WHY THE EQUAL-PROTECTION CASE FOR ABORTION RIGHTS RISES OR FALLS WITH *ROE*'S RATIONALE

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Why the Equal-Protection Case for Abortion Rights Rises or Falls with *Roe*'s Rationale

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For nearly 50 years, legal scholars who favor *Roe v. Wade*'s[2] outcome but scorn its rationale have tried to find firmer footing for a constitutional abortion right. *Roe* and its follow-on case, *Planned Parenthood v. Casey*,[3] claimed to derive such a right from the Due Process Clause. That proved deeply controversial, for reasons laid out in the leaked draft opinion for the Court in *Dobbs*.[4] Most prochoice critics of *Roe* would have relied instead on the Equal Protection Clause. Scores of essays on abortion rights have endorsed, developed, and refined the equality arguments over decades.[5] A book of proposals about what *Roe* should have said is filled with them.[6] A few separate judicial opinions are sprinkled with them.[7] The *Dobbs* dissent(s) might be. But in the end, I think, the equality rationale is only as strong as *Roe*'s. They rise or fall together.

The equality arguments for abortion rights come in two varieties. A leading proponent of one variety, from whom I've learned (and to whom I owe) a great deal, is Professor Reva Siegel, who co-filed an amicus brief in *Dobbs*.[8] She argues that we cannot explain prolife states' policies in terms of their professed concern for fetal life alone. Those policies also reflect invidious motivations, like stereotypes about women's "proper" role as mothers before all else.[9] Other equal-protection arguments, including Professor Jack Balkin's, focus less on motivation than on impact.[10] They suggest that prolife states impose burdens on women they would never tolerate on men. Either way, the idea is that abortion bans—viewed together with prolife states' other policies—reflect or impose sexist double standards.

Aside from Erika Bachiochi's feminist critique of the equality arguments for abortion rights,[11] there has been a dearth of sustained responses. And the draft *Dobbs* opinion, for its part, simply finds the equality arguments foreclosed by two cases holding that laws regulating sex-

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[2] 410 U.S. 113 (1973).

[3] 505 U.S. 833 (1992).

[4] Draft Opinion of Justice Alito in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 at 15–31 (February 2022), https://www.documentcloud.org/documents/21835435-scotus-initial-draft.

[5] *See generally* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

[6] *See* Jack M. Balkin, *Introduction*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin, ed., 2007).

[7] *See generally* Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 U.C.L.A. REV. DISC. 160 (2013).

[8] Brief of Equal Protection Constitutional Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, https://www.supremecourt.gov/DocketPDF/19/19-1392/193048/20210920164113157_19-1392%20bsac%20Equal%20Protection%20Constitutional%20Law%20Scholars%20Final.pdf (hereinafter "Amicus Brief").

[9] *See generally* Siegel, *supra* note 5.

[10] *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291 (2007).

[11] *See* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 893 (2011) (arguing that "abortion rights actually hinder the equality of women by taking the wombless male body as normative, thereby promoting cultural hostility toward pregnancy and motherhood").

specific procedures don't trigger scrutiny absent some animus[12] and that we needn't posit animus to explain abortion laws.[13] Critics respond that this answer gives the equality arguments short shrift and refuses to revisit two precedents (including *Geduldig*,[14] which for some has been overruled in the court of history[15]) in an opinion rejecting much bigger ones.[16]

To be fair to the *Dobbs* majority, the equal protection arguments depart not only from two cases but from the Court's global framework for equal protection law—with its focus on disparate treatment rather than impact and on classifications as triggers for scrutiny. Balkin concedes as much.[17] But he says that departing from these doctrines would take us closer to the Constitution's original meaning.[18] Here I will assume that he is right.

Specifically, as needed for both the unfair-motivations and unfair-impact versions of the argument, I will assume a doctrinal framework in which courts may reach equal-protection judgments by studying the whole body of a state's statutory (and common?) law to draw (1) inferences about the state's systematic motivations toward particular groups and (2) counterfactual judgments about how the state's laws might change if the burdens they imposed fell on different

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[12] Geduldig v. Aiello, 417 U.S. 484 (1974).

[13] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).

[14] *Supra* note 12.

[15] *Cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (declaring that *Korematsu v. United States* (1944) has been "overruled in the court of history").

[16] Comments of Mary Ziegler, The *Dobbs v. Jackson* Case – Part 3, *We the People Podcast*, https://www.stitcher.com/show/we-the-people/episode/the-dobbs-v-jackson-case-part-3-203140026.

[17] *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 325 (2007). Professor Reva Siegel argues that even under current doctrine, a law classifies by sex—triggering heightened scrutiny—if it is a "pregnancy-based regulation[.]" Amicus Brief, *supra* note 8, at 9. But I do not see how a general feticide law—with no special penalty but also no exception for feticide resulting from an abortion requested by the pregnant woman—classifies by sex at all. *See* Andrew Koppelman, *Beyond Levels of Scrutiny:* Windsor *and "Bare Desire to Harm",* 64 CASE W. RES. L. REV. 1045, 1049 (2014) (Supreme Court applies heightened scrutiny only when a policy requires "officials, in allocating rights and burdens, to determine" certain traits' presence or absence "in specific cases."); *cf.* Benjamin Eidelson, *Dimensional Disparate Treatment*, at 42–44 (forthcoming *Southern California Law Review*), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915787 (arguing that discrimination based on pregnancy is not, as a matter of ordinary meaning, discrimination based on sex).

Siegel elaborates that abortion laws classify by sex because they "single out women for regulation." Siegel, et al., *Equal Protection in* Dobbs *and Beyond*, 32 COLUM. J. OF GENDER & THE LAW at 13 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115569. Of course, abortion regulations do not single out women in the sense of prohibiting only women from performing abortions. To the contrary, the only differential treatment that contemporary abortion regulations show to any women is to *exempt* from liability the women who seek abortions (as opposed to the people who perform them). Obviously, a general feticide law will have a disparate impact on pregnant women if its main effect, in practice, is to prevent abortions requested by women; preventing those procedures burdens women far more than men. And perhaps this disparate impact *should*, in an ideal world, suffice to trigger scrutiny. The point is just that disparate impact does not make for a suspect classification under current doctrine—not for sex and not for any other protected trait.

Finally, Siegel suggests that "[e]ven if legislators drafted an abortion ban that expressly applied to all who become pregnant, that ban would be sex-based and unconstitutional if it were based on the sex-role stereotype that the state can coerce persons who are pregnant to continue pregnancy without recompense or support." *Id.* But to ascribe abortion laws to such stereotypes is to assume just what Siegel's equality arguments mean to prove (and what, I suggest below, they have not proven). In other words, the idea that abortion laws rest on unlawful stereotypes is the intended conclusion of Siegel's analysis, not a premise—not a basis for triggering *heightened scrutiny* of such laws.

[18] Balkin, *supra* note 17, at 318–19, 325.

groups than they currently do. Granting all of this, I think the equality arguments are vulnerable to an objection not based on precedent.

To preview: Despite their professed goal, the equality arguments ultimately have to assume that it is not even permissible for states to believe that fetal life is innocent human life. They must assume that the *Constitution itself* somewhere mandates a position on fetal moral worth—one that discounts early fetuses. But this was the weakest and most widely criticized premise of *Roe* and *Casey*. The equality arguments would thus be no stronger than *Roe* and *Casey*'s rationale. And so, for the *Dobbs* majority's purposes, they would fail for the same reasons. In fact, the premise they share with *Roe* and *Casey* would do most of the work in the equality arguments for abortion. There would be little left to be done by the appeal to equality itself.

For background, start with *Roe* and *Casey*'s rationale (since equal-protection arguments are supposed to improve on it). In their own telling, *Roe* and *Casey* rested at bottom on a balancing of two interests: the interest in aborting and the interest in protecting fetal life. They held that the moral balance tips toward the fetus (enough to justify protection) only at viability.[19] And they ascribed this moral discounting of pre-viable fetal worth to the Constitution. But for this they gave no historical or precedential support. Effectively, then, *Roe* and *Casey* hang on the surprising premise that the Due Process Clause takes a position found nowhere in our history on when the human fetus counts enough to be protected—that the Clause itself rejects higher estimations of pre-viable fetal worth.

Few appreciate that it was *Roe*'s defense of this *particular* premise that John Hart Ely and Laurence Tribe so famously scorned. Ely said *Roe*'s argument for discounting pre-viable moral worth was transparently circular, "mistak[ing] a definition [of viability] for a syllogism,"[20] and Tribe wrote that one has to "read[] the Court's explanation" for this premise "several times before becoming convinced that nothing has inadvertently been omitted."[21] And *Dobbs*'s historical analysis argues that the Constitution does *not* enshrine *Roe* and *Casey*'s moral premise that pre-viable fetuses lack sufficient worth. (Note that states could be constitutionally permitted to regard fetal life as human life even if they aren't *required* to do so by the Fourteenth Amendment—i.e., even if fetuses are not constitutional "persons." That is clear from the example set by *Roe* and *Casey* themselves,[22] not to mention the fact that some 40 states permissibly treat *non*-abortion feticide as a crime, most often as homicide.[23]) So if the equality arguments are to move the ball—in particular, if they are to escape any rebuttals on the merits that *Dobbs* makes against *Roe* and *Casey*—they must avoid resting on this constitutional discounting of early fetal worth.

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[19] See Sherif Girgis, *Misreading and Transforming* Casey *for* Dobbs, 20 GEO. J. L. & PUB. POL'Y 331, 340–41 & n.46 (2022).

[20] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe *v.* Wade, 82 YALE L.J. 920, 924 (1973).

[21] Laurene H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

[22] *Roe* and *Casey* taught that saving *X*'s life can be an interest of the highest order—a *compelling* interest—even if *X* isn't a person; they said just that of viable fetuses. Under *Roe* and *Casey*, post-viability abortion bans were permitted (though they burden a right) because they serve a compelling interest—but not required, because the late-term fetus isn't a constitutional person. See Girgis, *Misreading*, *supra* note 19, at 340–41 & n.46.

[23] *See* National Council of State Legislatures, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women* (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx

Some aspire to do that. The equality arguments summarized by Professor Reva Siegel and Professor Neil Siegel[24] (and separately by Reva Siegel[25]) recognize a "bona fide interest in protecting potential life."[26] Granting that abortion bans are partly "about" protecting "the unborn,"[27] these arguments do not say that this motivation is off-limits or insufficient under the Due Process Clause. (So they see no *inherent* constitutional problem with regarding fetal life as innocent human life weighty enough to justify abortion restrictions.) Instead, equality arguments submit that prolife states' policies *also* reflect *other* motivations—or have *effects*—that *are* forbidden, but by a different clause: equal protection. Specifically, as Siegel and Siegel sort them, these arguments rest on one of two broad claims: that (1) prolife states unjustly burden women in ways they would never burden men, and that (2) prolife states must be motivated by biased ideas about women. I'll take them in turn.

1. *"Gendered impact of abortion restrictions"*:[28] The first argument is that by banning abortion without offsetting the burden to women in certain ways (e.g., without "providing material resources to support" mothers[29]), states would impose *X* burden on women that they would never impose on men.

But I don't see how this argument could really grant the premise that it is constitutionally permissible for states to see fetal life as innocent human life (as needed if it's to improve on *Roe* and *Casey*). To grant this and still establish a sexist double standard, the argument would have to identify situations where prolife states would lift burdens like *X* from men (but not from women) at the cost of *legally permitting the intentional taking of innocent life or something morally comparable*. And it's hard to see how one could do that. What policy protects men's interests at the cost of legally permitting the intentional killing of innocents or anything morally close to it?

The costs of pregnancy cannot be trivialized. And given the limits of our technology, some of those costs cannot be transferred to another person or a machine. But if the equal-protection arguments are to add anything to *Roe* and *Casey*, they must allow that the costs of permitting abortion might also be grave—possibly as grave as permitting the intentional killing of innocent human life. And assuming those are the costs, we would have to find something similarly morally egregious that prolife states *would* tolerate to benefit *men*, if we're to establish a double standard.[30]

Compare conscription. Its costs—separation from friends, family, and work, and possibly death—fall on able-bodied adults. That doesn't mean that it reflects animus against the able-bodied relative to the disabled. That's because we couldn't transfer those costs even if we wanted to; we have very weighty reasons to tolerate them; and there's no evidence that we would refuse to accept similar tradeoffs when the disabled are the ones bearing the costs. (Just the opposite, unfortunately.) So too here, assuming—as any promising equality argument should—that the reasons to tolerate the burdens of abortion bans may well be as weighty as prolife states think.

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[24] *See generally* Siegel & Siegel, *supra* note 7.
[25] *See generally* Siegel, *supra* note 5.
[26] Siegel & Siegel, *supra* note 7, at 163.
[27] *Id.*
[28] *Id.*
[29] Siegel, *supra* note 5, at 822.
[30] Or we would have to find other combinations of cost and benefit that reveal that prolife states in particular apply less generous tradeoff rates to women.

2. *"Constitutionally suspect judgments about women"*:[31] A similar issue plagues the second family of equality arguments, each of which reasons as follows: By banning abortion but failing to protect human life in *XYZ* other ways (e.g., reducing abortion rates by providing "appropriate and effective sex education," or enhancing health outcomes by "provid[ing] assistance to needy families"[32]), states manifest not only concern for fetal life but also impermissible attitudes toward women (e.g., "stereotypes about women's roles as child bearers before all else"[33]).

In other words, prolife states are too callous toward human life in other contexts for their abortion bans to reflect a pure (admittedly legitimate) concern for fetal life, rather than also reflecting suspect judgments about women.

To establish that, this argument would have to identify situations where prolife states not only fail to effectively *promote* life in *XYZ* ways, but do something as callous toward life as *withdrawing the protection of homicide laws from a class of innocents*. Is failing to subsidize certain forms of health care—or failing to subsidize childcare, or for that matter failing to subsidize childcare when this will make someone marginally likelier to get an abortion—the moral equivalent of denying the protection of homicide laws to a class of innocents? It seems not to be.

But if we *cannot* point to such moral equivalents, we have not shown that prolife states' policies must have a hidden, invidious motivation.

To be clear, I think no matter what abortion policies we have, we can and should do more—much more—to support pregnant women, parents, and children. The narrow analytic point is just that withdrawing the protection of homicide laws from (what are conceded *arguendo* to be) innocent human lives is generally worse than failing to provide resources. With born persons, for instance, we must protect everyone against homicide, but we don't automatically give everyone every vital resource in every context—due to scarcity and costs, the unintended effects of some redistributive policies, competing policy needs, and other tradeoffs. So *if* states can see abortion as the intentional killing of innocents (as equality arguments mean to grant), they can see a world of difference between withdrawing the protection of homicide laws from the unborn, and giving the born and unborn this or that form of public support. We needn't posit that this difference is driven by suspect judgments about women.

We may have more direct evidence that some particular prolife people have harbored bias against women, but we also have empirical and historical evidence that many do not. *First*, there are the tiny gender differences in public opinion on abortion and high proportion of prolife women. From the 1970s onward, the gender gap on abortion has consistently been smaller than on almost any other political issue.[34] If suspect judgements about women drive prolife views, then women

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[31] Siegel & Siegel, *supra* note 7, at 163.

[32] Amicus Brief, *supra* note 8, at 20.

[33] *Id.*

[34] *See* Frank Newport, *Men, Women Generally Hold Similar Abortion Attitudes*, GALLUP (June 14, 2018), https://news.gallup.com/poll/235646/men-women-generally-hold-similar-abortion-attitudes.aspx; *see also* Matthew Yglesias, *Men and Women Have Similar Views on Abortion*, VOX (May 20, 2019), https://www.vox.com/2019/5/20/18629644/abortion-gender-gap-public-opinion.

hold constitutionally infirm views about women at nearly the same rate as men. And in absolute terms, just under half of all American women are guilty of misogyny and plagued by false consciousness. The fact that prolife or antiabortion views are barely more common among men than women, and are quite common among women, is a serious point against suspect-judgment arguments. *Second*, so is the historical fact that the pro-life movement has deep roots in the civil-rights movement—in New Deal-era civil-rights crusaders who "viewed their campaign as an effort to extend state protections to the rights of a defenseless minority (in this case, the unborn)."[35]

More broadly, there is no context where states must license something they permissibly see as comparable to the intentional killing of one group, in order to secure equality for another group. Nor is there any context where we would even ask whether equality required such a thing.

So the equality arguments must, after all, presuppose that it is *not* permissible for states to see fetuses as innocent human lives on a par with the born—that states *must* discount the intentional killing of fetal lives. But then equality arguments will need a defense of this further, purely moral judgment about fetal worth. That defense will need to improve on *Roe* and *Casey*'s plainly circular one. It will need to trace this view of fetal moral worth to some part of the Constitution, in order to justify its imposition by courts. And if an argument did all of that, I don't see what further work would remain to be done by appeals to equality. A constitutional abortion right would already have been established.

Those convinced by Peter Westen's argument that appeals to equality *never* do the work in an argument about rights will be unsurprised if it holds true here.[36]

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Even granting the equality arguments' reading of the Equal Protection Clause, their proposed doctrines for implementing it, and their rejection of *Geduldig* and other precedents, I think the arguments fail to establish an abortion right unless they assume with *Roe* and *Casey* that the Constitution itself takes a position discounting fetal moral worth. If *Dobbs*'s historical analysis proves that the Constitution does no such thing, it refutes the equality arguments, too.

[35] DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 4 (2019).

[36] Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

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Emory Law Journal
2007

Article
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SEX EQUALITY ARGUMENTS FOR REPRODUCTIVE RIGHTS: THEIR CRITICAL BASIS AND EVOLVING CONSTITUTIONAL EXPRESSION

What is at stake in a sex equality approach to reproductive rights? At first glance, equality arguments would seem to entail a shift in constitutional authority for reproductive rights--for example, from the Due Process to Equal Protection Clause of the Fourteenth Amendment--but as the articles of this Symposium richly illustrate, equality arguments for reproductive rights need not take this legal form. In introducing this Symposium, I identify a sex equality standpoint on reproductive rights that can be, and is, expressed in a variety of constitutional and regulatory frameworks.

