. Akron Center for Reproductive Health (1983). She writes, “There is no justification in law or logic for the trimester framework adopted in Roe and employed by the Court today on the basis of stare decisis.”\(^4\) Stare decisis is the principle that present and future decisions should follow the precedents established by prior judicial decisions. No one doubts that stare decisis should be adhered to most of the time, as it enables people to use past judicial opinions to predict the Court’s response in similar cases. Without stare decisis, it would often be impossible for people to predict accurately how the
Court might interpret a statute or constitutional clause. People would then lack the information necessary to assure their compliance with statutory and constitutional legal requirements. So general adherence to *stare decisis* is a precondition of the security that comes from knowing that one’s behavior is law abiding. For these reasons, a judge rarely finds a prior decision so repugnant that she is willing to sacrifice *stare decisis*. Yet O’Connor is willing to make an exception where *Roe v. Wade* is concerned.

Joining O’Connor in this negative attitude toward *Roe v. Wade* is Justice Antonin Scalia, another member who joined the Court in the 1980s. He writes in *Webster v. Reproductive Health Services* (1989) concerning Justice Blackmun’s worry that *Roe v. Wade* may be overruled: “I think that should be done.”

The two justices who originally dissented from the 7 to 2 decision in *Roe v. Wade*, Justices Rehnquist and White, show no signs of having changed their minds about the propriety of that decision. In *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) Justice White seconded O’Connor’s willingness to depart from the *Roe v. Wade* precedent. Rehnquist, now chief justice, maintained in his *Webster* opinion that “the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does.” He, too, referred in this context to the limits of *stare decisis*.

Since the votes of only four justices are needed for a writ of certiorari, which brings a case before the Supreme Court, it seems almost certain that Justices Rehnquist, White, O’Connor and Scalia will mandate consideration of one or more cases that provide the opportunity for a major revision or wholesale reversal of *Roe v. Wade*. So an examination of the constitutionality of abortion rights cannot reasonably be premised on *Roe* as a precedent that the Court will continue to follow. Instead, the rationale behind *Roe* must be explored and, if it is found wanting, a constitutionally acceptable substitute must be developed if the Constitution is to continue protecting abortion rights. Developing a substitute rationale is a major goal of the present work.

**Individual Rights and Majority Rule**

The present work concentrates on issues of constitutional law. Embodied in our Constitution is the democratic ideal of majority rule. Through their representatives, people are supposed to be able to govern
themselves by passing legislation. This is representative democracy, which is also called "indirect democracy" and "a republican form of government." The majority does not (usually) govern directly by passing legislation, but indirectly by electing those who are thereby authorized to legislate. In addition to the indirectness of the majority rule that it institutes, the Constitution further limits majority rule so as to protect individual rights. The tension between these two ideals, majority rule and individual rights, forms the background of many constitutional debates, including debates about abortion rights. Do women have constitutional rights as individuals to terminate their pregnancies, or can majorities, acting through their legislatures, legitimately curtail or prohibit the abortion procedure? In the present section I explore in general terms the tension between majority rule and individual rights in order to set the stage for an understanding of abortion as a constitutional issue.

The Framers of the Constitution believed that majority rule must be limited in several ways. First, they believed that some individual rights are so important that they should be denied, if at all, only for extraordinarily powerful reasons. These are constitutionally fundamental rights (or fundamental rights, for short). Adoption of the Bill of Rights in 1791 was designed to give voice and constitutional force to demands of individual rights. The First Amendment, for example, specifies that regardless of the will of the majority, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." Similarly, regardless of how eager the majority may be to fight crime, the Fourth Amendment protects everyone against "unreasonable searches and seizures," the Fifth Amendment outlaws double jeopardy in criminal cases as well as forced self-incrimination, and the Eighth Amendment prohibits "cruel and unusual punishments."

