



**STATE OF VERMONT**  
**OFFICE OF LEGISLATIVE COUNCIL**

**MEMORANDUM**

**To:** Senate Committee on Health and Welfare  
**From:** Brynn Hare, Legislative Council  
**Date:** February 28, 2019  
**Subject:** Proposal 5: "compelling interest" standard

This memo is intended to summarize the standard of review proposed in Article 22 of Proposal 5 to amend the Vermont Constitution. This proposal advances a new article to the Vermont Constitution as follows:

Article 22. [Personal reproductive liberty]

That the people are guaranteed the liberty and dignity to determine their own life's course. The right to personal reproductive autonomy is central to the liberty protected by this Constitution and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.

The Article enumerates the right to "personal reproductive autonomy," and requires that any regulation seeking to restrict that right be "justified by a compelling State interest achieved by the least restrictive means." This latter language establishes that the appropriate standard of review for restrictions on the right to reproductive autonomy is the strict (or heightened) scrutiny standard. Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of a law. This standard requires that, in order to pass constitutional muster, the law must 1) further a compelling interest of the state and 2) be narrowly tailored to achieve that interest.

When certain fundamental rights are at issue, the U.S. Supreme Court has held that "a regulation limiting these rights may be justified only by a compelling State interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113 (1973), citing Griswold v. Connecticut, 381 U.S. 479 (1965). The Court in Roe undertook this analysis in striking down a Texas statute that forbade all abortions not necessary for saving the life of the patient. The Court found that states may not categorically prohibit abortions by making their

performance a crime, because the 14th Amendment right of personal privacy<sup>1</sup> embraced a woman's decision whether to carry a pregnancy to term. The scope of the privacy right included only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" and relates to activities in the realm of marriage, procreation, contraception, family relationships, and child rearing and education. Since the Court found that the right to privacy is a fundamental right, only a compelling state interest could justify its limitation by a state.<sup>2</sup>

The Supreme Court of Vermont does not always abide by the standards of review of the U.S. Supreme Court. The Vermont Court has held that the history of Chapter II, Article 7 (the common benefits clause) indicates that a relatively uniform standard, reflective of the inclusionary principle at its core, governs the Court's analysis of laws challenged under the clause.<sup>3</sup> In this analysis, the Vermont Court will first define the part of the community disadvantaged by a law, and then examine the statutory basis that distinguishes those protected by the law from those excluded from the State's protection.

The Court will then look to whether excluding a part of the community from the protection of the law bears a reasonable and just relation to the governmental purpose. Making this determination may include examining 1) the significance of the benefits and protections of the challenged law; 2) whether the omission of members of the community from the benefits of the law promotes the government's goals; and 3) whether the classification is significantly underinclusive or overinclusive. In other words, the Court will assess the relative weights or dignities of the competing interests.

The U.S. Constitution may supplement the protections afforded by Article 7, but it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters.<sup>4</sup> The Vermont Supreme Court is free to provide more generous protection of rights under the VT Constitution than what is afforded by the U.S. Constitution.<sup>5</sup>

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<sup>1</sup> The right to privacy came from prior U.S. Supreme Court jurisprudence, including Griswold v. Connecticut (1965), the landmark case that was the first to articulate a Constitutional right to privacy. In that case, the Court found that states may not restrict a married couple's ability to access contraception. This case was followed up by Eisenstadt v. Baird (1972), which found the same for unmarried individuals, but the Court based the right on the Equal Protection Clause of the 14th Amendment.

<sup>2</sup> In its analysis of the state's interest in regulating abortion, the Court found that only after the first trimester did the state's interest in protecting maternal health provide sufficient basis to justify state regulation of abortion, and then only to protect that interest. The Court found the "compelling" point with respect to the state's interest in the potential life of the fetus to begin at viability. Therefore, according to Roe, the state's interest permits it to regulate abortion following viability except when necessary for the preservation of the life or health of the patient.

<sup>3</sup> Baker v. State, 170 Vt. 194 (1999).

<sup>4</sup> State v. Badger, 141 Vt. 430 (1982).

<sup>5</sup> State v. Jewett, 146 Vt. 221 (1985).