A sex equality analysis of reproductive rights views the social organization of reproduction as playing a key role in determining women's status and welfare and insists--custom notwithstanding--that government regulate relationships at the core of the gender system in ways that respect the equal freedom of men and women. Whatever sex role differences in intimate and family relations custom may engender, government may not entrench or ***816** aggravate these role differences by using law to restrict women's bodily autonomy and life opportunities in virtue of their sexual or parenting relations in ways that government does not restrict men's. On this view, laws imposing gender-specific burdens on women's sexual and parenting relations are constitutionally suspect. The longstanding tradition of imposing such burdens on women does not strengthen the law's claim to constitutional legitimacy and may instead weaken it: A pregnant woman's

> suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. [1]

As the articles in this Symposium illustrate, these understandings and commitments can be vindicated in different constitutional frameworks. They can be enforced though a doctrinal framework developed under the Fourteenth Amendment's Due Process Clause, Privileges or Immunities Clause, or Equal Protection Clause, by cases decided under the Eighth Amendment, the Ninth Amendment, the Thirteenth Amendment, or the Nineteenth Amendment, through a federal or state statute, or by a synthesis of these forms of law. More recently, the dissenting justices in the Carhart [2] case have asserted that the abortion right protects "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." [3]

In what follows, I sketch out some of the critical understandings and normative commitments that characterize the particular standpoint that I am calling a sex equality approach to reproductive rights. These understandings and commitments orient constitutional arguments that have been advanced in a variety of doctrinal frameworks. Persons who argue from the sex equality standpoint on reproductive rights may not endorse every element of the approach detailed below, but will reason from some recognizable group of these understandings and commitments. Sometimes expression of these understandings and convictions is explicitly part of the argument; more often than not it is implicit. For this reason, I begin with a generalized account of a standpoint, and then after surveying its main analytic features, tie this cluster ***817** of critical understandings and normative commitments to particular advocates and authorities in the reproductive rights debate in the last several decades, including the justices who dissented in the Carhart case and the participants in this Symposium.

I. Understandings and Commitments of a Sex Equality Approach to Reproductive Rights

Perhaps the most prominent feature of the sexual equality approach to reproductive rights is its attention to the social as well as physical aspects of reproductive relations. A sex equality analysis is characteristically skeptical of the traditions, conventions, and customs that shape the sex and family roles of men and women. Arguments from this standpoint are skeptical of custom, not simply because custom differentiates men and women in matters of sex and parenting, but because it does so in ways that have gender-differentiated impacts on the standing and well-being of the sexes. This critical engagement with custom is a crucial part of the sex equality outlook: Custom is an important source of social meaning, value, and structure and, precisely because it is, it is also an object of critical reflection and revision.

Arguments from the sex equality standpoint are concerned with the ways custom structures the sex roles of men and women. A sex equality analysis views sexual intimacy as a human need worthy of fulfillment; it respects sexual relationships that fulfill this need even when such relationships diverge from the heterosexual, procreative, and marital forms that custom privileges. A sex equality analysis worries that the customary morality governing sexual expression values men's sexual freedom, decisional autonomy, and pleasure more than women's--in some circumstances making it harder for women to say “yes” to sex, and in others to say “no.” According to traditional sexual double standards, men have license to engage in extramarital sex that women do not; women are punished for engaging in extramarital sex as men are not; women are coerced into sexual relations as men are not. Arguments from the sex equality standpoint do not oppose differentiation or validate homogeneity as such. They worry about gender-differentiated norms of sexual expression because, and only insofar as, these double-standard conventions of heterosexual intimacy lead to relationships in which women are deprived of dignity, health, happiness, and freedom as men are not.

Along similar lines, a sex equality approach to reproductive rights is concerned about the gender-differentiated norms and arrangements that ***818** structure parenting. Here again, arguments from the sex equality standpoint do not oppose differentiation or validate homogeneity as such. Arguments from this standpoint appreciate that parenting is a central source of identity and sustenance in life, but also understand that the role-differentiated work of parenting has adverse economic consequences for women-- prime among them that those who engage in care giving are often prevented from acquiring education and market experience that are economically valued as care giving is not. Arguments from this standpoint worry that the uncompensated parenting activities that women generally perform can lead to women's economic dependency on men or the state. They appreciate that having children generally impairs women's earning capacity [4] --and, in the individual case, can lead to decades of economic insecurity. They understand that these risks are generally present, whether sexual intimacy occurs outside stable households or within households that are presently stable but may not stay intact for the duration of a child's dependency. (Over a quarter of the nation's children are now raised in single-parent households, [5] with more than five times as many single-parent households headed by women than men. [6])

For these reasons and others, the sex equality approach to reproductive rights views control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class. Arguments from the sex ***819** equality standpoint appreciate that there is both practical and dignitary significance to the decisional control that reproductive rights afford women, and that such control matters more to women who are status marked by reason of class, race, age, or marriage. Control over whether and when to give birth is practically important to women for reasons inflected with gender-justice concern: It crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that this society no longer believes fair to enforce, yet is unwilling institutionally to redress.

Control over whether and when to give birth is also of crucial dignitary importance to women. Vesting women with control over whether and when to give birth breaks with the customary assumption that women exist to care for others. It recognizes women as self-governing agents who are competent to make decisions for themselves and their families and have the prerogative to determine when and how they will devote themselves to caring for others. In a symbolic as well as a practical sense, then, reproductive rights repudiate customary assumptions about women's agency and women's roles.

In nineteenth-century America, those who espoused a sex equality approach to reproductive rights endorsed “voluntary motherhood”--women's right to say no to sex in marriage. [7] These advocates did not endorse abortion or contraception, but they were outspoken about women's right to make decisions about sex and motherhood, and they blamed the incidence of abortion on customs that denied women reproductive autonomy in marriage; without protecting women's freedom to make decisions about

sex and motherhood, advocates of voluntary motherhood argued, marriage was little better than a "legalized prostitution." [8] But over the ensuing century, those who espoused a sex equality approach to reproductive rights came to endorse ***820** women's access to contraception and then to abortion--seeking to protect women's ability to say yes as well as no to sex, inside and outside marriage. [9]

Today, most who espouse a sex equality approach to reproductive rights view laws restricting contraception and abortion as suspect. They generally express no view about whether individual women and men should rely on contraception or abortion, but seek to protect women's access to commonly employed means of controlling birth. [10] They presume that women's reasons for controlling whether and when to bear children are considered, weighty, and warranting deference as a matter of social justice. [11] Conversely, they tend to ***821** view social justifications for restricting women's control over reproduction as suspect--as efforts to preserve the procreative orientation of sex or the family orientation of women's roles. [12] The sex equality approach to reproductive rights opposes laws restricting abortion or contraception to the extent that such laws presuppose or entrench customary, gender-differentiated norms concerning sexual expression and parenting. It probes the reasons offered for restricting women's control over reproduction, asking whether the social aims such restrictions claim to serve could be effectuated by some other means. Where the claimed purpose of such restrictions is to protect potential life, arguments from the sex equality standpoint rigorously probe the proffered justifications, endeavoring to determine whether the interest in protecting potential life is asserted only against women who resist customary sexual and parenting roles or whether the community acts consistently to protect potential life in other contexts and is prepared to support those women whom it would pressure into giving birth. [13]

If these conditions are met, some who take the sex equality approach to reproductive rights would still sanction restrictions on abortion. [14] But they are a minority. Generally, those who reason from the sex equality standpoint yet have moral concerns about the practice of abortion tend to advocate sex education and contraception policies designed to minimize the prevalence of abortion instead of policies designed to criminalize it. [15] Today, most who ***822** espouse the sex equality approach to reproductive rights oppose legal restrictions on abortion because (1) whatever the asserted fetal-protective rationale, in actual practice legal restrictions on abortion have reflected and entrenched customary, gender-differentiated norms concerning sexual expression and parenting; (2) they have conscripted the lives of poor and vulnerable women without similarly constraining the privileged; (3) they have punished women for sexual activity without holding men commensurately responsible; and (4) they have used law to coerce, but not to support, women in childbearing. [16]

Those who espouse a sex equality standpoint on reproductive rights do not generally view criminal sanctions on abortion or contraception as an appropriate vehicle for expressing the importance of family or the value of human life. Rather, they believe such values are appropriately expressed by supporting those who are endeavoring to bear or rear children, by recognizing and accommodating their care-giving efforts, and by providing material resources to support them [17] --policies that traditionalists view as threatening to erode the forms of family structure and the forms of character and virtue that sustain the private sphere. [18]

*823 II. Legal Expression of the Sex Equality Approach to Reproductive Rights

In the late 1960s and 1970s, many in the women's movement voiced the understandings and commitments I have characterized as the sex equality approach to reproductive rights, and over time, these views came, at least in part, to shape the understandings and commitments of officials charged with enforcing the Constitution. But these views have not always--or even most commonly--been expressed as claims about the Equal Protection Clause of the Fourteenth Amendment or the case law associated with it.

In the years before and after Roe, advocates invoked different clauses of the Constitution to express sex equality arguments for reproductive rights. Considering this history makes it easier to appreciate how the understandings and commitments of the sex equality claim for reproductive rights have slowly come to shape judicial expression of the abortion right, which now resonates with the critical standpoint of the equal protection sex discrimination cases, even though, to this day, the abortion cases still do not expressly rely on the authority of the Equal Protection Clause itself. [19]

In the period just before Roe was decided, when the American legal system was only beginning to recognize that criminal abortion laws threaten constitutionally cognizable harm to women as well as to doctors, [20] feminist briefs invoked multiple forms of constitutional authority on behalf of the abortion right. In these early briefs, liberty talk and equality talk were entangled

as emanations of different constitutional clauses.[21] In Roe itself, an ***824** amicus brief challenged the Texas and Georgia statutes on sex equality grounds; the brief invoked the Fourteenth Amendment's Due Process and Equal Protection Clauses, as well as the Eighth Amendment. In advancing the due process claim, the brief argued that "restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact that men are unable to see women in any role other than that of mother and wife."[22] Invoking equal protection, the brief argued that "laws such as the abortion laws presently before this court in fact insure that women never will be able to function fully in the society in a manner that will enable them to participate as equals with men in making the laws which control and govern their lives,"[23] and invoking the Eighth Amendment, the brief argued that abortion laws inflicted cruel and unusual punishment on women not imposed on men for conduct no longer fairly understood as criminal:

> Such punishment involves not only an indeterminate sentence and a loss of citizenship rights as an independent person . . . [and] great physical hardship and emotional damage "disproportionate" to the "crime" of participating equally in sexual activity with a man . . . but is punishment for her "status" as a woman and a potential child-bearer.[24] ***825** In this era, when it was still an open question whether there would be heightened scrutiny of laws that enforce wealth inequality,[25] and few had yet considered the possibility of treating laws enforcing sex inequality as constitutionally suspect,[26] equality talk for the abortion right was commonly understood to raise questions of class as well as gender.[27] Protecting abortion as an equality right would give poor women access to safe abortions, and free all women from the indignities of asking "the man" for permission not to bear a child. Whether making claims on the Fourteenth Amendment, the Eighth Amendment, or the Nineteenth Amendment, briefs argued that criminal laws forcing pregnant women to bear unwanted children were the expression of sex stereotyping and sex-role reasoning.[28] One of the movement's most systematically litigated cases, Abele v. Markle,[29] resulted in a federal district court ruling striking down Connecticut's abortion law on the grounds that "society now considers women the equal of men" and "the appropriate decision-makers about matters regarding their fundamental concerns."[30]

***826** In this same period, NOW's 1970 strike for equality commemorated the half-century anniversary of the Nineteenth Amendment's ratification with protest actions in cities across the nation that tied abortion to questions of political participation, work and education, and the social organization of childrearing from which the abortion right has since been torn asunder.[31] The strike sought ratification of the Equal Rights Amendment (ERA) and three demands: equality of opportunity in education and employment, access to abortion, and access to publicly supported childcare.[32] The strike argued that the Nineteenth Amendment's promise of equal citizenship could not be realized unless women were given control of the conditions in which they conceived, bore, and raised children.

This kind of structural argument for reproductive rights that tied the abortion right to claims for the enforcement of antidiscrimination norms in employment and education and to claims for public support of childcare was progressively obliterated with the growth of modern sex discrimination law, the elaboration of the abortion right, and backlash against the women's movement.[33] Appeals to sex equality as a legal basis for the abortion right disappeared for both doctrinal and political reasons. An emerging body of Fourteenth Amendment case law effaced equality as a basis for reproductive rights. In 1973, Roe expressed the abortion right as a form of liberty protected by the Due Process Clause, never mentioning equal protection or reasons rooted in sex equality, and Frontiero[34] stated the case for equal protection scrutiny of sex-based state action without mentioning laws regulating reproduction. In 1974, Geduldig[35] rejected arguments that laws discriminating against pregnant women reflect sex stereotyping[36] and held that, for equal protection purposes, discrimination on the basis of pregnancy was not necessarily the same as discrimination on the basis of sex.[37]

***827** But it was not only Roe and Geduldig that diminished the Equal Protection Clause as authority for the abortion right. In this period, sex equality arguments for the abortion right were extinguished politically in the fight over the Equal Rights Amendment. Phyllis Schlafly's first published attack on the ERA in February of 1972--a year before Roe was handed down--characterized the women's movement as "anti-family, anti-children, and pro-abortion":

> Women's lib is a total assault on the role of the American woman as wife and mother, and on the family as the basic unit of society.

> Women's libbers are trying to make wives and mothers unhappy with their career, make them feel that they are "second-class citizens" and "abject slaves." Women's libbers are promoting free sex instead of the "slavery" of marriage. They are promoting Federal "day-care centers" for babies instead of homes. They are promoting abortions instead of families. [38] Schlafly drove these latent semantics to the surface of the ERA debate. She mobilized opposition by talking about the symbolic and practical threats ERA posed to women in traditional family roles. As importantly, she mobilized opposition by framing abortion and homosexuality as potent symbols of the new family form that ERA would promote. [39] In this way, the ERA fight helped frame the meaning of Roe. Some two years after Roe, anti-ERA activists began to argue that the ERA would constitutionalize the abortion right, an argument they then emphasized throughout the campaign. [40] By the late 1970s, architects of the New Right had begun to use abortion as a basis for building a pan-Christian conservative movement opposed to the Equal Rights Amendment and anything that threatened the traditional family form. [41] The ***828** ERA's advocates responded by doing what they could to separate abortion and sex equality talk, on the streets and in the courts-- seeking to avoid sex equality reasoning for the right during litigation of the abortion funding cases and through hearings on the extension and reintroduction of the ERA. [42]

So while the doctrinal separation of abortion and equal protection began with the Court's decisions in Roe, Frontiero, and Geduldig, it was perpetuated by many in the women's movement during the ERA's ratification campaign. Paradoxically, throughout the 1970s and into the early 1980s, it was the ERA's opponents rather than its proponents who were most likely to assert that abortion was a sex equality right.

But with the collapse of negotiations over the ERA's reintroduction in the early 1980s [43] and continuing assaults on Roe, feminists were once again liberated to talk about abortion as a sex equality right. And talk they did. In 1984, Sylvia Law published Rethinking Sex and the Constitution, [44] arguing that state regulation of reproduction was constrained by equal protection. In 1985, Ruth Bader Ginsburg urged that the Court should have grounded the ***829** abortion right on equality reasoning in Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade. [45] In this period, equality reasoning began to emerge as a dominant rationale for the abortion right in the legal academy [46] and to find expression in law. Connecticut and later New Mexico interpreted ***830** their state ERAs to reach regulation of pregnancy and abortion. [47] In 1986, Justice Blackmun concluded the majority's opinion in Thornburg [48] by emphasizing that the Constitution protected the liberties of women as well as men, [49] and several years later in Casey, his concurring opinion argued: "A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality," [50] explaining:

> State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption--that women can simply be forced to accept the ***831** "natural" status and incidents of motherhood--appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. [51]

These themes appear throughout the joint opinion in Casey. The opinion stated the importance of preserving the abortion right in terms of the interests of women who had organized their sexual and economic lives in reliance on the availability of abortion. [52] The opinion expressed constitutional limitations on abortion laws in the language of its equal protection sex discrimination

opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases. As Casey reaffirmed the abortion right, it emphasized:

> Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. [53]
> The Court's insistence that abortion regulation not enforce the gender-stereotypical understandings of the separate spheres tradition also shaped its application of undue burden analysis, specifically its rejection of a spousal notice requirement on the grounds that the abortion law reflected "a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution." [54]

***832** This emergent understanding that gender stereotyping could shape state action directed at pregnant women seems to have developed over the decades that courts have been called upon to enforce the Pregnancy Discrimination Amendment to the 1964 Civil Rights Act (first enacted in 1978). [55] It plainly shaped the Court's ruling in Hibbs [56] that Congress had authority under the Fourteenth Amendment to enact the Family and Medical Leave Act [57] in order to deter and remedy equal protection violations. Hibbs held that state laws giving lengthy "pregnancy disability" leaves to women only (leaves that provide new mothers more time off than is physically needed to recover from giving birth) violate the Equal Protection Clause because they give a leave for early childcare to women that might also be given to men. [58] In these cases, Hibbs held, the regulation concerning pregnancy violates equal protection because it discriminates between the sexes in ways that perpetuate sex stereotypes concerning the different roles and responsibilities of fathers and mothers. [59]

A similar reading of Hibbs and Geduldig appears in Tucson Woman's Clinic v. Eden, [60] a case involving an equal protection challenge to laws restricting access to abortion clinics. In considering whether laws singling out abortion clinics for regulation presented an equal protection question, the Ninth Circuit observed that Geduldig restricted equal protection claims involving pregnancy, but that Hibbs had limited Geduldig's reach: "[T]he Supreme Court recently implied that laws which facially discriminate on the basis of pregnancy, even those that facially appear to benefit pregnant persons, can still be unconstitutional if the medical or biological facts that distinguish pregnancy ***833** do not reasonably explain the discrimination at hand." [61] The Ninth Circuit then quoted the passages of Hibbs discussing "'pregnancy disability' leave" that is longer than medically needed and observed, "Hibbs strongly supports plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender." [62]

As it has become more commonplace to discuss regulation of pregnant women as raising questions of sex equality, numerous commentators have analyzed the interaction of liberty and sex-equality values in Casey. [63] In the years since the decision, the literature urging the Court to adopt an equality-based framework for analyzing laws regulating reproduction has continued to grow. [64] The equality framework supplies explicit, textual authority for a right ***834** that many have attacked as "unenumerated." As importantly, the equality framework identifies powerful constitutional values at stake in the abortion right's preservation that persist even if Roe is eviscerated or reversed. Courts can enforce equal citizenship values by evaluating restrictions on reproductive decision making to ensure that such restrictions do not reflect or enforce gender stereotypes about women's agency or their sexual and family roles. Legislatures can vindicate equal citizenship values through policies that promote the equal freedom of men and women in sex, reproduction, and parenting. [65] The equality framework serves as a reminder, in law and in politics, that justifications for limiting women's freedom that were constitutionally reasonable in 1860 or 1960 may no longer be so today. [66]

***835** Recognizing that the abortion right vindicates constitutional values of sex equality is especially important now that advocates are arguing that criminal abortion statutes are needed to protect women from abortion--a justification offered for the abortion ban South Dakota enacted in 2006. [67] Despite the ban's defeat, the woman-protective antiabortion argument is spreading. [68] As the ***836** justifications for regulation shift from fetal-focused to conventionally gender based, the equality framework will play a crucial role. The equality framework invites courts to analyze this new woman-protective justification for restricting abortion to ensure it does not enforce views of women associated with traditions of gender paternalism the nation

has renounced. Woman-protective restrictions on abortion, like any other seemingly benign form of sex-based state action, may neither reflect nor enforce stereotypical assumptions about women's capacities as decision makers or their role as mothers. [69]

Yet even as courts continue to expand sex equality analysis as a limit on laws regulating women, they might develop this analysis as an additional constitutional basis for reproductive rights as Casey did, one that supplements and illuminates the liberty values Roe and Casey protect. [70] Even this brief ***837** history of the abortion right suggests several reasons why such a synthetic approach might make sense. Casey's expression of the abortion right as rooted in constitutionally protected rights of liberty and equality draws on the authority of stare decisis, avoids the pitfalls of physiological naturalism and a legal-formalist approach to equality, and gives tempered expression to some of the more politically provocative commitments of the sex equality argument. [71]

As this Symposium goes to press, the questions it explores find vivid expression in the Court's most recent abortion decision, Gonzales v. Carhart. [72] In the course of upholding the Partial Birth Abortion Ban Act, the Court adopted for the first time a woman-protective justification for restricting access to abortion. [73] Justice Ginsburg led the dissenting justices in a wide-ranging ***838** critique of the majority's reasoning, criticizing the Court for deferring to restrictions on abortion that threaten women's health and decisional autonomy.