When originally adopted, the Bill of Rights guaranteed these and other individual rights only against the tyranny of the majority at the federal level. Only the federal government was debarred from establishing a religion, curtailing freedom of the press or imposing cruel and unusual punishments. But the slavery issue of the mid-nineteenth century focused attention on the denial of individual rights by many states. So in 1868, in the wake of the Civil War, the Fourteenth Amendment was adopted. Like the other two post Civil War amendments, the Thirteenth (1865) and the Fifteenth (1870), the Fourteenth Amendment is directed at protecting citizens against at least some abuses by democratic state majorities. It provides, among other things, that no state shall "deprive any person of life, liberty, or property, without due pro-
cess of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Besides guaranteeing due process and equal protection, the Fourteenth Amendment has over the past one hundred years been interpreted to apply to state action an increasing number of the guarantees contained in the Bill of Rights. Under its current interpretation, the states, like the federal government, are prohibited from establishing a religion, abridging the freedom of speech, and imposing cruel and unusual punishments.

Fundamental constitutional rights are the corollaries of these prohibitions. What is constitutionally prohibited to the federal and state legislatures is retained as a constitutional right by individual citizens. Thus, citizens have fundamental rights to freedom of speech, freedom of the press, equal protection of the laws, and due process of law.

But a fundamental right is not an absolute right. In the classic illustration, freedom of speech does not include the right to shout “Fire!” in a crowded theater (in which one does not believe there is a fire) because doing so could lead to unnecessary and grave harm to others. Even if there is a fundamental right to terminate one’s pregnancy, then, it does not follow that one can do so whenever and however one chooses.

Majority rule, the other end of the tension that we are exploring, is expressed primarily in legislation. Typically, legislation defines different classes among people and permits to (or imposes on) members of some classes what is not permitted to (or imposed on) members of other classes. People over twenty-one years of age, for example, may legally buy hard liquor in most states, whereas people under twenty-one may not. Most people may legally borrow money from a given bank, but not those who own the bank. Young men must register with the federal government upon turning eighteen; young women need not. Of course, many criminal statutes apply to everyone. No one may simultaneously have more than one spouse.

As these examples illustrate, legislation typically limits people’s freedom and alters their legal rights and responsibilities. With different legislation, people would have a legal right to have more than one spouse at a time, young people would be able to buy hard liquor at age sixteen instead of having to wait until they are twenty-one, and neither males nor females would have to register with the federal government at age eighteen. In these and myriad other cases, the legislation, notwithstanding the fact that it alters and limits people’s legal rights, is presumed by the Supreme Court to be constitutionally valid. This presumption of validity reflects the value attached to majority rule in our republican form of government. Majority rule, as reflected indirectly in the deci-
sions of elected representatives, should prevail unless the contervailing considerations are particularly strong.

As we have seen, among the strongest contervailing considerations are individuals’ fundamental constitutional rights. Additional tests that legislation must pass to be held constitutional concern the procedure of its enactment, the specificity of its requirements, the relationship it bears to a legitimate public purpose, and the nature of the classifications it creates. I deal with these in turn before returning for additional consideration of fundamental rights.

Governmental restrictions of people’s liberty must be properly enacted. This is primarily a protection of people’s liberty against administrative regulations and decisions that lack appropriate authorization. For example, Congress has authorized the Food and Drug Administration (FDA) to determine the safety and efficacy of all new medications offered for sale in the United States. If the FDA were to issue regulations concerning the safety of children’s toys, it would exceed its authority. The regulations would be unauthorized attempts to limit people’s liberty, and this would violate the Fourteenth Amendment’s Due Process Clause. As we have seen, the Fourteenth Amendment guarantees that no one be deprived of “life, liberty, or property, without due process of law.” Since laws most often interfere with people’s liberty or property, one aspect of due process is that these restrictions represent the will of the majority as the political system has seen fit to represent that will in actions of democratically elected legislatures operating in accordance with some form of majority rule. This due process requirement would not be met were the FDA to issue regulations outside the areas of its congressional mandate. The regulations would lack the indirect authorization of the majority that we require in our form of government. The regulations would violate procedural due process because the focus is on the procedures employed in the creation of legal restrictions and requirements. The background value is that of representative democracy. Appeals to procedural due process, then, do not call into question the ideal of majority rule. Instead, appeals to procedural due process are designed to ensure that legal rules embody the indirect majority rule that characterize our republican form of government.