Justice Ginsburg's dissent begins by quoting at length the equality reasoning in Casey, and, on the basis of this authority, emphasizes that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." [74] The dissent makes direct appeal to the Court's equal protection sex discrimination cases to denounce the majority's woman-protective justification for restricting abortion as an affront to women's dignity and freedom: "This way of thinking reflects ancient notions about women's place in the family and under the Constitution--ideas that have long since been discredited. . . ." [75] In these passages, the dissenting justices appeal to Justice Kennedy to respect constitutional understandings he endorsed in Casey; and remind the majority, and the nation, that constitutional guarantees of equal protection continue to protect reproductive freedom. In citing to the equal protection cases, the dissent emphasizes that the Constitution limits government efforts to regulate women's choices and women's roles, and would continue to do so, even if the Court were to reverse Roe and Casey. The dissent, in short, summons an understanding of women as equal citizens that is vindicated through cases interpreting both the Constitution's liberty and equality guarantees.

III. The Sex Equality Approach to Reproductive Rights: Symposium Articles

The articles gathered in this Symposium demonstrate how laws regulating reproduction can be constrained by equality norms emanating from a variety of sources of law. In Accommodating Women's Differences Under the Women's Anti-Discrimination Convention, the human rights expert Rebecca Cook and Susannah Howard read the Convention on the Elimination of Discrimination Against Women (CEDAW) as requiring signatory states to regulate the delivery of health care so that "all women have equal and dignified access to services that respond to their particular health needs and that respect their ***839** moral agency." [76] Also working in a transnational framework, Joanna Erdman advances comparative constitutional analysis by demonstrating how the sex equality norms of the Canadian Charter apply to the delivery of health care services in In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada. [77]

Applying United States law, Gillian Metzger argues that habits of judicial deference to the regulation of health care may leave clinics vulnerable to regulation hostile to the abortion right, and in Abortion, Equality, and Administrative Regulation, Metzger urges that values of sex equality in the provision of health care can be advanced and protected through the ordinary doctrines of administrative law. [78]

Others in this Symposium draw on more familiar bodies of constitutional law. David Gans grounds the abortion right in the history and precedent associated with several clauses of the Fourteenth Amendment. [79] He argues that the Equal Protection Clause should be read along with the Citizenship Clause, the Privileges or Immunities Clause, and the Due Process Clause to provide constitutional authority for the abortion right in a synthetic argument he calls The Unitary Fourteenth Amendment. [80] In The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion

Legislation, Eileen McDonagh presents the abortion right as a right of self-defense in a synthetic argument that fuses the doctrinal authority of the suspect classifications and the fundamental rights branches of equal protection analysis. [81]

While this first group of articles examines sex equality understandings of reproductive rights in different sources of law--transnational, regulatory, and constitutional--another group of articles draws on the understandings and commitments of the sex equality approach in order to relate the abortion right to other sexual and parenting rights.

***840** These articles illustrate that, with the reversal of Bowers v. Hardwick [82] and increasing constitutional protection for same-sex sexual expression, constitutional protection for abortion is once again understood as constitutional protection for intimate sexual expression. [83] Symposium organizer Kim Buchanan reads the Court's decision in Lawrence v. Texas [84] as imposing constitutional limitations on the regulation of intimate sexual expression which protect cross-sex couples from invasive regulation as well as same-sex couples. [85] In Lawrence v. Geduldig: Regulating Women's Sexuality, Buchanan elaborates an equal sexual liberty framework that takes as a given "that women enjoy rights to sexual autonomy equal to those of men" [86] and "would put governments to a stringent standard of justification when they impose legal, social, financial, or health burdens on women's sexual expression that are not imposed on that of men." [87] The equal sexual liberty analysis that Buchanan derives from Lawrence imposes important limitations on Geduldig [88] that would alter constitutional analysis of laws regulating abortion and other practices associated with heterosexual sexual expression: "Restrictions on abortion constitute another form of sexual regulation that imposes a 'crushing restraint' on the sexual expression of heterosexual women." [89] In Heterosexual Reproductive Imperatives, David Cruz challenges ideologies about reproduction invoked to justify laws discriminating against both women and sexual minorities. [90] While government no longer invokes the facts of reproductive physiology to justify excluding women from politics or the professions, it continues to invoke claims about women's bodies to justify laws enforcing traditional understandings of women's roles, especially in the area of abortion. [91] Similarly, as government retreats from openly exclusionary claims about sexual minorities, it continues to justify their differential treatment through claims about the procreative purposes of marriage. This critical understanding of reproductive regulation, Cruz argues, calls for coalition of ***841** women, lesbigay people, and transgendered persons against the imposition of a narrow, heterosexual conception of reproduction.

Others reasoning from the understandings and commitments of the sex equality approach emphasize the ties between regulation of abortion and contraception and sex education. In Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy, Nina Pillard calls for an analysis of sex equality and reproductive rights issues beyond the core right to an abortion. [92] Because the formal legal right to an abortion often fails in practice "to secure reproductive choice equally for all women--young and mature, poor and rich, rural and urban," [93] Pillard argues for a "counter-stereotyping" sex education, for contraceptive equity, and for work-family accommodations that she believes should command the support of all those committed to women's equality, even those opposed to abortion for moral reasons. [94] Michelle Fine and Sara McClelland advance these themes in The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body where they argue that "certain groups of already marginalized young women, such as young women of color, those with disabilities, lesbians, and young women in poverty, suffer more severely as the public sphere shifts away from offering support, and instead, toward punishment for sexual activity." [95] They demonstrate this claim through an analysis of federally funded abstinence-until-marriage education, refusal to grant young women over-the-counter access to emergency contraception, and requirements of parental consent and notification for minors' abortion. [96]

Just as a sex equality analysis of the abortion right can identify its connections to matters concerning the regulation of sexual expression, sexual education, contraception, and the definition of marriage, equality analysis of the abortion right can also differentiate the forms of decisional autonomy protected in Roe from other regulated practices. In Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction, Pamela Bridgewater distinguishes reproductive practices by attending to the forms of social power that participants exercise, employing this equality perspective critically to ***842** analyze institutions from slavery to surrogacy. [97] Jack Balkin also employs equality analysis to differentiate the abortion right from other reproductive practices. In How New Genetic Technologies Will Transform Roe v. Wade, Balkin analyzes Roe's implications for the regulation of the new reproductive technologies in an account that distinguishes Roe's several holdings--that the embryo/fetus is not a constitutional "person" within the meaning of the Fourteenth Amendment, that states have interests in development of antenatal life and its potentiality for personhood, and that persons have a constitutionally protected right of

"sexual privacy" a "freedom from state interference in decision making in relationships and intimate life, a right that applies to men and women equally." [98] This last right, Balkin emphasizes, is best understood as a constitutionally protected "choice under conditions of sex inequality." [99] Understanding the juridically protected constitutional right in this way shows how it is properly vindicated in politics. "To secure women's equal citizenship, our legislatures must honor and support the work of motherhood far more than they currently do. They must invest in health care, nutrition, child support, and workplace reforms. They must . . . make contraception (and education about contraception) more widely available, particularly to poor women." [100] Not only do these choice-enabling forms of regulation vindicate Roe, but so, too, are certain legislative restrictions on reproductive decision making consistent with the right, properly understood. "Where new reproductive technologies do not further equality between the sexes, their connections to the underlying justification for the abortion right become greatly attenuated, and we should leave their regulation to the political process in most cases." [101]

As the articles gathered in this Symposium demonstrate, a sex equality approach to reproductive freedom does not always depend on the authority of the Equal Protection Clause and at times speaks the language of liberty; it is comfortable with the regulation of reproduction and might even require it, so as to ensure equal sexual freedom.

Footnotes

a1 Nicholas deB. Katzenbach Professor of Law, Yale University. Many thanks to the Center for Reproductive Rights for bringing together the academics and advocates who participated in this Symposium. Kim Buchanan played a special role in making it all happen. I am indebted to Kim Buchanan, Jack Balkin, Ken Karst, and Kara Loewentheil for comments on this manuscript, and to Kathryn Eidmann and Kara Loewentheil for research assistance.

1 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

2 Gonzalez v. Carhart, 127 S. Ct. 1610 (2007).

3 Id. at 1641 (Ginsburg, J., dissenting); see also id. at 1649.

4 See Mary Ann Mason & Marc Goulden, Do Babies Matter? The Effect of Family Formation on the Lifelong Careers of Academic Men and Women, 88 Academe 21 (2002) ("There is a consistent and large gap in achieving tenure between women who have early babies and men who have early babies, and this gap is surprisingly uniform across the disciplines and across types of institutions."); Joni Hersch, Male-Female Differences in Hourly Wages: The Role of Working Conditions, Human Capital, and Housework, 44 Indus. & Lab. Rel. Rev. 746, 747 (1991) (citing studies finding that having children has significant negative effects on white women's wages and positive effects on the wages of white men and noting that the implications of child-bearing on wages may differ according to race). The research of Jane Waldfogel and others shows mothers earn lower hourly wages than women without children. See Deborah J. Anderson et al., The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility, 56 Indus. & Lab. Rel. Rev. 273 (2003); Jane Waldfogel, Understanding the "Family Gap" in Pay for Women with Children, 12 J. Econ. Persp. 137 (1998) (analyzing wage discrepancies, not only between men and women, but also between mothers and childless women); Jane Waldfogel, The Effect of Children on Women's Wages, 62 Am. Soc. Rev. 209 (1997) (same). Much research shows that men have higher wages than similarly situated women. See, e.g., Aloysius Siow, Differential Fecundity, Markets, and Gender Roles, 106 J. Pol. Econ. 334, 336 (1998) (finding that, controlling for age, married men have higher wages than both nonmarried men and married women).

5 More than twenty-six percent of children in America lived in a single-parent household as of 2001. See, e.g., Rose M. Kreider & Jason Fields, Current Population Reports: Living Arrangements of Children: 2001, at 2 (2005), http://www.census.gov/prod/2005pubs/p70-104.pdf.

6 In 1996, there were 9.9 million single mothers and 1.9 million single fathers; single mothers thus represent eighty-four percent of single parents overall. U.S. Dep't of Commerce, Population Profile of the United States 30 (1998), http://www.census.gov/prod/3/98pubs/p23-194.pdf.

7 Linda Gordon, The Moral Property of Women: A History of Birth Control Politics in America 55-71 (2002) (describing voluntary motherhood as an ethic that renounced contraception and abortion while endorsing both mutual and unilaterally practiced sexual restraint in marriage with the aim of regulating birth and discussing voluntary motherhood as a vehicle for public conversation about gender roles in sex and parenting); Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 Cal. L. Rev. 1373 (2000).

8 See Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 308-14 (1992).

9 For an historical account of the evolving aims of the women's movement in the nineteenth and twentieth centuries in matters concerning women's reproductive autonomy, see Gordon, supra note 7, at 297-302.

The new feminist argument for abortion extended the analyses of the earlier feminists. Nineteenth-century feminists rejected involuntary motherhood and agreed on the importance of women's right to refuse the sexual advances of their husbands. Emma Goldman and Sanger went a step further in their analysis of the importance of contraception: without the ability to avoid pregnancy, women could not enjoy (heterosexual) sex or control their own lives. Yet no contraceptive, not even "the pill" introduced in 1960, was 100 percent effective. Furthermore, birth control was hard to get, especially for the unmarried, and some men refused to use it. When women faced unwanted pregnancies, hundreds of thousands of them, married and unmarried, both in the movement and in the mainstream, searched for abortions. Women who never had an abortion needed it as a back up. Abortion was actually used, potentially needed, and representative of women's sexual and reproductive freedom. Each of these meanings underpinned feminist support for legal and accessible abortion.

Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973, at 229 (1997). For some accounts of the women's movement's initial assertion of the abortion right in the 1960s, see Kristin Luker, Abortion and the Politics of Motherhood 92-125 (1984); Susan Brownmiller, In Our Time: Memoir of a Revolution 102-35 (1999) (describing the "rash, impudent, decentralized, yet interconnected" campaign that made abortion "the first feminist cause to sweep the nation," id. at 102, and identifying the "classic Women's Liberation position" as that expressed by Sarah Weddington in the Roe oral arguments: "Pregnancy to a woman is one of the most determinative aspects of life. It disrupts her education, it disrupts her employment, and it often disrupts her entire family life. If any rights are fundamental to a woman, she should be allowed to make the choice whether to terminate or continue." Id. at 130); Flora Davis, Moving the Mountain: The Women's Movement in America Since 1960, at 453-70 (1991) (identifying the battle of abortion as one implicating women's freedom and independence as well as men's control over women's sexuality and reproduction); Faye Ginsburg, The Body Politic: The Defense of Sexual Restriction by Anti-Abortion Activists, in Pleasure and Danger: Exploring Female Sexuality 174 (Carol S. Vance ed., 1984) ("Most pro-choice activists see safe and legal abortion as an essential safeguard which guarantees that a sexually active woman will have the power to control whether, when, and with whom she will have children."); Lauri Umansky, Motherhood Reconceived: Feminism and the Legacies of the Sixties 38 (1996) (chronicling the rejection of motherhood by some feminist groups in the 1960s and 1970s that saw it as an activity in which women were "sacrificed on the altar of reproduction" and "damned to the world of dreary domesticity by day, and legal rape by night" (internal citations omitted)).

10 Gordon, supra note 7, at 295-302.

11 Luker, supra note 9, at 175-86 (concerns of pro-choice leaders).

12 See, e.g., Rosalind Pollack Petchesky, Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom 288 (1984).

13 See Reva B. Siegel, Abortion as a Sex Equality Right: Its Basis in Feminist Theory, in Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood 43, 64-65 (Martha Fineman & Isabel Karpin eds., 1995) (surveying arguments advanced by Sylvia Law, Lawrence Tribe, Catharine MacKinnon, Fran Olsen, Donald Regan, Reva Siegel, and Cass Sunstein in the law review literature in the 1980s and early 1990s).

14 Feminists for Life of America, Mission Statement, http://www.feministsforlife.org/who/joinus.htm (last visited Dec. 30, 2006) ("Feminists for Life of America recognizes that abortion is a reflection that our society has failed to meet the needs of women .... Our efforts are shaped by the core feminist values of justice, nondiscrimination and nonviolence."). But see Katha Pollitt, Feminists for (Fetal) Life, Nation, Aug. 29, 2005, at 13 (analyzing positions espoused by Feminists for Life, including its failure to promote birth control or acknowledge the health hazards of illegal abortions and its assumption that women cannot make their own choices about childbearing, and questioning whether the organization's philosophy is properly characterized as feminist).

15 Democrats in the Senate and the House of Representatives have recently proposed legislation designed to elicit the support of "abortion grays"--those who are ambivalent about supporting an unqualified right to abortion. The proposed legislation offers programs that would prevent unwanted pregnancies (and thus abortions) without imposing legal restrictions on abortion, providing access to contraception, funding for family planning, and support for mothers who choose to continue unwanted pregnancies. Shailagh Murphy, Democrats Seek to Avert Abortion Clashes, Wash. Post, Jan. 21, 2007, at A5; see also Julie Rovner, Democrats Seek Middle Ground on Abortion (NPR radio broadcast Sept. 15, 2006).

16 See supra note 14. Those who endorse a sex equality approach to reproductive rights express concern about several forms of gender bias in the regulation of abortion. Laws prohibiting abortion "single out women for an especially burdensome and invasive form of public regulation"; reflect and enforce stereotypical understanding of women's roles by compelling women to become mothers; and "subject women, especially poor women, to unsafe, life-threatening medical procedures." Siegel, supra note 13, at 64-65.

17 See generally Petchesky, supra note 12; Umansky, supra note 9. On workplace accommodation of child care and its relation to abortion, see Joan C. Williams & Shauna L. Shames, Mothers' Dreams: Abortion and the High Price of Motherhood, 6 U. Pa. J. Const. L. 818 (2004). On the comparatively low levels of support for childcare in the United States, see, e.g., Dorothea Alewell & Kerstin Pull, An International Comparison and Assessment of Maternity Leave Legislation, 22 Comp. Lab. L. & Pol'y J. 297 (2001) (comparing parental leave policies in the United States, Japan, Germany, the Netherlands, Denmark, and the United Kingdom); Sandra L. Hofferth, Child Care, Maternal Employment, and Public Policy, 563 Annals Am. Acad. Pol. & Soc. Sci. 20, 27 (1999) (contrasting the U.S. policy of limiting public child care funds to low-income children with European countries' policies of using public funds for promoting all children's development and education); Yvonne Zylan, Maternalism Redefined: Gender, the State, and the Politics of Day Care, 1945-1962, 14 Gender & Soc'y 608, 625-26 (2000) (discussing the history of legislative consideration of publicly funded daycare and concluding that "[i]t was created as a response to ... the needs of state and local welfare officials and politicians who were looking for ways to reduce welfare expenditures" and that because "day care policy has not since been afforded the opportunity to become a fully nationalized, universal system of provision for working women ... [i]ts potential to mitigate the conditions of gender inequality remains largely untapped"); see also Emilie Stoltzfus, Citizen, Mother, Worker: Debating Public Responsibility for Child Care After the Second World War 14, 15, 197-237 (2003); Heather S. Dixon, National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success, 36 Colum. Hum. Rts. L. Rev. 561, 562-63 (2005).

18 For one portrait of this debate as it emerged in the 1970s, see Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 1984-2005 (2003); see also Kimberly Morgan, A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Childcare, 13 J. Pol'y Hist. 216, 231-38 (2001).

19 See Reva B. Siegel, Note on Opinion, in What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision 244, 244 (Jack M. Balkin ed., 2005) [hereinafter Siegel, Notes on Opinion]; Reva B. Siegel, Siegel, J., concurring, in What Roe v. Wade Should Have Said, supra, at 63 [hereinafter Siegel, Concurring].

20 See Nancy Stearns, Commentary, Roe v. Wade: Our Struggle Continues, 4 Berkeley Women's L.J. 1, 2 (1988-89).

21 In this early period, plaintiffs and amici made sex equality arguments in several cases challenging abortion statutes. See Brief for Human Rights for Women, Inc. as Amicus Curiae at **11-12, United States v. Vuitch, 402 U.S. 62 (1971) (No. 84), 1970 WL 136422 (arguing that the abortion statute denies women, as a class, the equal protection of the law guaranteed by the Fifth Amendment in that it restricts their opportunity to pursue higher education, to earn a living through purposeful employment, and, in general, to decide their own future, as men are so permitted, and also arguing that the abortion statute violates the Thirteenth Amendment on grounds that "[t]here is nothing more demanding upon the body and person of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later"); Brief for the Joint Washington Office for Social Concern et al. as Amici Curiae at 10-11, Vuitch, 402 U.S. 62 (No. 84) (arguing that the abortion statute discriminates against women in violation of their right to equal protection).

Then-attorney Nancy Stearns offered an especially sophisticated rendering of the equality claim, in Nineteenth Amendment as well as Fourteenth Amendment terms:

[T]he Nineteenth Amendment sought to reverse the previous inferior social and political position of women: denial of the vote represented maintenance of the dividing line between women as part of the family organization only and women as independent and equal citizens in American life. The Nineteenth Amendment recognized that women are legally free to take part in activity outside the home. But the abortion laws imprison women in the home without free individual choice. The abortion laws, in their real practical effects, deny the liberty, and equality of women to participate in the wider world, an equality which is demanded by the Nineteenth Amendment.

First Amended Complaint at 6-7, Women of R.I. v. Israel (No. 4605) (D.R.I. June 22, 1971); see also Brief for Plaintiffs, Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969) (No. 69 Civ. 4469) (attacking New York abortion laws under a Fourteenth Amendment Due Process claim, and asserting that abortion laws are "both a result and symbol of the unequal treatment of women that exists in this society") (cited in Diane Schulder & Florynce Kennedy, Abortion Rap 218 (1971)).

22 See Brief Amicus Curiae on Behalf of New Women Lawyers et al. at 24, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40).

23 Id. at 32.

24 Id. at 42 (internal citations omitted).

25 See, e.g., Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar & Reva B. Siegel, Processes of Constitutional Decisionmaking 1613-23 (5th ed. 2005) (discussing era when constitutional protection for the poor through the judicially enforceable provisions of the Fourteenth Amendment was seen as possible, and the cases that foreclosed this possible understanding of the Equal Protection Clause); see also William E. Forbath, Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present, 39 Tulsa L. Rev. 597, 613-14 (2004).

26 Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 Cal. L. Rev. 755, 776 (2004) (providing an historical account of the process by which women's rights activists overcame the rifts caused by the ERA to coalesce around a "dual strategy": "the simultaneous pursuit of a constitutional amendment and judicial reinterpretation of the Fourteenth Amendment.").

27 See, e.g., Brief as Amici Curiae for State Communities Aid Association at *4, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1971 WL 128050 ("State statutes restricting the right to obtain an abortion place an unequal burden on the poor in violation of the equal protection clause of the Fourteenth Amendment. The burden of state statutes which prohibit or greatly restrict the right to obtain an abortion is felt most acutely by the poor, who generally bear the burden of society's harsher laws."); Brief for the Joint Washington Office for Social Concern et al. as Amici Curiae, supra note 21, at *11 ("If social caste cannot be identified by the clothes women wear it can be identified by the kind of abortions they buy. With money, abortions may easily be obtained--even in the shadow of the legislative halls where they were banned. The degree of legality is measured by the money the woman can pay. The price paid by the poor is often death-always blood, sweat and tears."); see also Amy Kesselman, Women Versus Connecticut: Conducting a Statewide Hearing on Abortion, in Abortion Wars: A Half Century of Struggle, 1950-2000, at 42 (Rickie Solinger ed., 1998).

28 See supra note 21.

29 342 F. Supp. 800 (D. Conn. 1972) (striking down Connecticut's abortion statute for violating women's right to privacy and liberty under the Ninth and Fourteenth Amendments and noting that "society now considers women the equal of men" and "the appropriate decision-makers over matters regarding their fundamental concerns").

30 Id. at 802 ("equal of men"); id. at 804 ("appropriate decision-makers"); see also Kesselman, supra note 27.

31 Post & Siegel, supra note 18, at 1988-89.

32 Id.

33 Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 Cal. L. Rev. 1323, 1389-415 (2006).

34 Frontiero v. Richardson, 411 U.S. 677 (1973).

35 Geduldig v. Aiello, 417 U.S. 484 (1974).

36 For an early brief by Ruth Bader Ginsburg arguing that discrimination on the basis of pregnancy violates equal protection, see Brief for the Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178) (arguing that involuntary discharge from the Air Force due to pregnancy is presumptively unconstitutional because it enforces sex stereotypes in violation of equal protection). For a sampling of such arguments in the briefs of the movement and in lower court decisions, see Siegel, Concurring, supra note 19.

37 The Court ruled that not all discrimination against the pregnant woman is sex discrimination, but left open the possibility that some regulation of pregnant women might be discrimination on the basis of sex. See 417 U.S. at 497 n.20 ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed ... and Frontiero ...."); Reva B. Siegel, You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs, 58 Stan. L. Rev. 1871 (2006) (analyzing the Geduldig holding and locating the Geduldig decision in the ERA debate); see also Siegel, supra note 33, at 1408 (same).

38 Phyllis Schlafly, What Is Wrong with "Equal Rights" for Women, 5 Phyllis Schlafly Rep. at 3-4 (Feb. 1972).

39 Siegel, supra note 33, at 1389-401.

40 Id. at 1369.

41 Several historical accounts attribute the Republican Party's decision to focus on abortion to strategic political concerns: the search for an issue that could split traditionally Democratic voting blocs and encourage evangelical Protestants to join the political process. New Right leaders saw abortion as a particularly useful nexus for connecting evangelical and religious voters to politically conservative movements. At the initial meeting in Lynchburg, Weyrich "proposed that if the Republicans could be persuaded to take a firm stance against abortion, that would begin to split the strong Catholic voting bloc within the Democratic Party." Sara Diamond, Not by Politics Alone: The Enduring Influence of the Christian Right 66 (1998); see also Cynthia Gorney, Articles of Faith: A Frontline History of the Abortion Wars 346 (1998) ("So it was apparently by mutual consensus, Weyrich and company advising and Falwell seeing the pragmatic and moral wisdom of the plan, that abortion--the subject likeliest to reel in conservative Catholics and disenchanted Democrats (often, but not always, the same people)--was placed at the head of the Moral Majority's sweeping agenda."). Focusing on abortion allowed the New Right to subsume seemingly disparate religious groups: "It was Weyrich's idea to blur the distinctions between secular right-wingers, fundamentalist Protestants, and anti-abortion Catholics by merging abortion into the panoply of new right, 'pro-family issues.'" Michele McKeegan, Abortion Politics: Mutiny in the Ranks of the Right 23 (1992). "No other social issue had the political potential to galvanize the evangelical Protestants whom Weyrich, Viguerie, and Phillips were determined to bring into the political process." Id. at 21-22. See generally Robert C. Post & Reva B. Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373 (2007) (discussing recent scholarship on Roe's reception).

42 See Siegel, supra note 33, at 1395-401.

43 See The Impact of the Equal Rights Amendment Part 1: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the S. Judiciary Comm., 98th Cong. 451 (1983); Equal Rights Amendment: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary on H.J. Res. 1, 98th Cong. 1st Sess. (1983).

44 Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 962 (1984) (arguing that "sex equality doctrine must confront squarely the reality of categorical biological differences between men and women," in order to reconcile the ideal of equality with the reality of biological difference in a way that will make the legal system responsive to and promoting of women's legal equality despite biological difference, and advocating a test that focuses on the impact of sex-differential regulations and in the reproductive rights arena adds a state interest in substantive sex equality to the balancing process).

45 Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375 (1985) (arguing that a more narrowly tailored holding in Roe v. Wade that rested on gender equality grounds and did not go beyond the particularly extreme statute at stake would have accomplished the goal of facilitating the political development of abortion rights without prompting as much social opposition and backlash); see also Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1199-201 (1992) (arguing that "[t]he Roe decision might have been less of a storm center had it both homed in more precisely on the women's equality dimension of the issue," id. at 1200, and noting that "sex equality advocates of the 1970s" "argue[d] that by enshrining and promoting the woman's 'natural' role as selfless homemaker, and correspondingly emphasizing the man's role as provider, the state impeded both men and women from pursuit of the opportunities and styles of life that could enable them to break away from familiar stereotypes .... The endeavor was ... to remove artificial barriers to women's aspiration and achievement." Id. at 1205 n.124).

46 See Siegel, supra note 8 (arguing that abortion restrictions are sex-based state action, and drawing on the history of abortion's criminalization to demonstrate how such regulation can reflect unconstitutional reasoning about women as well as well as benign judgments about the unborn); Siegel, supra note 13 (discussing basic claims of sex equality

arguments for the abortion right in 1980s and 1990s in the work of Sylvia Law, Catharine Mackinnon, Reva Siegel, Cass Sunstein, and Lawrence Tribe); Lawrence E. Tribe, American Constitutional Law §15-10, at 1353-59 (2d ed. 1990); see also Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class, 1991 Duke L.J. 324 (arguing that adolescents are a suspect class for equal protection analysis of reproductive rights regulations because of a long social history of coercing pregnant teenagers into giving birth despite its detrimental effects on their health and because of their inability to participate in the political process); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281 (1991) (arguing that law should relieve the forms of inequality that it has historically imposed on women in matters of sex and procreation); Siegel, supra note 8 (calling for an equality analysis of reproductive rights; analyzing the nineteenth century criminalization of abortion and contraception to demonstrate that restrictions on birth control can enforce relations of race, gender, and class inequality, even when it is couched in physiological and fetal-protective justifications); Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy), 92 Colum. L. Rev. 1 (1992) (critiquing the legal concept of "neutrality" as a perspective that is grounded in a preexisting distributional context and advocating instead a support for reproductive rights based on the goal of preventing women's sexuality and reproductive capacities from being used or controlled by others).

Others advocated approaches that combined an equality jurisprudence with the existing focus on privacy. See, e.g., Ruth Colker, Feminism, Theology and Abortion: Toward Love, Compassion and Wisdom, 77 Cal. L. Rev. 1011 (1989) (evaluating both equal protection and liberty-due process interest frameworks from a feminist theological perspective and advocating a rejection of Roe's viability framework in favor of abortion regulations that avoid coercing women into giving birth but that also recognize the state's interest in the fetus throughout pregnancy); Dawn E. Johnsen, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 Yale L.J. 599 (1986) (arguing that creating an adversarial relationship between women and their fetuses through the mechanism of fetal rights invites intensive state regulation of pregnancy and menaces women's liberty, privacy, and equal protection rights); Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419 (1991) (demonstrating that the multiple levels of historical and current oppression black women experience makes the prosecution of black women for using drugs while pregnant a violation of their equal protection and privacy rights).

47 See Doe v. Maher, 515 A.2d 134, 159 (Conn. 1986) (holding that the Connecticut ERA requires heightened judicial review of pregnancy discrimination, and invalidating ban on state funding for medically necessary abortions) (observing that "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them"); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 852-55 (N.M. 1998) (following Doe in applying heightened scrutiny to pregnancy discrimination under the New Mexico ERA, and ordering state to pay for medically necessary abortions for Medicaid-eligible women) (reasoning that "classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment to ... the New Mexico Constitution [which] requires the State to provide a compelling justification for using such classifications to the disadvantage of the persons they classify"). See generally Linda J. Wharton, State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination, 36 Rutgers L.J. 1201, 1247-54 (2005) (discussing state constitutional equality provisions that have been interpreted to protect women against discrimination on grounds of pregnancy or abortion). State courts invalidated abortion funding restrictions under other equality guarantees of state constitutions, as well. See Right to Choose v. Byrne, 450 A.2d 925, 941 (N.J. 1982) (invalidating New Jersey's restrictions on public funding of medically necessary abortion services based on constitutional guarantee of equal protection); see also Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 32, 37 (Ariz. 2002) (invalidating Arizona's restrictions on public funding of medically necessary abortion services based on the equal privileges and immunities clause of the Arizona Constitution); State v. Planned Parenthood of Alaska, 28 P.3d 904, 908 (Alaska 2001) (invalidating Alaska's restriction on public funding of abortion based on the State constitutional guarantee of "equal rights, opportunities and protection under the law").

48 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

49 Id. at 772 (writing for the Court that "a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men.") (internal citations omitted).

50 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring).

51 Id. at 928 (citing Siegel, supra note 8, and MacKinnon, supra note 46).

52 The stare decisis section of the opinion refuses to analyze reliance in light of discrete acts of sexual intimacy and focuses instead on understandings about sexual and economic roles that have developed in reliance on the availability of abortion. See Casey, 505 U.S. at 856.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed.

Id. (internal citations omitted).

53 Id. at 852.

54 Id. at 898.

55 Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000e(k) (2000).

56 Nev. Dep't of Human Res. v. Hibbs, 538 U.S 721 (2003).

57 Id. at 727.

58 Id. at 736-39. Hibbs observed that laws providing maternity leave to women only reflected sex stereotyping of pregnant women--the belief that the responsibilities of new parents are differentiated by sex:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.

Id. at 736.

59 See generally Siegel, supra note 37.

60 379 F.3d 531 (9th Cir. 2004).

61 Id. at 548.

62 Id.

63 For sources discussing liberty and equality values in Casey, see Erin Daly, Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey, 45 Am. U. L. Rev. 77 (1995) (finding in Casey the seeds of a broader approach to reproductive rights that integrates equal protection and liberty into a privacy framework based on the range of considerations the Court describes as relevant to the abortion right and language used that suggests reproductive rights are critical to the emancipation of women); Kenneth L. Karst, Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender, 38 Wake Forest L. Rev. 513 (2003) (arguing that "substantive outcomes in our courts can also be seen as cultural forms," and that the evolution of cultural norms about women's participation in society have shaped and been shaped by the Supreme Court's reproductive rights jurisprudence); Elizabeth M. Schneider, The Synergy of Equality and Privacy in Women's Rights, 2002 U. Chi. Legal F. 137 (arguing that equality and privacy are inextricably linked and must be analyzed as such in order to protect women's reproductive rights and develop a full notion of legal equality); Siegel, supra note 13 (analyzing elements of sex equality argument for abortion right and identifying several elements of the argument expressed in Casey); David H. Gans, Note, Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law, 104 Yale L.J. 1875 (1995) (proposing a new approach to equal protection analysis in which, when determining if a statute creates a sex-based classification, courts would consider whether the law rests on stereotypical ideas about women and their roles, including those based on stereotypical ideas about biological difference, in order to avoid the constraining similarly situated problem vis-à-vis biological difference).

64 For examples, see Tribe, supra note 46; What Roe v. Wade Should Have Said, supra note 19 (sex equality opinions by Jack Balkin, Reva Siegel, and Robin West); Ruth Colker, Equality Theory and Reproductive Freedom, 3 Tex. J. Women & L. 99 (1994) (advocating an anti-essentialist equality-based approach to reproductive rights jurisprudence that focuses on the factual impact of reproductive rights regulations in view of substantive equality for women); see also supra note 63.

Pamela Bridgewater advanced equality arguments in a Thirteenth Amendment framework. See Pamela D. Bridgewater, Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights, 3 J. Gender Race & Just. 401 (2000) (using the lens of the controversy over the promotion of Norplant in minority communities to argue for the use of the Thirteenth Amendment in challenging reproductive rights regulations via the historical practice of "slave breeding" to achieve equal reproductive rights for women as compared to men and for black women as compared to white women). Peggy Cooper Davis has advanced an historical equality argument in the context of Fourteenth Amendment and family rights. See Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values (1998) (drawing on narratives from Civil War era history to show that the drafters of the Reconstruction Amendments considered family autonomy central to securing equality and citizenship). For an equality argument in a human rights framework, see Rebecca J. Cook & Bernard M. Dickens, Human Rights Dynamics of Abortion Law Reform, 25 Hum. Rts. Q. 1 (2003) (documenting evolution of abortion laws on an international scale through a human rights reform lens and recommending that for the sake of women's equality and health, abortion be considered a medical or public health issue rather than a part of a criminal or penal code).

Eileen McDonagh has advocated a different equality-based approach focused on the right to bodily integrity and the government's responsibility to protect citizens from serious injury (in this case, the injury done to a woman by a fetus during an unconsenting pregnancy). See Eileen McDonagh, Breaking the Abortion Deadlock: From Choice to Consent (1996); Eileen McDonagh, My Body, My Consent: Securing the Constitutional Right to Abortion Funding, 62 Albany L. Rev. 1057 (1999) (advancing the argument that if a woman has not consented to a pregnancy, the fetus's effects on her body are a serious injury to her fundamental rights to liberty and bodily integrity that justify the use of deadly force, leaving such a woman similarly situated to others who are at risk for serious bodily injuries that would justify the use of deadly force, and since the government enables others to defend themselves in this context, government refusal to fund abortions is a violation of equal protection); Robin West, Review Essay: Liberalism and Abortion, 87 Geo. L.J.

2117 (1999) (interpreting McDonagh's arguments as an evolution of Western liberalism and situating McDonagh in a chain of liberal reasoning extending from John S. Mills's argument that women must be free in marriage to Catharine McKinnon's argument that women must be free in sexual choice and ending in McDonagh's argument that women must be free in choosing pregnancy and childbirth).

65 The equality framework opposes sex discriminatory state action and other forms of institutional inequality. Its proponents might support policies creating institutional conditions in which women and men have equal freedom in matters concerning the conception, bearing, and rearing of children. See supra text at notes 15-17 and accompanying text.