Another requirement of due process where fundamental rights are not at issue concerns clarity. Vague legislation makes it impossible for people to know what behaviors are forbidden or required. When limiting people’s liberty, the government must specify with reasonable clarity the nature of those limitations so that people can know how to conform their behavior to the law, and so that they will not be subject to un-
predictable or arbitrary governmental interference in their lives. The underlying value here is the individual's right to self-determination within the limits of public acceptability.

It is also required by due process that a statute "rationally furthers some legitimate, articulated state purpose." There are two aspects to this. First, there must be a legitimate state (or federal) purpose. For example, protecting the health and welfare of young people, reducing the probability of fraud or mismanagement in the banking industry, and preparing for the nation's defense are legitimate purposes of legislation. Given such a purpose, the legislation must be rationally related to the furtherance of that goal. That is, there must be some plausible understanding of the relevant facts and of how things work in the world that would make a reasonable individual think that the legislation in question could further the goal. For example, requiring people to be twenty-one years of age before they can buy hard liquor can plausibly further the goal of protecting the health and welfare of young people. Making it illegal to borrow money from the bank that one owns is rationally related to the goal of reducing the incidence of fraud and mismanagement in the banking industry, as is requiring young men to register with the government related to the goal of providing national defense.

The requirement of a rational relationship is in our era usually interpreted to exclude as unconstitutional only patently absurd, not merely unwise, legislation. In declaring legislation to be valid, the Supreme Court is not endorsing the means chosen by the legislature to effect its purpose. It may deem those means entirely unsuitable and may still find the legislation valid because the value of representative democracy is usually best served when democratically elected legislatures, rather than appointed judges, make determinations of the best means to serve a given end. This judicial deference to legislative judgments is called judicial restraint. As a result of such restraint, legislation that does not involve fundamental rights is not usually judged invalid unless, in the Court's judgment, no plausible reading of the factual situation would allow reasonable people to think that the means chosen in the legislation would further any relevant state objective. When legislators adopt unhelpful means to reach public goals, but no fundamental rights are at issue, the Court usually maintains, as Chief Justice Morrison Waite did long ago in *Munn v. Illinois*, that "for protection against abuses by legislatures the people must resort to the polls, not the courts."

Where fundamental rights are concerned, however, the situation is entirely different. One such right, guaranteed by the Fourteenth Amend-
ment, is the right to "the equal protection of the laws." Consideration of this right has led the Court to view with suspicion certain kinds of legislative classifications. I turn now to a consideration of such suspect classifications.

We have seen that legislation typically classifies people and allows to (or imposes on) some people what is not allowed to (or imposed on) others. Nevertheless, some of these classifications, for example, those by race or national origin, are suspected by the Court of unfairly denying individual rights to members of minority groups. A group that is insular or politically weak may not be well enough represented in the legislature to assure that its members' rights are adequately protected by a political process geared to the creation and maintenance of majority coalitions. Blacks, for instance, suffered legal liabilities, especially in the South, regarding education and transportation (to name but two). Redress through normal political processes was impossible because blacks were a minority who first were denied the right to vote and then could never beat the majority at the ballot box. The Court maintained that blacks were thus denied "the equal protection of the laws" promised by the Fourteenth Amendment. The Court's decisions in this area did not rest on the belief that blacks, or others, have fundamental (constitutional) rights to education or transportation. Instead, the underlying value was equality before the law. People have a fundamental right to be treated by the law equally, regardless of the legislation's subject matter. The normal presumption that such equality is being respected by the state does not apply in the case of legislation containing suspect classifications.

The Court now addresses the problem of equal protection of the laws by applying strict scrutiny to suspect classifications. Strict scrutiny often results in a reduction of judicial restraint. "Strict scrutiny means that the state system is not entitled to the usual presumption of validity, that the state rather than the complainants must carry a 'heavy burden of justification.'" In these cases the state must show that its legislation is not merely rationally related to a legitimate state goal, but that it is necessary to meet a compelling public need.

Both sides in the abortion debate have raised the issue of suspect classifications. Pro-choice advocates have claimed that because women as a group are much less politically powerful than men, and legislation restricting abortion rights primarily affects women only, the Court should subject such legislation to strict scrutiny. According to this view, such legislation is constitutional only if the state can show that it serves
some goal of unusual importance that can be reached in no other way than by restricting or forbidding abortions. Pro-life advocates, in contrast, have maintained that fetuses as a group are even less able than women to speak for themselves politically. So legislation that allows abortions should be subjected by the Court to strict scrutiny. Both claims are discussed in Chapter 2.

Strict scrutiny is applied by the Court whenever fundamental rights are at issue. The right to "equal protection of the laws" is only one example. The same strict scrutiny would apply if a woman has a fundamental right to terminate her pregnancy. In that case, too, the state may significantly limit that right only if it shows that the limitation is really necessary to meet a compelling public interest. If the state has a goal it wishes to serve by the limitation of a woman's right to terminate her pregnancy, then, if that right is fundamental, the goal will have to be unusually important (compellingly so) for the statute to be valid. Also, even if the goal is compelling, the statute is still invalid if the means chosen by the state limit the woman's right more than is necessary to reach the goal. Thus, even though fundamental rights are not absolute rights, the designation of a right as fundamental makes legislative limitations of it much harder to justify.13

Constitutional Interpretation

How does one know which rights are fundamental? Since by "fundamental" we mean fundamental according to the Constitution, it is all a matter of constitutional interpretation. Disparate constitutional interpretations arise in part from different views about how the Constitution should be approached. In this section I explain opposite, extreme positions on this matter; then I discuss and critique these extremes and some positions in between. No one's approach to the Constitution conforms to either of the extremes, but their elaboration helps clarify the issues that separate those who occupy different positions on the continuum between them. I conclude by indicating the position taken in this work.

Two matters of principal contention are these: First, to what extent should the Constitution be interpreted to guarantee only those rights mentioned explicitly in the text? Freedoms of religion and speech, for example, are mentioned explicitly in the Bill of Rights, but freedoms of association and procreation are not. The latter are constitutionally guaranteed only if the Constitution is interpreted to include implicit, as
well as explicit, guarantees. The inclusion of implicit guarantees is controversial.

Also controversial are interpretations that rely on very general, as opposed to more specific, guarantees. Guarantees concerning "unreasonable searches and seizures" (Fourth Amendment) and self-incrimination (Fifth Amendment) are relatively specific when compared to the guarantee of "liberty" contained in the provision that no state shall "deprive any person of life, liberty, or property, without due process of law" (Fourteenth Amendment). Some interpreters favor reliance on the more specific guarantees, whereas others rely equally on relatively general guarantees.

These two dichotomies—explicit/implicit and specific/general—help clarify the differences among competing approaches to the Constitution. One extreme view is that the Constitution guarantees only those relatively specific rights explicitly mentioned therein and that the meaning, extent and implications of these rights are just what the original authors believed them to be. I will call this the Conservative view. Thus, for example, if the Framers of the First Amendment intended the guarantee of free speech to extend only to speech used in the process of political debate, such speech would forever be all that the First Amendment guarantees. If the authors of the Eighth Amendment believed that capital punishment is not "cruel and unusual punishment," then all statutes providing for capital punishment are forever protected from constitutional challenge on Eighth Amendment grounds. If the authors of the Fourteenth Amendment did not view state legislation requiring racial segregation to violate that amendment's guarantee of "the equal protection of the laws," then legislated segregation can never be found inconsistent with equal protection.

This view minimizes the constitutional requirements that legislation must meet. Because it affords maximum latitude to legislative majorities, it reflects greater respect for the value of majority rule than for the value of individual rights. I call this the Conservative view, though it does not invariably support politically conservative causes.