66 See Siegel, supra note 8.

67 See Reva B. Siegel, The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions, 2007 U. Ill. L. Rev. 991; see also Monica Davey, National Battle over Abortion Focuses on South Dakota Vote, N.Y. Times, Nov. 1, 2006, at A1; Reva B. Siegel & Sarah Blustain, Mommy Dearest?, Am. Prospect, Oct. 3, 2006, at 22; Stephanie Simon, Antiabortion Campaign Waves Feminist Flag, L.A. Times, Oct. 9, 2006, at A1.

68 The harm-to-women approach has spread throughout the antiabortion movement. Several leading antiabortion organizations feature it as a primary argument against the availability of abortion. See, e.g., The Bitter Price of Choice, Am. Feminist, Spring 1998, available at http://www.feminstsforlife.org/af/1998/spring/Spring98.pdf (last visited Nov. 10, 2006) (featuring several articles about the physical and psychological price women pay for abortion rights); Concerned Women for America, Abortion's Physical and Emotional Risks, http://www.cwfa.org/articledisplay.asp?id=3111&department=CWA&categoryid=life (last visited Nov. 10, 2006) (explaining that "[r]egardless of the supposed "normalcy" of abortion, the procedure continues to pose countless physical and emotional risks to American women--sometimes even costing them their lives"); National Right to Life Committee, Is Abortion Safe?, http://www.nrlc.org/abortion/ASMF/#Is_Abortion_ Safe (last visited Nov. 10, 2006) (providing links to articles describing abortion as physically dangerous due to risks of pain, bleeding, hemorrhage, and infection, and psychologically damaging due to risks of developing suicidal ideations, substance abuse problems and "post-abortion syndrome," among other problems); Operation Rescue, Post Abortion Healing, http://www.operationrescue.org/?p=80 (last visited Nov. 10, 2006) ("Post-Abortion Syndrome (PAS) is a type of Post-Traumatic Stress Disorder. It occurs when a woman is unable to work through her emotional responses due to the trauma of an abortion."); Focus on the Family, Post-Abortion Kit, http://www.family.org/resources/itempg.cfm?itemid=2326.cfm (last visited Nov. 10, 2006) (offering a Post-Abortion Kit for a suggested donation of $10.00 which "helps women identify and overcome Post-Abortion Syndrome--while finding healing and forgiveness"); Focus on the Family, FAQ: What Can You Tell Me About the Possible Link Between Abortion and Breast Cancer, http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=420 (last visited Nov. 10, 2006) ("Recent studies reveal a correlation between abortion and breast cancer.").

Other antiabortion organizations feature the harm-to-women argument as one among many abortion-related concerns. See, e.g., American Life League, Abortion Risks, http://www.all.org/article.php?id=10117 (last visited Nov. 10, 2006) (listing breast cancer, "post-abortion grief," and "emotional and physical disturbances" as among the most common risks of abortion); Pro-Life Action League, Getting Help, http://www.prolifeaction.org/faq/help.htm (last visited Nov. 10, 2006) (listing organizations and books for "post-abortion healing"); Priests for Life, After Abortion, http://www.priestsforlife.org/afterabortion/index.htm (last visited Nov. 10, 2006) (listing "healing" resources). For one recent account of woman-protective antiabortion argument, see Emily Bazelon, Is There a Post-Abortion Syndrome?, N.Y. Times, Jan. 27, 2007, §6 (Magazine), at 41.

Several states, including Ohio, Mississippi, and Louisiana have followed in South Dakota's footsteps, including the use of the harm-to-women language in legislative findings or testimony. For Ohio, see Marley Greiner, God's Politics at the Statehouse: Ohio Abortion Hearing Goes to Sunday School, Columbus Free Press, July 2, 2006, available at http://www.freepress.org/departments/display/18/2006/2070 ("Lisa Dudley, a paralegal and traveling witness for the San Antonio-based Justice Foundation's anti-abortion Operation Outcry project ... presented 2000 affidavits from women claiming their abortions were forced or coerced."); Center for Bioethical Reform, Ohio Abortion Ban Gets Hearing, http://www.cbrinfo.org/CBRMidwest/0706.html (last visited July 20, 2006) ("Stellar testimony was given by ... several post-abortive women from Operation Outcry"). For Mississippi, see Legislature of Miss., Conference Committee Report on SB2922 (Mar. 23, 2006) (testimony of Lisa Dudley, paralegal at Operation Outcry),

available at http://www.operationoutcry.org/pages.asp? pageid=37528 (“Because of the scientific evidence we now have, because of testimony upon testimony of women about how abortion hurt them, because we now know it is not good for women and it really isn't a choice, abortion should no longer be legal.”); see also id . (testimony of Tracy Reynolds, representative from Operation Outcry), available at http://www.operationoutcry.org/pages.asp? pageid=37529. In Louisiana, a witness presented the South Dakota Task Force Report in a hearing of the Louisiana state legislature, and directly quoted, without attribution, significant passages of the report in her own testimony. Hearings on S.B. 33 Before the House Administration of Criminal Justice Comm. (La. 2006) (testimony of Dr. Freda McKissic Bush), available at http://www.lawoflifeproject.com/blog/Documents/Prepared%20Testimony%C20*o*f%C20Freda%C20McKissic%C20Bush%C2C%20MD.pdf. After hearing Post-Abortion Syndrome (PAS) testimony, the legislature enacted a “trigger ban” to go into effect with Roe's overruling. Dorinda C. Bordlee & Nikolas T. Nikas, Eroding Roe: Get on the PRA Bandwagon, Nat'l Rev. Online, June 19, 2006, http://article.nationalreview.com/?q=ZDM3OGUzNTE5OWU5N2Q4NTJlYzgwYzE4OTdhYmJk=&c=1. Finally, legislators in other states have cited South Dakota as a model, such as state senator Hank Erwin, who sponsored a bill criminalizing abortion in Alabama, remarking “I thought if South Dakota can do it, Alabama ought to do it.” Gudrun Schultz, Alabama Legislators Push for Law to Ban Abortion, LifeSiteNews.com, Mar. 27, 2006, http://www.lifesite.net/ldn/2006/mar/06032704.html; see also Rich Ehisen, States Lining Up to Copy South Dakota Ban, State Net Capitol J., Mar. 13, 2006.

69 See Siegel, supra note 67. (arguing that abortion restrictions justified by gender-paternalist reasoning of the kind expressed in South Dakota enforce unconstitutional stereotypes about women's limited decisional capacity and their “natural” family roles; demonstrating how such regulation violates values of equal freedom at the heart of the Court's sex discrimination cases and values of sexual equality at the heart of the Court's reproductive liberty cases).

70 For commentators endorsing Casey's synthesis of liberty and equality, see id.; see also Anita L. Allen, The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender and the Constitution, 18 Harv. J.L. & Pub. Pol'y 419 (1995) (arguing that contrary to work by Cass Sunstein and others, an equality approach to reproductive rights would not necessarily have produced different results than the privacy-liberty approach has and that the privacy-liberty approach is not more harmful than helpful but should be combined with an equal protection approach to achieve the best results); David B. Cruz, “The Sexual Freedom Cases” ? Contraception, Abortion, Abstinence, and the Constitution, 35 Harv. C.R.-C.L. L. Rev. 299, 302 (2000) (interpreting the Supreme Court's decisions on contraception and abortion as upholding equal citizenship for men and women, procreative autonomy, and a right to bodily integrity as well as a “nonconsequential side constraint forbidding government from using the threat either of physical harm or of the creation of new persons as a means of controlling citizens' behavior,” while arguing that this interpretation negates the claim that the decisions in question support a “right to sex” like that at issue in cross-sex sodomy statutes); Daly, supra note 63; Karst, supra note 63, at 513; Dorothy E. Roberts, Unshackling Black Motherhood, 95 Mich. L. Rev. 938 (1997) (describing strategies used by attorneys to challenge the convictions of black mothers who used drugs while pregnant to demonstrate the importance of bringing race to the surface of legal arguments in this arena in order to show how such policies violate black women's rights as black women); Elizabeth M. Schneider, The Synergy of Equality and Privacy in Women's Rights, 2002 U. Chi. Legal F. 137 (2002) (arguing that equality and privacy are inextricably linked and must be analyzed as such in order to protect women's reproductive rights and develop a full notion of legal equality); see also Paula Abrams, The Tradition of Reproduction, 37 Ariz. L. Rev. 453 (1995) (arguing that the Supreme Court's reproductive rights jurisprudence mirrors a historical ambivalence about the control of reproduction, women's moral agency, and the redemptive role of motherhood and wifedom that is particularly problematic in the privacy-liberty interest sphere since fundamental rights must be based on American tradition and history and that tradition and history are fatally flawed when it comes to gender equality).

71 See supra notes 38-42 and accompanying text. Constitutional limitations on laws that perpetuate gender stereotypes in sex and family roles can be enforced without expressly grounding these limitations in the requirement that government equally respect the freedom and burden the welfare of men and women. Of course, the more indirectly these constitutional commitments are expressed, the easier it may prove to evade them.

72 127 S. Ct. 1610 (2007).

73 See id. at 1634.

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.
>
> Id. (citations omitted)

In holding that it was reasonable to restrict women's access to abortion because some women might regret their choices, the majority concedes that it had "no reliable data to measure the phenomenon," and reasoned instead from an amicus brief containing the kinds of affidavits South Dakota considered in adopting its abortion ban. See Siegel, supra note 67, at 1025 n.142.

74 Carhart, 127 S. Ct. at 1641 (Ginsburg, J., dissenting) (citing Siegel, supra note 8 and Law, supra note 44).

75 Id. at 1649.

76 Rebecca J. Cook & Susannah Howard, Accommodating Women's Differences Under the Women's Anti-Discrimination Convention, 56 Emory L.J. 1039, 1091 (2007).

77 Joanna N. Erdman, In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada, 56 Emory L.J. 1093 (2007).

78 Gillian E. Metzger, Abortion, Equality, and Administrative Regulation, 56 Emory L.J. 865 (2007).

79 David H. Gans, The Unitary Fourteenth Amendment, 56 Emory L.J. 907 (2007).

80 Id.

81 Eileen McDonagh, The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation, 56 Emory L.J. 1173, 1196 (2007).

82 478 U.S. 186 (1986).

83 Cf. Eisenstadt v. Baird, 405 U.S. 438 (1971) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

84 539 U.S. 558 (2003).

85 Kim Shayo Buchanan, Lawrence v. Geduldig: Regulating Women's Sexuality, 56 Emory L.J. 1235, 1237 (2007).

86 Id. at 1238.

87 Id.

88 Geduldig v. Aiello, 417 U.S. 484 (1974).

89 Buchanan, supra note 85, at 1265.

90 David B. Cruz, Heterosexual Reproductive Imperatives, 56 Emory L.J. 1157 (2007).

91 Id.

92 Cornelia T.L. Pillard, Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy, 56 Emory L.J. 941 (2007).

93 Id. at 941.

94 Id. at 942.

95 Michelle Fine & Sara I. McClelland, The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body, 56 Emory L.J. 993, 995 (2007).

96 Id. at 995-96.

97 Pamela D. Bridgewater, Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction, 56 Emory L.J. 1215 (2007).

98 Jack Balkin, How New Genetic Technologies Will Transform Roe v. Wade, 56 Emory L.J. 843, 850 (2007).

99 Id. at 851 (internal quotation marks omitted).

100 Id. at 853.

101 Id. at 857.

56 EMORYLJ 815

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No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,
v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF EQUAL PROTECTION CONSTITUTIONAL LAW SCHOLARS SERENA MAYERI, MELISSA MURRAY, AND REVA SIEGEL AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici Serena Mayeri, Melissa Murray, and Reva Siegel are professors of constitutional law and equality law. They submit this brief to identify and explain the equal protection principles that support Respondents' position and afford an independent basis on which to affirm the judgment below.[1]

Serena Mayeri is Professor of Law and History at University of Pennsylvania Carey Law School; Melissa Murray is Frederick I. and Grace Stokes Professor of Law at New York University School of Law; and Reva Siegel is Nicholas deB. Katzenbach Professor of Law at Yale Law School.[2]

SUMMARY OF ARGUMENT

The fundamental right at stake in this case matters to millions of Americans—not only to those who choose to end their pregnancies, but also to those who make life decisions secure in the understanding that they *could* make that choice if necessary. One in four women of child-bearing age in this country will have an abortion. They represent every race, religion,

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of the positions advocated in this brief.

socioeconomic background, and more.[3] They often are already raising children themselves. And because our society provides such inadequate infrastructure for families and so little support for caregivers, increasingly, those who decide to end their pregnancies are living in poverty.[4]

HB 1510 impermissibly burdens the constitutional right to liberty and bodily autonomy—in direct violation of this Court's precedent in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See* Resp. Br. 2-3, 12-15. But HB 1510 also violates another fundamental constitutional guarantee—the right to equal protection under the law. *See id.* at 36-41. As *amici* explain in this brief, the Equal Protection Clause supplies an additional, independent basis for the constitutional right to an abortion, and it forbids states like Mississippi from trampling on that right by passing laws like HB 1510.

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[3] *See* Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 AM. J. PUB. HEALTH 1904, 1907 (2017) (finding that "an estimated 23.7% of women aged 15 to 44 years in 2014 will have an abortion by age 45"); *see also* Patrick T. Brown, *Catholics Are Just as Likely to Get an Abortion as Other U.S. Women. Why?*, AMERICA (Jan. 24, 2018), https://www.americamagazine.org/politics-society/2018/01/24/catholics-are-just-likely-get-abortion-other-us-women-why.

[4] *See, e.g.*, Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html ("Half of all women who got an abortion in 2014 lived in poverty, double the share from 1994 … .").

Under this Court's equal protection jurisprudence, laws that classify on the basis of sex—including laws that regulate pregnancy—are subject to heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) ("*Virginia*"); *see also Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728-34 (2003). To survive heightened scrutiny, the State of Mississippi must offer an "exceedingly persuasive justification" for its sex-based classification: specifically, it must show that its decision to regulate by sex-discriminatory means is substantially related to the achievement of important governmental objectives. *Virginia*, 518 U.S. at 531-33. In making that showing, the State may "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," nor may sex classifications "be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 533-34 (internal citation omitted). HB 1510 does not pass constitutional muster under this standard.

Mississippi has enacted HB 1510 to "protect[] the life of the unborn" and to "protect[] the health of women." *See* H.B. 1510 § 1(2)(b)(i)-(v), 2018 Leg., Reg. Sess. (Miss. 2018) (citations omitted). With certain narrow exceptions, the statute prohibits physicians from performing "an abortion" on a "maternal patient" after 15 weeks—singling out a pregnant woman and imposing on her the role of mother. *See id.* § 1(4). But the State denies the enormity of this imposition by expressly claiming that coercing motherhood, over a woman's objection, protects the woman in addition to any fetal life she may carry. *See id.* § 1(2)(b)(ii)-(v). The statute's paternalist justifications derive from "overbroad generalizations," *Virginia*, 518 U.S. at 533,

about women as destined for motherhood that date back to nineteenth-century anti-abortion campaigns.

Relying on these antiquated sex-role stereotypes, Mississippi assumed it could fulfill *both* of its important objectives (protecting fetal life and women's health) by prohibiting abortion after 15 weeks. Because the State relied so heavily on sex-role stereotypes to achieve its two ends, it failed to explore the many less discriminatory and noncoercive ways to reduce abortion and to protect the life and health of women and future generations—such as by providing appropriate and effective sex education or assisting those who wish to bear children.

For these reasons, Mississippi has failed to offer an "exceedingly persuasive justification" for forcing a woman to continue pregnancy. *Id*. at 531. HB 1510 instead enforces a sex-based and coercive classification that "perpetuate[s] the legal, social, and economic inferiority of women." *Id*. at 534. Although people of all gender identities may become pregnant, seek abortions, or bear children, *see* Resp. Br. 13 n.3, this brief focuses on the constitutionally impermissible sex-role judgments about women that historically undergird laws regulating abortion, *see infra* Part II, including HB 1510. *See, e.g.*, Miss. H.B. 1510 § 1(2) (using language such as "maternal patient" and "women"); *see also infra* n.13 (reporting on debate among State legislators about the Mississippi women on whom the State's abortion regulations focus).[5]

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[5] Laws that discriminate on the basis of pregnancy can involve various forms of sex-based discrimination, as this Court has

This brief proceeds in four parts. *First*, *amici* demonstrate that, under this Court's existing precedent, laws that regulate pregnancy, like HB 1510, are sex classifications subject to heightened scrutiny. *Second*, *amici* explain how HB 1510's attempt to protect both women's health and fetal life violates settled equal protection principles by relying on archaic notions about a woman's social role. *Third*, *amici* show that Mississippi relied on these impermissible assumptions to enact HB 1510's regulation on abortion and, in fact, rejected numerous other less discriminatory means of protecting women's health and fetal life. And *fourth*, *amici* explain why attempts to justify HB 1510 on equality grounds are meritless.

ARGUMENT

I. HB 1510 VIOLATES THE EQUAL PROTECTION CLAUSE

A. This Court's Precedents Recognize That Equality Principles Underlie the Constitutional Right to an Abortion

The right to make decisions about whether to end a pregnancy is grounded in both the Due Process and Equal Protection Clauses. In *Casey*, this Court acknowledged that women's talent, capacity, and right "to participate equally in the economic and social life

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acknowledged. *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1744 (2020) ("In *Phillips*, the employer could have accurately spoken of its policy as one based on 'motherhood.' In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender status.").

of the Nation" is dependent on "their ability to control their reproductive lives." 505 U.S. at 856. Indeed, because of the physical, emotional, spiritual, economic, and social stakes of pregnancy and motherhood, the State cannot "insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and of our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852; *see also Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures … center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship … .").[6]

And just last Term, Justice Sotomayor recognized the equality interests at stake in accessing abortion. Justice Sotomayor observed that "[t]his country's laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks," imposing "an unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose." *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (citing *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting)).

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[6] *Cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

Those undue burdens are often most severe for low-income women and women of color. *Id.* at 582.

Accordingly, Justices of this Court have long acknowledged the fundamental equality principles that underlie the constitutional right to an abortion. Similarly, and over time, the Court has applied its prohibition on discriminatory sex-based classifications to laws regulating pregnancy. As *amici* explain in further detail below, HB 1510 violates those equality principles by imposing an unjustified and profoundly dangerous sex-based restriction on a woman's right to control her own reproductive life.[7]

B. Pregnancy Regulations Are Sex-Based Classifications Subject to Heightened Scrutiny

Throughout much of American history, belief in traditional gender roles has shaped the Nation's laws, including the assumptions that "a woman is, and should remain, 'the center of home and family life,'" and that "'a proper discharge of [a woman's] maternal

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[7] Even before *Casey*, prominent legal scholars recognized that the abortion right is also protected by the Constitution's equality guarantees. *See Casey*, 505 U.S. at 928 & n.4 (Blackmun, J., concurring in part) (observing that the "assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause" and citing scholarship); *see also* Serena Mayeri, *Undue-ing Roe: Constitutional Conflict and Political Polarization in* Planned Parenthood v. Casey, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 150-52 (Melissa Murray, Katherine Shaw & Reva B. Siegel, eds. 2019) (describing role of sex equality principles in academic and judicial discourse leading up to *Casey*).

functions … justif[ies] [protective] legislation,'" *Hibbs*, 538 U.S. at 729 (third alteration added) (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), and *Muller v. Oregon*, 208 U.S. 412, 422 (1908)). Those sex-role stereotypes led three members of this Court to insist that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment) (upholding a state's denial of a law license to a woman because of her sex).

Fifty years ago, this Court changed course and began to strike down sex-based state action that enforced these traditional gender stereotypes as unconstitutional under the Equal Protection Clause. *See Reed v. Reed*, 404 U.S. 71, 76 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (plurality opinion) (citing *Bradwell* as evidence of the Nation's "long and unfortunate history of sex discrimination"). The Court did not initially give a clear account of how pregnancy-based regulations perpetuate these stereotypes. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). But as the Court gained experience interpreting the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018), it began to explain how certain laws regulating pregnancy could be based on impermissible sex-role stereotypes, *see Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289-90 (1987) (Marshall, J.) (upholding a state law mandating a reasonable, unpaid pregnancy disability leave as consistent with the Pregnancy Discrimination Act and Title VII because it "promotes equal employment opportunity" and "does not reflect archaic

or stereotypic notions about pregnancy and the abilities of pregnant workers").

The Court thereafter made clear that equal protection principles apply with equal force to pregnancy-based classifications. Justice Ginsburg's landmark decision in *United States v. Virginia* recognized that pregnancy-based regulations, too, are sex classifications subject to scrutiny under the Equal Protection Clause. *See Virginia*, 518 U.S. at 533-34 (citing *Cal. Fed.*, 479 U.S. at 289). In *Virginia*, the Court held that sex classifications cannot be justified by physical differences between men and women. The Court affirmed that the Constitution's equality guarantees extend to women as men's equals, regardless of any "inherent differences" between the sexes. Those "[i]nherent differences," the Court explained, "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.*

Not every sex classification, the Court reasoned, was constitutionally infirm. Sex classifications that "promot[e] equal employment opportunity" or "advance [the] full development of the talent and capacities of our Nation's people"—like the state law establishing unpaid pregnancy disability leave at issue in *Cal. Fed.*—are permissible. *Id.* at 533 (quoting *Cal. Fed.*, 479 U.S. at 289 (first alteration in original)). But the Court in *Virginia* held that the Constitution's guarantee of equal protection means that sex "classifications may not be used, as they once were … to create or perpetuate the legal, social, and economic

inferiority of women." *Id.* at 534 (internal citation omitted).

Seven years later, Chief Justice Rehnquist elaborated on *Virginia*'s logic, further confirming that the Equal Protection Clause applied to laws regulating pregnancy. In *Hibbs*, the Court held that Congress could enact the Family and Medical Leave Act to remedy and prevent inequality in the provision of family leave because historically, "ideology about women's roles" had been used to justify discrimination against women particularly when they were "mothers or mothers-to-be." 538 U.S. at 736 (citation omitted).

Hibbs made clear that pregnancy-based regulations anchored in archaic stereotypes about gender roles can violate the Equal Protection Clause. As Chief Justice Rehnquist put it, the "differential [maternity and paternity] leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work." *Id.* at 731. Laws perpetuating such sex-role stereotypes injured women *and* men. And "[t]hese mutually reinforcing stereotypes," the Chief Justice recognized, "created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver." *Id.* at 736 ("Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave.").

Taken together, *Virginia* and *Hibbs* establish that laws regulating pregnancy are sex-based classifications that violate the Equal Protection

Clause when they are rooted in sex-role stereotypes that injure or subordinate. *See* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19TH AMENDMENT SPECIAL EDITION GEO. L.J. 167, 189-211 (2020); *see also id.* at 208 & n.229 (explaining *Geduldig*'s status after *Virginia* and *Hibbs*).

C. Because HB 1510 Regulates Pregnancy, It Must Satisfy Heightened Scrutiny

HB 1510 singles out pregnant women for coercive regulation. By its terms, the law is designed to deprive women, and not men, of their right to make choices about whether or not to have children.

Because Mississippi has chosen "discriminatory means" to protect health and life, the State must satisfy heightened scrutiny by offering an "exceedingly persuasive" justification for its choice of means that does not rely on "overbroad generalizations" about the differences between sexes. *Virginia*, 518 U.S. at 533. In scrutinizing sex-based state action for impermissible sex stereotyping, the *Virginia* standard examines the law's historical context and the State's decision-making in a larger policy context to ascertain whether the State's sex-based classification is being used "to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534.[8]

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[8] *See Virginia*, 518 U.S. at 535-40 (determining from historical context that stereotyped beliefs about sex roles originating in nineteenth-century ideas about women's physical and reproductive fragility underpinned the exclusion of women from VMI); *id.* at 539 (determining from policy context that VMI's

HB 1510 does not satisfy heightened scrutiny for at least two reasons. First, considered in historical context, the State's legislative findings reflect "ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." *Gonzales*, 550 U.S. at 185 (Ginsburg, J., dissenting). *See infra* Part II. Second, relying on these traditional sex roles, the State assumed it could protect fetal life *and* the health of women by prohibiting abortion after 15 weeks. But gripped by those stereotyped beliefs, Mississippi failed to adopt many alternative, less discriminatory means of reducing abortion and supporting those who seek to raise children. *See infra* Part III.

II. MISSISSIPPI'S JUSTIFICATIONS FOR HB 1510 ARE INEXTRICABLY INTERTWINED WITH OUTDATED STEREOTYPES ABOUT WOMEN

Petitioners insist that *Roe* and *Casey* "shackle States to a view of the facts that is decades out of date." Pet. Br. 4. To the contrary, Mississippi's own logic and its laws are anchored in the past.

Today, as in the past, advocates of laws like HB 1510 argue that restricting abortion will protect fetal life *and* protect women—all while denying that limiting abortion access risks hurting women.[9] *See*

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rejection of coeducation in 1986 did not reflect "any Commonwealth policy evenhandedly to advance diverse educational options").

[9] In the 1990s, in response to public unease with arguments against abortion that ignored or attacked women, advocates

Miss. H.B. 1510 § 1(2)(b)(i) (finding that banning abortion protects fetal life); *id.* § 1(2)(b)(ii)-(v) (finding that banning abortion protects women).

These justifications are not new. The nineteenth-century anti-abortion campaign, too, claimed that regulating abortion would protect women's physical and psychological health. The anti-abortion campaign shows how a call to protect a pregnant woman's health can function as an effort to enforce a woman's role as mother. Most importantly, the campaign demonstrates how seemingly benign concerns can be deeply entangled with wholly unconstitutional reasons for compelling a woman to bear a child. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280-323 (1992) (showing how nineteenth-century doctors argued that banning abortion would protect fetal life, protect a woman's health, enforce wives' marital duties, and control the relative birthrates of "native" and immigrant populations, in order to preserve the demographic character of the nation); *see also infra* Part IV.

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began to emphasize that restricting abortion not only protects fetal life, but also protects women's psychological and physical health. *See* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. (forthcoming 2021) (manuscript at 20-33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3799645 (explaining how anti-abortion movement's "pro-woman and pro-life" claims implicitly and expressly appeal to the sex role-based belief that what is best for children is best for the mother's health).

A. Historical Context Illustrates That Sex Stereotypes Are Interwoven into Abortion Restrictions Like HB 1510

In the nineteenth century, the physician who led the campaign to ban abortion, Dr. Horatio Storer, claimed that childbearing was "the end for which [married women] are physiologically constituted and for which they are destined by nature." *See* HORATIO STORER, WHY NOT? A BOOK FOR EVERY WOMAN 75-76 (1866); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, 78, 89, 148 (1978) (recounting Storer's role in persuading Americans to ban abortion). According to Storer, avoiding this pre-ordained biological and social role would lead to a woman's physical and social ruin. *See* STORER, *supra*, at 37 ("[A]ny infringement of [natural laws] must necessarily cause derangement, disaster, or ruin."); H.S. POMEROY, THE ETHICS OF MARRIAGE 97 (1888) ("Interference with Nature so that she may not accomplish the production of healthy human beings is a physiological sin of the most heinous sort … ."). The American Medical Association's 1871 *Report on Criminal Abortion* denounced a woman who ended a pregnancy: "She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract." D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 TRANSACTIONS AM. MED. ASS'N 239, 241 (1871).

During this same time, doctors further justified controlling women's roles by asserting women's incompetence to make their own decisions about sex and childbearing. Because they understood

childbearing as the "end for which [women] are psychologically constituted and for which they are destined by nature," anti-abortion advocates claimed that termination of pregnancy is "disastrous to a woman's mental, moral, and physical well-being." STORER, *supra*, at 75-76. The notion that interrupting a pregnancy produced feminine hysteria followed neatly from the premise that women lack decisional capacity to choose to avoid motherhood. *See* E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 145, 146 (1867) (noting that "violence against the physiological laws of gestation" would cause a "severe and grievous penalty" because of "the intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders arising from uterine derangements"). Further, the choice to avoid motherhood was believed to confer "a moral as well as a physical taint" that "stamps its effects indelibly on the constitution of the female." J.J. Mulheron, *Foeticide: A Paper Read Before the Wayne County Medical Society*, 10 PENINSULAR J. MED. 385, 390 (1874).

And just as women's minds were supposedly irrevocably and deleteriously affected by abortion, so too were their bodies. Physicians claimed that abortion would "insidiously undermine[]" women's reproductive organs, and "permanently incapacitate[] [women] for conception." STORER, *supra*, at 50. A woman who has an abortion "destroys her health … [and] sooner or later comes upon the hands of the physician suffering with uterine disease." O.S. Phelps, *Criminal Abortion: Read Before the Calhoun County Medical Society,* 1 DETROIT LANCET 725, 728 (1878).

According to anti-abortion advocates, these and other health issues were a "direct result of this interference with *nature's* laws." L.D. Griswold et al., *Additional Report from the Select Committee to Whom Was Referred S.B. No. 285*, 1867 OHIO SENATE J. APPENDIX 233, 234 (emphasis added). It should come as little surprise that "[s]tatements hostile to the woman's rights movement appeared in many of the anti-abortion tracts penned by America's doctors and their supporters." Siegel, *Reasoning from the Body*, *supra*, at 303; *see generally id.* at 302-14.[10]

B. HB 1510 Rests on Modern Expressions of Outdated Sex-Role Stereotypes

HB 1510 recites Mississippi's interests in banning abortion to protect fetal life and women's health. *See* Miss. H.B. 1510 § 1(2)(b)(i)-(ii). Although the State does not employ nineteenth-century rhetoric in its legislative findings, its asserted justifications for HB 1510 are a modern twist on the same old sex-role

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[10] Emphasizing the importance of a woman's right to "voluntary motherhood" (that is, to oppose her husband's sexual advances), abolitionist and suffragist Lucy Stone remarked, "[i]t is very little to me to have the right to vote, to own property, … if I may not keep my body, and its uses, in my absolute right." *Id.* at 305 (quoting Letter from Lucy Stone to Antoinette Brown (Blackwell) (July 11, 1855), *quoted in* ELIZABETH CAZDEN, ANTOINETTE BROWN BLACKWELL: A BIOGRAPHY 100 (1983)). Doctors leading the nineteenth-century campaign against abortion attacked arguments for voluntary motherhood on the grounds that recognizing a wife's right to refuse her husband's sexual advances would make marriage a relation of "legalized prostitution." *See id.* at 308-14. This debate over women's sexual and reproductive autonomy offered competing perspectives on the practice of abortion.

stereotypes that animated anti-abortion campaigners in centuries past.

Like nineteenth-century physicians, Mississippi assumes that women are incapable of deciding for themselves how to balance the comparative health risks and emotional burdens of continued pregnancy, childbirth, and abortion. For instance, the legislative findings in HB 1510 declare that "[a]bortion carries significant physical and psychological risks to the maternal patient," including "depression; anxiety; substance abuse; and other emotional or psychological problems." *Id.* § 1(2)(b)(ii), (iv). The State Legislature further asserts that the "medical, emotional, and psychological consequences of abortion are serious and can be lasting." *Id.* § 1(2)(b)(v) (internal quotation marks omitted); *see* Pet. Br. 8.

That unsupported assertion reflects the same stereotypical view of women's fragile, maternal psyche espoused by nineteenth-century anti-abortion advocates. Meanwhile, the mental and emotional stress of pregnancy, childbirth, and caring for children—in an economy that discriminates against mothers and pregnant people—go entirely unmentioned. *See* Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359-61 (2008). Rather than leave judgments about how to balance these risks to *women*, Mississippi has decided to make the decision for itself, banning abortions after 15 weeks on the ground that doing so is in the psychological best interests of the "maternal patient." Miss. H.B. 1510 § 1(2)(b)(ii).

There is a second, even more fundamental, sex-role assumption underlying HB 1510. As the Court in

Virginia recounted, it was commonplace for nineteenth-century doctors to argue that women who violated sex roles (*e.g.*, by pursuing higher education) risked jeopardizing their reproductive physiology. *See Virginia*, 518 U.S. at 536-37 & n.9. The physicians in Storer's campaign repeatedly warned of the litany of health harms that would attend a woman's deviation from her reproductive destiny. *See supra* Part II.A. The reasoning Mississippi offers for banning abortion after 15 weeks—to protect the health of the "maternal patient," Miss. H.B. 1510 § 1(2)(b)(ii), (iii), echoes the sex-role assumptions of the nineteenth-century anti-abortion campaign: a pregnant woman's "health" will suffer if she deviates from her natural maternal role. But whatever health risks may be associated with abortion (on one hand) and bearing children in Mississippi (on the other), the choice of whether to assume those risks and how to weigh them belongs to women and not the State.

Moreover, when Mississippi claims that abortion in the second trimester is more dangerous than childbirth, *id.* § 1(2)(b)(iii), it appears to be making an empirical claim. In fact, Mississippi is appealing to the traditional sex-role assumption that a woman will suffer if she chooses to avoid her natural maternal role. If its claim were genuinely based in science, the State would address the scientific finding that childbirth is many times more dangerous than abortion—as this Court and others have recognized. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016) (observing that "[n]ationwide, childbirth is 14 times more likely than abortion to result in death"); Siegel, *Why Restrict Abortion?*, *supra* (manuscript at 49-50 & n.259) (describing Judge

Richard Posner and others criticizing an anti-abortion expert for persistently, and falsely, claiming that abortion is more dangerous than pregnancy). *See generally* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (2012) (concluding that the risk of death associated with childbirth is approximately 14 times higher than with abortion). *See infra* Part III.

While the justifications undergirding HB 1510 may superficially be couched in the language of health and science, even a cursory examination of the relevant historical context reveals that the State's justifications are just re-packaged versions of the same sex-role stereotypes used by nineteenth-century anti-abortion advocates. Thus, HB 1510 carries forth a long and unfortunate tradition of state-sponsored paternalism, in which the coercive control of a woman is justified as an act of benign solicitude. *See Frontiero*, 411 U.S. at 684 (explaining that traditional forms of sex discrimination were "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage").

To be clear, Mississippi may surely protect the health of women and the next generation, but in seeking to achieve these important ends, the State may "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Those are precisely the assumptions about women on which HB 1510 relies in presenting coercion as protection. These well-worn sex-role stereotypes may be archaic, but they are anything but quaint: when these sex-role

stereotypes are enforced through a law restricting abortion, they can deprive a woman of her autonomy, her job, her health, and even her life.

III. RELIANCE ON IMPERMISSIBLE SEX STEREOTYPES LED MISSISSIPPI TO FOREGO LESS DISCRIMINATORY MEANS TO ACHIEVE ITS GOALS OF PROTECTING WOMEN'S HEALTH AND FETAL LIFE

Mississippi employed sex-discriminatory means to achieve its goals of protecting women's health and protecting fetal life. *Virginia* requires the State to demonstrate that its choice of sex-discriminatory means is "substantially related to the achievement of" important government ends, by advancing an "exceedingly persuasive justification" that does not rely on sex-role stereotypes. *See Virginia*, 518 U.S. at 533-34. It cannot make that showing here.

Mississippi could have employed *many* policy means to reduce abortion and protect the health of women and children. Relying on available federal funds, it could have provided appropriate and effective sex education and expanded access to contraception; it could have expanded access to health insurance and provided assistance to needy families. But instead, Mississippi has restricted abortion access.

In its belief that banning abortions at 15 weeks would protect both the fetus *and* the health of the pregnant woman—a belief that is itself rooted in stereotypes about women's roles as child bearers before all else—Mississippi pushed women who seek to end pregnancies into harm's way by compelling

pregnancy and childbirth, when the State could have pursued its ends by alternate, less discriminatory means. The State singled out women who sought to end pregnancy instead of pursuing its ends by aiding those who want to avoid parenthood and supporting those who want to raise children.

Because Mississippi so heavily relied on sex-role stereotypes to enact a law that singled out and harmed women, the State has not demonstrated that its ban on abortion after 15 weeks is "substantially related" to important ends. Instead, the State's reliance on sex-role stereotypes led it to protect through coercion, which in turn "perpetuate[s] the legal, social, and economic inferiority of women." *Id.*

A. Abortion Restrictions Like HB 1510 Do Not Protect Women But Rather Expose Them to Harm

Mississippi seeks to protect women and fetal life by banning abortion after 15 weeks. But the ban it has adopted to achieve those ends actually jeopardizes, rather than protects, the health of women.

Not only does HB 1510 take from women control over their life decisions, as nineteenth-century doctors preached, it subjects women to myriad health harms in a State where the social safety net makes grossly inadequate provision for women or children. *See* Michele Goodwin, *Banning Abortion Doesn't Protect Women's Health*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/opinion/roe-abortion-supreme-court.html.

The risks of compelled pregnancy are considerable, in a state where the maternal mortality rate is

alarmingly high, averaging 33.2 deaths for every 100,000 live births. MISS. STATE DEP'T OF HEALTH, MISS. MATERNAL MORTALITY REPORT 10 (2019), https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/Maternal_Mortality_2019_amended.pdf.

Pregnancy in Mississippi presents particular risks for Black women, who accounted for "nearly 80 percent of pregnancy-related cardiac deaths" between 2013 and 2016. *Id.* at 16. The pregnancy-related mortality rate for Black women was nearly three times the rate for white women. *Id.* at 12 (ranging from 51.9 to 61.4 deaths per 100,000 live births compared to 18.9 to 36.7 deaths per 100,000 live births).