No one endorses this view in its pure form because its implications are too radical. It would deny constitutional protection to individual rights where we have come to expect it. For example, the authors of the Fourteenth Amendment did not intend it to disallow racial segregation, so state laws requiring racial segregation in schools would be perfectly constitutional as long as their enactment was procedurally correct. Similarly, it is unlikely that the authors of the Fourteenth Amendment intended it to require application to the states of the guarantees contained
in the Bill of Rights. If the authors' intent were to prevail, then, the states could pass constitutionally unobjectionable laws allowing officials to conduct unreasonable searches and seizures, institute cruel and unusual punishments, and limit in any ways they chose the freedoms of speech, assembly, and religion. The restrictions and denials of individual rights that would be allowed on this approach to the Constitution are legion. Too many rights that we have come to regard as (constitutionally) fundamental would be denied for the Conservative view to be accepted in its pure form.

I pointed out in the Preface that the first criterion of success for interpretations of the Constitution is their congruence with the words of the Constitution and with Supreme Court interpretations of those words. The basic approaches to the Constitution being discussed in this section are guidelines to be used in arriving at such constitutional interpretations. We have just seen that the extreme Conservative view would lead to interpretations that diverge widely from those accepted by the Court. So these interpretations, and the basic approach that leads to them, fare poorly on the first criterion of success.

The second criterion of success is conformity with our moral and political ideals. The extreme Conservative view fares poorly on this measure as well. Our current political ideals include, I think, the belief that individuals should be protected by the federal Constitution from state denials of free speech, freedom of religion, and freedom of the press. We have such a moral and political commitment to equality before the law that we expect our Constitution to protect individuals against laws that discriminate on the bases of race, religion, or national origin. The extreme Conservative view fails adequately to portray the Constitution as reflecting the ideals that we expect it to embody. It casts the Constitution in a relatively unfavorable light by making it appear less responsive than we would wish to individual rights.

Finally, the extreme Conservative view is not coherent. It endeavors to enhance the power of majority rule by limiting the scope of legitimate constitutional objections to the will of legislative majorities. Constitutional objections are supposed to be limited by interpreting the Constitution according to the Framers' original intent. But to the best of our knowledge, the Framers' original intent was that the Constitution severely limit majority rule. Distrust of the majority was reflected in the fact that blacks and women were not allowed to vote, and that states were allowed to refuse the franchise to those who lacked property. Even those who could vote were not permitted to elect directly either senators or the president; senators were elected by state legislatures and the pres-
ident by the electoral college. Members of the Supreme Court were appointed and confirmed for life by the indirectly elected president and Senate.

These are not accidental departures from the ideal of majority rule. They were calculated to reduce the extent of majority rule in order to protect individual rights from encroachments by democratically elected legislatures. James Madison wrote to Thomas Jefferson, "The invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the majority number of the Constituents."\(^{16}\) John Adams also was convinced that majority rule was incompatible with proper respect for individual rights. Because democrats do not respect individual rights, "democracy never lasts long. It soon wastes, exhausts, and murders itself."\(^{17}\) The intent of the Founding Fathers, then, was to provide in the Constitution checks against the excesses of majority rule. Original intent cannot be invoked to minimize judicial interference with majority rule, since the Founding Fathers intended majority rule to be limited substantially.

In sum, the extreme Conservative view lacks coherence, and it leads to interpretations that conflict sharply with a great many Supreme Court decisions and with some of our most cherished moral and political ideals. Any relatively Conservative view contains these defects in greater degree as it approaches the extreme.

The opposite extreme affords maximum protection to individual rights at the expense of respect for the role of majority rule in our republican form of government.\(^{18}\) According to this approach, the Constitution embodies universal principles of natural law and natural rights. These are principles, discoverable by reason alone, that specify the rights that individuals have by nature. Because the Constitution is believed, according to the extreme Liberal view, to protect all the rights individuals have by nature, it is unnecessary in establishing constitutional protection for a right that explicit mention of the right be found in the Constitution. So if there is (believed to be) a natural right to the free expression of sexuality among consenting adults, any legislation that significantly limits this right is unconstitutional unless the restrictions it imposes are the minimum necessary to meet a compelling public need. This result obtains whether or not a right to sexual preference is explicitly mentioned in the Constitution or is clearly implied by a right that is explicitly mentioned. Similarly, if it is believed on grounds of natural law that women have a natural right to terminate their pregnancies, then no textual support from the Constitution is needed to declare
unconstitutional any and all statutes that restrict this right more than is necessary to meet a compelling public need. I call this the Liberal view, in honor of the nineteenth century liberals' zeal for individual rights, even though the view does not invariably support what we today call liberal political causes.