Forcing pregnancy and childbirth onto women against their will places their health and lives at risk. HB 1510, therefore, does not promote—let alone substantially relate to—Mississippi's claimed goal of promoting women's health.

B. Mississippi Repeatedly Rejected Nondiscriminatory Alternatives That Would Protect the Health of Women and Families

Mississippi had many policy alternatives for protecting the health of women and families. But in considering the many options before it, the State has consistently rejected noncoercive opportunities to improve the health of mothers and infants, even declining federal monies available to support these ends. The consequences are especially dire for Black mothers and infants. Despite the increased risks they face in Mississippi, the State has repeatedly declined

to enact policies that could improve their health and wellbeing.

1. Access to regular health care and checkups could reduce maternal deaths by up to 60%. Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 MORBIDITY AND MORTALITY WEEKLY REPORT 423 (May 10, 2019). Lack of care can be deadly for newborns—the U.S. Department of Health and Human Services found that newborns whose mothers had no early prenatal care are almost five times more likely to die. *See* Dep't of Health & Hum. Servs. Off. on Women's Health, PRENATAL CARE, https://www.womenshealth.gov/a-z-topics/prenatal-care (Apr. 1, 2019).

Yet ensuring access to health care is largely dependent on income and insurance coverage, and Medicaid expansion under the Affordable Care Act (ACA) has been shown to reliably improve insurance access. Jamie R. Daw et al., *Medicaid Expansion Improved Perinatal Insurance Continuity for Low-Income Women*, 39 HEALTH AFFS. 1531 (Sept. 2020). Increasing access to Medicaid could not only reduce maternal and infant deaths, but could also give a pregnant person lacking alternative health insurance the security to continue an unplanned pregnancy and to cope with delivery and postpartum care.

Mississippi, however, has refused to expand Medicaid under the ACA, compromising health care access for under-resourced Mississippians. Sarah Varney, *How Obamacare Went South in Mississippi*, THE ATLANTIC (Nov. 4, 2014), https://www.theatlantic.com/health/archive/2014/11/how-obamacare-went-

south-in-mississippi/382313/. This policy decision left an estimated 138,000 otherwise eligible people without health coverage and deprived the state of an estimated $1.2 billion in federal funds.

Ironically, after signing HB 1510, then-Governor Phil Bryant announced that he was "committed to making Mississippi the safest place in America for an unborn child, and this bill will help us achieve that goal." Jenny Gathright, *Mississippi Governor Signs Nation's Toughest Abortion Ban into Law*, NAT'L PUB. RADIO (Mar. 19, 2018), https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law. But, in reality, Mississippi's refusal to accept federal funding to provide health care for its residents directly contributes to its startlingly high infant and maternal mortality rates, especially in communities of color.[11]

2. Lack of financial resources is among the most common reasons that women provide for ending a pregnancy. *See* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH 29 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729671. The Temporary Assistance for Needy Families (TANF) program, which provides grants to support low-income families with children, enables Mississippi to channel

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[11] In 2018, the State ranked worst in the nation for infant mortality, with a rate of 8.43 infant deaths per 1,000 live births. MISS. STATE DEP'T OF HEALTH, INFANT MORTALITY REPORT 1 (2019), https://msdh.ms.gov/msdhsite/_static/resources/8431.pdf. Black infants constitute most infant deaths in Mississippi and are almost twice as likely to die as white infants. *Id.* at 8.

federal monies to its low-income residents. Participating in TANF offers a clear, noncoercive means of empowering people to choose to continue pregnancy with resources to support dependent family members.

Remarkably, despite this opportunity to support at least some women in choosing to continue pregnancies and to reduce the nation's highest child poverty rate, in 2019, Mississippi spent only about five percent of its TANF funds on direct assistance to families. Ali Safawi, *Mississippi Raises TANF Benefits but More Improvements Needed, Especially in South*, CTR. FOR BUDGET & POL'Y PRIORITIES (May 4, 2021), https://www.cbpp.org/blog/mississippi-raises-tanf-benefits-but-more-improvements-needed-especially-in-south. And the number of poor families receiving TANF has declined precipitously: less than 3,000 families received the maximum benefit of $170 per month by 2021, down from 23,700 families in 1999. *See* Anna Wolfe, *Mississippi Found 'Absurd' Ways to Spend Welfare on Anything but the Poor. These Bills Would Put More Money into Families' Pockets*, MISS. TODAY (Jan. 29, 2021), https://mississippitoday.org/2021/01/29/mississippi-found-absurd-ways-to-spend-welfare-on-anything-but-the-poor-these-bills-would-put-more-money-into-families-pockets. [12] Until 2021,

[12] TANF money has also been blatantly wasted in the State. Beginning in 2016, the director of the Mississippi Department of Human Services spearheaded the "largest public embezzlement scheme in state history." Anna Wolfe, *Embattled Welfare Group Paid $5 Million for New USM Volleyball Center*, MISS. TODAY (Feb. 27, 2020), https://mississippitoday.org/2020/02/27/welfare-program-paid-5-million-for-new-volleyball-center/. Millions of

Mississippi maintained the lowest TANF benefit levels in the nation, refusing for decades even to adjust for inflation. *Id.*

Moreover, many women who decide to end a pregnancy are poor and low-income mothers who fear that having another child will compromise their ability to provide for the children they already have. Mississippi preserves policies that reinforce those genuine concerns. For instance, the State maintains a family cap, limiting TANF benefits for additional children born into families that receive public assistance. Mississippi's family cap survives despite evidence that these policies "harm children's health" and "deepen poverty," evidence that has prompted their repeal in many states. Teresa Wiltz, *Family Welfare Caps Lose Favor in More States*, PEW STATELINE (May 3, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states.

3. Information about and access to contraception lowers rates of unplanned pregnancies. But rather than provide effective sex education and contraceptive access, Mississippi continues to promote abstinence-only sex education. Chris Elkins, *More Than 'Just Say No' Needed in Sex Ed*, DAILY J. (Dec. 13, 2012), https://www.djournal.com/opinion/other-opinion-more-than-just-say-no-needed-in-sex-ed/article_

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dollars meant for TANF instead were diverted to "a new volleyball stadium, a horse ranch for a famous athlete, multi-million dollar celebrity speaking engagements, high-tech virtual reality equipment, luxury vehicles, steakhouse dinners and even a speeding ticket." Wolfe, *Mississippi Found 'Absurd' Ways to Spend Welfare on Anything but the Poor*, *supra.*

db4f2969-e2b8-5950-8fd7-f46d551cb742.html. For example, instead of using federal monies to implement comprehensive sex education at no cost to the state, Mississippi funded a "Teen Pregnancy Prevention Summit" featuring pamphlets discouraging the use of contraceptives because they supposedly harm girls' "physical[,] emotional and spiritual well-being." Andy Kopsa, *Sex Ed Without Condoms? Welcome to Mississippi*, THE ATLANTIC (Mar. 7, 2013), https://www.theatlantic.com/national/archive/2013/03/sex-ed-without-condoms-welcome-to-mississippi/273802; *see also* Alana Semuels, *Sex Education Stumbles in Mississippi*, L.A. TIMES (Apr. 2, 2014) (recounting a public school sex education curriculum which instructed students to unwrap a piece of chocolate, pass it around the class, and observe how dirty it became to "show that a girl is no longer clean or valuable after she's had sex").

The consequences of these policies for women's and children's health are severe: Mississippi boasts some of the nation's highest rates of teen pregnancy, gonorrhea, chlamydia, and syphilis. Sarah Fowler, *Mississippi Has the Highest Rate of this STD, Ranks 3rd for Two Others*, MISS. CLARION LEDGER (Oct. 15, 2019), https://www.clarionledger.com/story/news/local/2019/10/15/gonorrhea-std-rate-mississippi-highest-chlamydia-syphillis-access-to-care-factor/3932140002/. Nevertheless, Mississippi continues to rely on a mode of protecting women's health and fetal life that is rooted in impermissible sex stereotypes, and does so by restricting access to reproductive health care.

Mississippi objects that *Casey*'s protections for women's decision-making "prevent[] States from providing health benefits and protections that they can provide in other contexts." Pet. Br. 41-42. But Mississippi has a wealth of policy options for reducing the incidence of abortion in the state and protecting women's health. *See* Emily Wax-Thibodeaux & Ariana Eunjung Cha, *The Mississippi Clinic at the Center of the Fight to End Abortion in America*, THE WASH. POST (Aug. 24, 2021) (recounting story of a young woman receiving follow up care after abortion in the state's only remaining clinic who said "that because Mississippi teaches only abstinence in public schools, no one explained to her how to prevent pregnancy if she had sex").

In short, Mississippi could provide care and support for individuals who wish: to avoid pregnancy, to bear children who will not languish in poverty, to preserve their own or their children's health, or to safeguard their ability to provide for existing children. Instead, Mississippi chooses to prevent women from making the most intimate, consequential decisions for themselves and to coerce women into giving birth under dangerous, demeaning conditions.[13] HB 1510 thus functions more as a tool of control than as an

[13] For a debate among white and Black Mississippi lawmakers about the women regulated by the State's abortion restrictions, including remarks by Republican Sen. Joey Fillingane, co-sponsor of HB 1510, *see* Emily Wagster Pettus, *Mississippi Considers Abortion Ban After Fetal Heartbeat*, ABC NEWS, (Feb. 5, 2019), https://abcnews.go.com/us/wirestory/mississippi-considers-abortion-ban-fetal-heartbeat-60864978.

expression of care for Mississippi's women and children. *See* Pet. App. 46a n.22.

IV. HB 1510 DOES NOT ADVANCE EQUALITY INTERESTS

Increasingly, those who support abortion restrictions take the extraordinary position that laws like HB 1510 actually *promote* equality under the law by preventing abortion from being used for eugenic purposes. In his separate concurrence in the judgment below, Judge Ho, drawing on a concurrence by Justice Thomas, asserts "that abortion 'has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics'" and notes that "the current 'abortion ratio … among black women is nearly 3.5 times the ratio for white women.'" Pet. App. 35a (quoting *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1790-91 (2019) (Thomas, J., concurring)).

Such efforts to link abortion to eugenics ignore the fundamental differences between a state-sponsored program of eugenic regulation designed to control the demographic character of the community and a law protecting an individual's decision to terminate a pregnancy. In the former, decisional authority rests with the state. In the latter, the state protects the authority of an individual to make reproductive decisions consistent with her individual beliefs and circumstances.

Without acknowledging these differences, abortion opponents insist that, today, *Roe* and the constitutional law of abortion rights are being used as a tool of eugenic manipulation. There is a certain irony

here: If there is any historical association between abortion law and projects of demographic control, it lies in the nineteenth-century campaign to criminalize abortion itself.

The nineteenth-century campaign unfolded during an era of nativist, anti-immigrant, anti-Catholic feeling. *See* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES 42-44 (2019). Storer and others blamed abortion for the differences in birth rate between "native" (*i.e.*, Protestant) women and "foreign" women. *See* STORER, *supra*, at 62-63; *id.* at 64-65 (observing that "abortions are infinitely more frequent among Protestant women than among Catholic [women]"); *see also, e.g.*, William McCollom, *Criminal Abortion*, TRANSACTIONS VT. MED. SOC'Y 40, 42 (1865) ("Our own population seem to have a greater aversion to the rearing of families than … the French, the Irish and the Germans."); L.C. Butler, *The Decadence of the American Race,* 77 BOS. MED. & SURGICAL J. 89, 93-94 (Sept. 5, 1867) (comparing Protestant and Catholic doctrine on abortion with attention to the relevant reproductive rates of Protestants and Catholics). Storer tied Protestant families' declining size to Protestant women exercising reproductive autonomy; he thus sought abortion bans to increase the number of Protestants. He questioned whether "the great territories of the far West, just opening to civilization, and the fertile savannas of the South" would be filled by "our own children, or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation." STORER, *supra*, at 85. His words resonated with at least some state lawmakers enacting abortion

restrictions. *See* L.D. Griswold et al., *supra*, at 235 ("Shall we permit our broad and fertile prairies to be settled only by the children of aliens?"). Doctors leading the campaign to criminalize abortion sought to wrest control of the reproductive decisions of "our own women" to protect fetal life, to enforce marital roles, and to preserve the demographic character of the nation. Siegel, *Reasoning from the Body*, *supra*, at 297-300.

Interest in eugenics—"'the science of improving stock' by giving 'the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable'"—became more popular in the nineteenth and early twentieth century. DOROTHY ROBERTS, KILLING THE BLACK BODY 24, 59 (2d ed. 2017). Eugenicists argued that "society should encourage the procreation of those of superior lineage, while discouraging procreation among—and public support for—those of inferior lineage." Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2036-37 (2021).

But the twentieth century eugenics movement did not focus on abortion as a way to control the population. It turned to laws permitting sterilization of the "feebleminded" and "habitual criminals," as well as laws criminalizing miscegenation and interracial marriage. *Id.* at 2037. By the mid-twentieth century, policies of reproductive control primarily targeted impoverished communities of color perceived as threats to the public fisc by *curtailing* individuals' ability to make decisions about their reproductive lives. *Id.* at 2047.

Mississippi's own history is instructive. In the 1950s and 1960s, state lawmakers prescribed sterilization as a punishment for nonmarital childbearing. *See id.* at 2042 (describing 1964 Student Nonviolent Coordinating Committee pamphlet *Genocide in Mississippi*). Civil rights leader Fannie Lou Hamer famously estimated that six in ten Black women who gave birth in Sunflower County Hospital during this period underwent post-partum sterilization without their consent, and often without their knowledge, a practice so common it was colloquially called a "Mississippi appendectomy." CHANA KAI LEE, FOR FREEDOM'S SAKE: THE LIFE OF FANNIE LOU HAMER 21-22, 80 (1999); REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980 at 93-94 (2009). As history makes clear, there is simply no comparison between state policies of reproductive control aimed at limiting birth among marginalized groups and the individual right to make reproductive decisions free from state coercion.

Further, when abortion opponents point to the incidence of abortion among minority communities as evidence that abortion is rife with "eugenic potential," they ignore the "structural impediments communities of color face in reproductive decisionmaking." Murray, *supra*, at 2090-91. For many people of color, "the decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities, and lack of access to health care and affordable quality childcare." *Id.* at 2090-91. Efforts to associate abortion with eugenics obscure how Mississippi's own policy choices, by failing to

support families, perpetuate the conditions that lead increasing numbers of poor women and women of color to decide to end their pregnancies. *See supra* Part III. Rather than link abortion rates to the policy choices that perpetuate poverty, opponents shift blame on to women who make decisions about abortion in a nation that provides scarcely any support for those who conceive, bear, and raise children.

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For a half century, this Court has affirmed that the Equal Protection Clause forbids the State from imposing traditional gender roles. *See also* Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143-44 (1978). HB 1510 does just that. It discriminates on the basis of sex, enforcing nineteenth-century sex-role stereotypes that compel a woman to continue pregnancy while the State foregoes alternative nondiscriminatory means to achieve the same ends.

In *Casey*, the Court explained that a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Casey*, 505 U.S. at 852. Mississippi has banned abortion after 15 weeks to protect the life and health of the fetus and the "maternal patient." Miss. H.B. 1510 § 1(2)(b)(ii)-(v). The statute addresses a pregnant woman as a mother, but in the same breath, it deprives her of control over whether to become a mother—all while claiming to act in the name of her "physical and psychological" "health." *See id.* Mississippi offers no persuasive justification for its

ready embrace of sex-based coercive means to protect life and health when less discriminatory means were available.

At the heart of both the Due Process Clause and the Equal Protection Clause is the individual's right to be free from state imposition of traditional gender roles. HB 1510 denies that fundamental constitutional guarantee.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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34 Harv. J.L. & Pub. Pol'y 889

Harvard Journal of Law & Public Policy
Summer, 2011

Article
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EMBODIED EQUALITY: DEBUNKING EQUAL PROTECTION ARGUMENTS FOR ABORTION RIGHTS

***890** Within legal academic circles and the general prochoice feminist population, it is axiomatic that women's equality requires a right to abortion. Yet not all women agree. Indeed, a growing segment of women instead echoes the views of the early American feminists, who believed that abortion was not only an egregious offense against the most vulnerable human beings, but that it was also an offense against women and women's equality. [1] Although the growth of this view has been accompanied by recent gains for prolife feminists in the political arena, and the introduction of organizations such as Feminists for Life on some college campuses, there is, nevertheless, a dearth of prolife feminist argument within legal academic literature. [2]

***891** But if prolife feminist literature is scarce, prochoice feminist literature abounds, and, with rare exceptions, revolves around one decisive claim: The Equal Protection Clause of the Fourteenth Amendment is the proper constitutional ground for the right to abortion. [3]

That the abortion right should be included within the Supreme Court's equal protection jurisprudence is not a new idea. Prochoice feminists have filed amicus briefs arguing as much ***892** both before and since the Supreme Court's pronouncement of the constitutional right to abortion in 1973. [4] The Supreme Court in *Roe v. Wade* steered clear of such reasoning, relying instead on the "right to privacy" found in the Court's newly-minted substantive due process jurisprudence. [5] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of the Court intimated that legal abortion was necessary to women's equality in

society, going so far as to say that society had come to rely on abortion as key to socioeconomic development and the organization of intimate relationships. [6] The Court in *Casey* did not, however, rely on the Equal Protection Clause for its holding. [7]

As a lawyer and activist, now-Justice Ruth Bader Ginsburg argued forcefully that equal protection required abortion rights and that the Equal Protection Clause was the strongest ration-ale for the abortion right. [8] After her appointment to the Court, Justice Ginsburg was able to articulate her distaste for *Roe*'s privacy rationale in her dissent in the partial-birth abortion case ***893** *Gonzales v. Carhart*, where she and three other Justices officially embraced equal protection reasoning, asserting that "[l]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." [9] Although the Court has never adopted equal protection grounds for the abortion right, it is certainly possible that a future majority of the Court will find the Ginsburg rationale persuasive.

In this Article, I challenge the assumptions underlying the idea that pregnancy and motherhood necessarily undermine equality for women. I argue instead that abortion rights actually hinder the equality of women by taking the wombless male body as normative, thereby promoting cultural hostility toward pregnancy and motherhood. Only prolife feminism can promote the equality of women because it does not embrace the falsehood that equality requires women to deny their fertility and reject their children. This Article seeks to systematically engage, on feminist grounds, the leading prochoice feminist legal literature, detailing why sexual equality need not--indeed, should not-- include a right to abortion. [10]

This Article proceeds in four parts. Part I discusses why prochoice legal scholars are so interested in locating the right to abortion in the Equal Protection Clause and why the Supreme ***894** Court has thus far declined to adopt this view. A review of the history of equal protection jurisprudence with regard to sex discrimination is necessary to trace the Court's understanding of how women's equality comports with the physical differences between the sexes.