In its extreme form the Liberal view fails adequately to satisfy the criterion of congruence with the Constitution and with its interpretation by the Supreme Court. It is inherent in the view that the words of the Constitution are to be given little weight when individual rights are at issue. This generates conflict not only with the Constitution but with most of the history of Supreme Court interpretations, as the Court has for the most part taken pains to tie its interpretations to the words of the document it is interpreting.

The extreme Liberal view might seem at first to satisfy much more adequately the second criterion. One might expect it to endorse interpretations of the Constitution that reflect current moral and political ideals. This is not entirely the case. First, many Supreme Court decisions of the past that employed the extreme Liberal view did not reflect what we would consider the most enlightened moral views of their time. For example, when slavery was an issue, the Court's *Dred Scott* decision supported slavery against abolition. As we see in Chapter 1, the Court also blocked legislation early in this century that many at the time, and we today, believe necessary to protect workers' health and safety. More generally, the Supreme Court is sometimes called on to make decisions that are important precisely because contemporary moral and political ideals come into conflict with one another. The abortion issue featured in the present work is a case in point. Because there are current moral and political ideals supporting opposite decisions by the Supreme Court, the decision reached, even if guided by the extreme Liberal view, cannot possibly correspond uniquely to relevant ideals.

The extreme Liberal view suffers also on the criterion of correspondence with current moral and political ideals because one of our principal ideals is majority rule. The extreme Liberal view justifies the substitution by unelected judges of their moral and political opinions for those of democratically elected legislatures. Because Americans are currently less suspicious of majority rule than were James Madison and John Adams, the extreme Liberal view suffers from a failure of correspondence with this central political ideal. In sum, the extreme Liberal view, like the extreme Conservative view, leads to interpretations that conflict sharply with a great many Supreme Court decisions and with some of our most cherished moral and political ideals. Any relatively
Liberal view, like any relatively Conservative view, suffers from these defects in greater degree as it approaches the extreme.

Positions taken between the extremes include the following: Leaning toward the Conservative extreme is the view that the Constitution protects only those specific rights explicitly mentioned as protected, but the nature, extent, and implications of these rights can be understood in ways that differ somewhat from the Framers' understanding. The smaller the difference allowed between the current and the original understanding of these rights, the more latitude is given to majority rule and the less constitutional protection is afforded to individual rights.

Leaning toward the Liberal extreme (of protecting all manner of individual rights) is an approach that finds implicit in the Constitution guarantees of rights not mentioned explicitly but arguably implied by those that are mentioned explicitly. Farther from the extreme is an approach that is confined to rights mentioned explicitly in the Constitution but that concentrates on those rights in their most general form. The right to "liberty" guaranteed in the Fourteenth Amendment is such a general right. All the Liberal approaches are illustrated in Chapter 1. The Conservative view is discussed further in Chapter 3.

I adopt a view that I believe to be closer than any of those so far mentioned to the midpoint between the extremes of total deference to majority rule and complete protection of individual rights. I call this the Moderate view. I would confine the constitutional protection of individual rights to rights explicitly mentioned in the Constitution. I would further confine constitutional protection to those rights in their relatively specific, rather than general, form. But I would allow broad scope to the development of the meaning of the specific concept in question. Thus, the meaning of the Equal Protection Clause can legitimately evolve to render suspect any classifications based on race, since the clause appears in the Fourteenth Amendment, whose original goal was to guarantee equal citizenship to blacks. In Chapters 3, 4, 5, and 6 I argue similarly that the concept of religion in the First Amendment has legitimately evolved to include many matters concerning abortion. In Chapter 1, in contrast, I show why the general right to liberty should not be invoked to grant constitutional protection to specific rights not mentioned in the Constitution. The term "liberty" is too general and broad for the Court to gain specific guidance from it. (Almost) every law limits (someone's) liberty, so appeals to a general right to liberty cannot, by themselves, tell us which laws are, and which are not, constitutional. Without more specific guidance, the Court's interpretations of the Constitution are liable to give insufficient weight to the principle of
majority rule and excessive weight to unelected judges' particular, and possibly idiosyncratic, opinions about morality, politics, and economics. This is the vice of the Liberal view.

I favor the Moderate view because I believe it fares best on the criteria of congruence with written documents and correspondence with moral and political ideals. Congruence with the Constitution itself is guaranteed by the fact that the Moderate view endorses extending constitutional protection to all and only those relatively specific rights that are explicitly mentioned therein.

On the criterion of correspondence with moral and political ideals, no view can endorse decisions that correspond to all relevant ideals when the opposite sides of a legal dispute feature different ideals. But any acceptable view must strike a reasonable balance between the master political ideals of majority rule and individual rights. We have seen that in their extreme forms the Conservative view slights individual rights in favor of majority rule, and the Liberal view slights majority rule in favor of individual rights. The Moderate view does a better job of giving due weight to each of these central political ideals.

One’s view of the proper approach to constitutional interpretation affects one’s evaluation of arguments in constitutional law. Thus, I offer arguments that accord with my Moderate view and criticize the arguments of others as too conservative or too liberal. I also argue that the Moderate view is the best approach to the Constitution. In addition, I argue that only on the Moderate view, especially as applied to the First Amendment guarantees regarding religion, can the Supreme Court's various decisions regarding abortion be understood to express a consistent, and constitutionally appropriate, approach to the matter.

Preview of Chapters

I begin by investigating (constitutional) justifications for the concerns of those four Supreme Court justices who have indicated their desire to reconsider Roe v. Wade. I do this by addressing the controversy surrounding Roe's derivation and specification of the fundamental right, proclaimed there for the first time, of a woman to terminate her pregnancy. Chapter 1 reviews the precedents on which Justice Blackmun relied when deriving that right from others mentioned explicitly in the Constitution. I argue that crucial precedents are not themselves well-
grounded in the Constitution and that *Roe* may not be a logical extension of them anyway. I further argue that Justice Stewart’s alternative justification, though better, is still weak.

Chapter 2 discusses the limitations placed by the Court in *Roe* and in later, related decisions, on a woman’s right to terminate her pregnancy. Criticism centers on the meaning and importance of fetal viability.

All of this is preliminary to justifying on entirely different constitutional grounds a result substantially similar to that reached in *Roe v. Wade*. Chapters 3, 4, 5, and 6 argue that a woman must have a right to terminate her pregnancy at least during its first twenty weeks. I reach this result by analyzing the meaning of “religion” as it appears in the First Amendment, where it says “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” I find that according to the Supreme Court, this amendment prohibits laws whose sole purpose or principal effect is support for a religious belief. I find also in the Court’s interpretations of the Religion Clauses the view that religious beliefs are those that one cannot establish with arguments employing secular premises alone. Secular premises reflect the agreements in belief, thought and practice that are integral to our society’s common way of life. Religious beliefs, by contrast, are those that the Court considers to constitute, or rest at least partly on, beliefs that are optional in our society. People in our society can agree to disagree about religious beliefs because our common way of life is not jeopardized by disagreement. The paradigm case is belief in the existence of God. I argue that believing a human fetus to be a human person before it has completed twenty weeks of gestation is similarly a religious belief. So laws restricting abortions during the first twenty weeks of pregnancy are unconstitutional violations of the First Amendment religion guarantees, unless they can be justified on grounds other than those which presuppose that fetuses are human persons during the first twenty weeks of gestation.

These First Amendment arguments illustrate the Moderate view of constitutional interpretation. Freedom of religion is explicitly mentioned in the Constitution and is relatively specific. But the meaning that the Court attaches to the word “religion” has expanded, especially during the past fifty years, and the arguments offered in the present work employ this newer, expanded meaning.

Chapters 7 and 8 apply the foregoing reasoning to cases concerning such issues as the public funding of abortions, the use of public facilities
for abortions, the rights of minors to have abortions without parental consent or notification, and state requirements that certain information be supplied before an abortion can be performed. I find the Supreme Court’s decisions on these issues to be largely justified, but their rationales to be largely deficient.