Prochoice legal scholars make various arguments to justify basing the right to abortion in the Equal Protection Clause. Professor Jennifer Hendricks argues that among scholarly justifications for abortion, equality arguments generally take two different forms. [11] Some scholars make body-focused arguments, emphasizing the burden of "forced pregnancy," while others speak in terms of "forced motherhood," that is, the unjust social conditions in which American mothers find themselves. [12] Though the conclusions I draw will be different from those of Professor Hendricks, her analytic framework is apt, and so I too will formulate my analysis within this framework.

Part II discusses the "burden of motherhood" arguments. Prochoice feminists employ several different types of burden of motherhood arguments in their attempt to base the right to abortion in the Equal Protection Clause. The first, "equal citizenship," refers to the phrase used by Justice Ginsburg in her *Gonzales* dissent. This phrase has enjoyed heightened scholarly usage of late, though it lacks the kind of currency other pro-choice arguments have in general political discourse on abortion. Women's right to equal citizenship is less of an argument for abortion rights per se than it is an expression used to symbolize burden of motherhood arguments in general. In *United States v. Virginia*, Justice Ginsburg defined equal citizenship as "equal opportunity to aspire, achieve, participate in and contribute to society based on ... individual talents and capacities." [13] Use of the term in an abortion case such as *Gonzales* serves to weave equality arguments for abortion rights into the landscape of sex discrimination jurisprudence, which has generally relied upon the Equal Protection Clause. Subsumed in the demand for equal citizenship, then, are three other, more widely-recognized burden of motherhood arguments for why ***895** abortion restrictions violate equal protection (or, in Justice Ginsburg's view, equal citizenship): first, because such laws deny women both decisional and reproductive autonomy; second, because restrictive abortion laws perpetuate women's subordinate status by compelling motherhood; third, because such laws preserve traditional notions of what prominent legal scholar Reva Siegel has called "separate spheres," that is, discriminatory understandings of women as primarily wives and mothers. [14]

After discussing the use of equal citizenship as an overarching theme in feminist jurisprudence, I critique each of these three arguments. In doing so, I discuss the feminist philosophy underlying them, a philosophy that reduces sexual equality to sameness, unwittingly setting up the male experience, and especially the male body, as the norm. I argue that, in a legitimate attempt to get beyond the essentialist idea that women's reproductive capacities should be determinative of women's lives, prochoice feminist legal scholars have jettisoned the significance of the body. In rightfully arguing that pregnancy is more than just a biological reality, they discount that pregnancy is a fundamental biological reality. I will show that acknowledging this fundamental biological reality--that the human species gestates in the wombs of women--need not necessitate the current social reality that

women are the primary (and, too often, sole) caretakers of their children or the social arrangements in which professional and public occupations are so hostile to parenting duties. Biological realities need not determine social arrangements, but in ignoring or denying biological realities, we make it more likely that social arrangements will end up denigrating biological difference. [15]

The second type of equality argument in the literature--the burden of pregnancy argument--is addressed in Part III. Unlike the multifaceted approach of burden of motherhood arguments, burden of pregnancy arguments share a common starting point: Professor Judith Jarvis Thomson's famous 1971 essay, *A Defense of Abortion*. [16] Professor Thomson granted the personhood of the fetus and then analogized this nascent and ***896** dependent human being to a famous unconscious violinist who is kept alive only by being attached, for nine months, to an innocent, unwilling bystander's circulatory system. [17] Professor Thomson employs the analogy in an attempt to demonstrate the injustice of laws that would mandate continuation of a pregnancy without the consent of the pregnant woman.

I show how Professor Thomson's analogy and other analogies that follow her line of reasoning fails for lack of a proper understanding of the biological dependency relationship the unborn child has with the pregnant mother. Such a relationship gives rise to affirmative duties of care on the part of both the mother and the father. In ignoring the biological reality that women's bodies gestate human beings to whom we owe affirmative duties of care, prochoice feminists once again view the male, wombless body as paradigmatic. Easy access to abortion serves to further discharge men of the consequences that sometimes result from sexual intercourse and so places responsibility for unintentional pregnancies solely on pregnant women. Rather than making significant demands on men who sire children, current law encourages women to mimic male abandonment.

Part IV argues that concomitant with the proclivity to view male sexual autonomy as the standard for human reproduction is an embrace of a male-centered sexuality that ignores the procreative potentialities inherent in the sexual act. I outline the contours of a prowoman sexuality and an embodied equality that takes the male and the female body seriously and affirms their shared capacities for full human development.

I. SITUATING THE EQUAL PROTECTION PROBLEM: SEX DISCRIMINATION, PREGNANCY, AND ABORTION

A. Why the Equal Protection Clause?

Ever since the Supreme Court decided *Roe v. Wade* in 1973, legal scholars supportive of abortion rights have sought to find a more appealing constitutional justification than the roundly criticized right to privacy offered in *Roe*. [18] Not only is the right to privacy ***897** difficult to discern from the text of the Bill of Rights, privacy rights, by their nature, provide only a negative sphere of protection for the rights-bearer and so offer little more than the right to be free from state interference. [19] *Casey*'s liberty justification makes a more direct appeal to such a guarantee of governmental nonintervention but, for abortion proponents, still suffers from its inability to offer rights-bearers positive rights against the state.

Equality rights theoretically generate such positive rights. [20] If abortion is necessary to secure equality between the sexes, then impediments to exercising that right (economic or geographic restraints, for example) would themselves implicate equality and would arguably need to be removed by the State. Public funding of abortion as a necessary equalizer of the sexes would be assumed. [21] Moreover, were the abortion right litigated under the rubric of the Equal Protection Clause, rather than the Due Process Clause, the burden of proof would shift from the plaintiff (who currently must show a restriction poses an undue burden) to the State (which would need to show that a restriction was substantially related to an important governmental interest). In applying equal protection reasoning to questions of abortion law, the Court could, in effect, take a step that Congress, by declining to pass the Freedom of Choice Act, has thus far refused: invalidate laws regulating abortion throughout the fifty states.

***898** *B. Early History of Sex Discrimination Law*

For the first 100 years after adoption of the Fourteenth Amendment, laws making distinctions on the basis of sex generally were construed as benign and in the best interests of women. Legislation governing working hours and conditions, barring women from certain professions, and preventing women from entering into contracts or serving in the military, was understood as necessary for protecting women from corrupting cultural forces that might compromise their valued roles as wives and

mothers. [22] The cultural shift brought on by the civil rights movement in the 1950s and 1960s and the second-wave feminist movement in the 1960s and 1970s inspired the Court to begin to question the merit of such paternalist laws. Women's roles in society were expanding well beyond the home, and the women's movement began to garner support and success in its comparison of sexual discrimination with racial discrimination. In 1971, the Supreme Court in *Reed v. Reed* first used the Equal Protection Clause to strike down a law that preferred men to equally qualified women in the administration of estates, holding that "[b]y providing dissimilar treatment for men and women who are ... similarly situated, the challenged section violates the Equal Protection Clause." [23]

The Burger Court formulated its sex discrimination jurisprudence throughout the 1970s and into the 1980s, settling on a standard of intermediate scrutiny to ascertain whether statutes violated equal protection. In *Frontiero v. Richardson*, Justice Brennan's opinion echoed the feminist sentiment of the time--that sexual discrimination was comparable to racial discrimination, because both sex and race were "immutable characteris-tics." [24] Justice Brennan thus urged that classifications based on ***899** sex be reviewed under the same strict scrutiny standard used for racial classifications. [25] Though a plurality of the Court agreed in *Frontiero*, the majority of the Court opted instead for the intermediate level of scrutiny three years later in *Craig v. Boren*. [26] The Court further articulated its rationale in *Michael M. v. Superior Court*, finding that, unlike men of different races, "the sexes are not similarly situated in certain circumstances." [27] This formulation, also utilized in *Reed*, reiterated a long-held view within equal protection jurisprudence in general, which Justice Frankfurter had articulated in 1940: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." [28] Thus, though sex, like race, is an immutable characteristic determined solely by the accident of birth, classifications based upon the physical differences between the sexes may indeed be constitutional, assuming such classifications are "substantially related to the achievement" of "important governmental objectives." [29]

It is no coincidence that during the uptick in sex discrimination cases in the 1970s, future Justice Ruth Bader Ginsburg was a talented young attorney working for the ACLU. Indeed, Justice Ginsburg helped to craft the plaintiff's brief in *Reed*, and argued before the Court in *Frontiero* on behalf of the Women's Rights Project at the ACLU. [30] According to legal historian Cary Franklin, Justice Ginsburg's legal strategy, developed through each of the briefs she wrote for the Court during that decade, was to reveal the discriminatory nature of sex-role stereotyping--that is, the discriminatory nature of laws that defined women as homemakers and men as breadwinners. [31] Indeed, her pro bono sex discrimination advocacy began not on behalf of women, but rather of men, whom the state had, in various ways, pigeon-holed as providers rather than caretakers, a move that ***900** adversely affected their ability to care for their dependents. [32] Most notably, Justice Ginsburg successfully argued the 1975 case *Weinberger v. Wiesenfeld*, in which the Court held that a husband's right to equal protection of the laws required the government to disperse to him, as a dependent husband, his wife's benefits upon her death, just as a wife is entitled to collect the Social Security survivor benefits of her husband upon his death. [33] To Justice Ginsburg, *Weinberger* was the "most critical" of the sex discrimination cases decided that decade, because it perfectly illustrated her proposed theory of sex discrimination: Sex-role stereotyping violated equal protection. [34] The Burger Court, however, chose not to extend this antistereotyping principle of sex discrimination into the arenas of state regulation to which Justice Ginsburg and other feminists most wanted the principle to extend: classifications based upon physical differences between men and women--most especially, pregnancy. [35]

For those who hoped that an equality basis for abortion rights would emerge out of the legal doctrine governing sex discrimination, the 1974 Supreme Court case *Geduldig v. Aiello* was a major setback. [36] In *Geduldig*, the Court upheld a California disability insurance program that excluded normal pregnancy from coverage, reasoning that because women, as a class, were not excluded from the program, the state had not discriminated on the basis of sex. [37] Though the Court acknowledged that the program adversely affected women because only women could become pregnant, the Equal Protection Clause was not triggered because "[not] every legislative classification concerning pregnancy is a sex-based classification." [38] Feminist scholars attacked *Geduldig* because it seemed obvious to them that classification on the basis of pregnancy--that most basic physical difference between men and women--constituted ***901** sex-based classification. [39] But the Court in *Geduldig* understood itself to be embracing the guiding principle of all equal protection reasoning: the Equal Protection Clause governs only those regulations that discriminate between persons who are similarly situated. Men and women are not similarly situated with regard to pregnancy, and, therefore, pregnancy discrimination need not constitute discrimination on the basis of sex.

Reacting in part to both the Court's *Geduldig* decision and a similar holding in *General Electric Co. v. Gilbert* [40] that extended *Geduldig*' s reasoning to Title VII of the Civil Rights Act, Congress passed the Pregnancy Discrimination Act (PDA), announcing that pregnancy discrimination constituted sex discrimination, at least with respect to Title VII. [41] But the PDA left *Geduldig* (and thus pregnancy discrimination vis-à-vis the Fourteenth Amendment) untouched. [42] To many commentators at the time, *Geduldig* seemed to reject the possibility that discrimination on the basis of pregnancy could ever constitute sex discrimination for purposes of the Equal Protection Clause. This appearance dampened the hopes of abortion advocates that abortion restrictions would one day be governed by the constitutional guarantee of equal protection. [43] At the very least, *Geduldig* precluded the argument that because only women become pregnant, abortion restrictions implicate equal protection. [44]

C. Casey, Virginia, Hibbs--*and* Nyugen

After nearly twenty years of faded hope, *Planned Parenthood v. Casey* put new wind in the sails of those making equality arguments for abortion rights. Though the plurality in *Casey* did not expressly ground its holding in the Equal Protection ***902** Clause, much of its reasoning indicated a willingness to smuggle equality arguments into the Court's due process framework. [45] From the perspective of prochoice legal scholars, however, two sex discrimination cases decided by the Supreme Court after *Casey* were equally important to *Casey*'s flirtations with equality reasoning: *United States v. Virginia* and *Nevada Department of Human Resources v. Hibbs*. [46] For prochoice scholars, these cases marked an encroachment upon the reasoning in *Geduldig*, indicating that even laws that were erected based upon physical differences between men and women were no longer safe from equal protection scrutiny. [47] Indeed, these cases, together with *Casey*, form what one scholar suggests amounts to a "critical capacity to discern gender bias in reproductive regulation," and so bring abortion rights into the equal protection fold. [48]

Though prochoice legal scholars are correct to note that sex discrimination jurisprudence over the last fifteen years has moved steadily toward Justice Ginsburg's view that sex-role stereotyping provides the lens through which to discern sex discrimination, their confidence that these cases have erected an opening through which abortion law might pass lacks merit. [49] The holdings in *Virginia* and *Hibbs*, read together with a contemporaneous case, *Nguyen v. INS*, [50] exclude abortion ***903** regulations from their purview--unless one entirely ignores the biological basis of pregnancy.

In 1996, Justice Ginsburg wrote the opinion of the Court in *Virginia*, striking down the male-only admissions policy of the Virginia Military Institute (VMI). The State argued that differences between men and women in physical capacities and learning styles justified the policy, because female students tend to thrive in "cooperative" educational atmospheres, quite unlike the unique "adversative" approach used at VMI. [51] The Court disagreed, finding that because some women "do well under [the] adversative model," [52] the state was not justified in "denying opportunity to [those] women whose talent and capacity place them outside the average description." [53] Writing for the Court, Justice Ginsburg did not deny that actual differences between the sexes exist; rather, she maintained that classifications based on such differences could not be used to rationalize state policies that "create or perpetuate the legal, social, and economic inferiority of women." [54]

In 2003, the Court in *Hibbs* upheld the Family and Medical Leave Act (FMLA) as a proper use of congressional power under Section 5 of the Fourteenth Amendment. [55] To the surprise of many, Chief Justice Rehnquist wrote the Court's opinion, holding that leave policies that differentiated on the basis of sex (by, for example, offering elongated maternity leave but no paternity leave) reinforced "the pervasive sex-role stereotype that caring for family members is women's work," and so were properly redressed by the FMLA. [56] Chief Justice Rehnquist ***904** wrote at some length about the "self-fulfilling cycle" such stereotypes create in reinforcing women's role as primary caregivers while discouraging men from such caregiving. [57] Critical for our purposes is the Court's finding that Congress was within its authority to "remedy and deter" sex discrimination violations because "[t]his and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work." [58]

Five years after *Virginia*, and two years before *Hibbs*, the Court decided another sex discrimination case that also concerned differences between men and women, but that was not found to constitute an equal protection violation. In *Nguyen*, the Court held that the government did not contravene the Equal Protection Clause when a statute required a father to provide proof of biological parenthood, but did not require the same of a mother because of the different circumstances mothers and fathers find

themselves in at the time of birth. [59] Mothers are always present at birth, whereas fathers need not be. Thus, fathers and mothers are not "similarly situated" with regard to proving their parentage. [60] Importantly, the Court noted that the burden legitimately placed on the father by the statute ***905** at issue did not result from stereotyping, but rather from an "undeniable difference" in the circumstances at birth. [61]

Professors Reva Siegel, Cary Franklin and others view *Hibbs*, together with *Virginia* and *Casey*, as paving the way for sex discrimination jurisprudence to subsume abortion jurisprudence, that is, for the Equal Protection Clause to govern abortion rights. [62] Certainly Professor Siegel is correct that Chief Justice Rehnquist had "come a long way, baby" in his explicit adoption of sex-role stereotyping as the principle animating sex discrimination law. [63] Moreover, Chief Justice Rehnquist's recognition that policies discouraging caretaking by fathers serve to perpetuate primary caretaking by mothers reveals an important cultural shift in the nation's views on caretaking. But this shift in thinking, assuredly manifest in these cases, has eclipsed neither the reality of sexual differences nor the importance the Court accords to such differences.

Virginia, Hibbs, and *Nguyen* speak to differences between the sexes, but only the last, *Nguyen*, turns on the treatment of "real" physical differences. *Virginia* and *Hibbs* indicate, rather, that the government cannot justify social inferences or expectations on the basis of physical differences between the sexes, if such inferences or expectations engage in sex-role stereotyping by perpetuating traditional sex roles or understandings (here, that women tend toward cooperative learning and caretaking, respectively). *Nguyen*, in contrast, is the only one of the three cases that does not turn on illicit legislation on social expectations of the sexes, but on the physical circumstances of pregnancy and birth itself. This triad of cases teaches that a legislature does not engage in sex-role stereotyping when it passes a law that is based upon the biological facts of childbearing (for example, that women, and not men, gestate and bear children), but that it is sex-role stereotyping when a law seeks to define traditionally the social roles of men and women in reliance upon those biological facts (for example, because women bear children, they care less about their professional work). Chief Justice ***906** Rehnquist tells us as much when he writes that the differential leave policies at issue were discriminatory because they "were not attributable to any differential *physical needs* of men and women, but rather to ... pervasive sex-role stereotype[s]." [64] That is, *Hibbs* is not making a statement about the potentially discriminatory nature of "laws regulating pregnant women," as Professor Siegel has suggested; [65] the leave policies Chief Justice Rehnquist took to task were those that extended leave beyond the "typical ... period of physical disability [required by] pregnancy and childbirth," without offering men a similar caretaking benefit. [66] The illicit policies were not regulating pregnancy at all, or even the days and weeks required for maternal recovery; rather, they suggested that women, not men, were the assumed caregivers for infants beyond such a period. To the Court, such an assumption was sex-role stereotyping. [67]

The Supreme Court's decisions in *Virginia, Hibbs*, and *Nguyen* give us no reason to think that restrictions on abortion contravene the Equal Protection Clause. After all, it is untrue to declare categorically, as Professor Cary Franklin does, that "[w]hen the state deprives women of control over their own reproductive capacity [through abortion restrictions], it is making *a social, not a biological, statement* about women's roles and stature in the community." [68] Rather, abortion restrictions regulate the biological state of pregnancy, and do so precisely because it is the physiological process by which new human beings enter the world. As Professor Michael Stokes Paulsen has written:

> Abortion restrictions impose legal burdens not on the basis of gender but on the basis of the asserted presence and value of a human life *in utero*. To be sure, only women become pregnant. But [abortion restrictions do] not regulate *women* ***907** as a class; [they] regulate[] the conduct of *men and women* relevant to the commission of or assistance in abortion ...." [69]

The fundamental biological difference between men and women with respect to pregnancy is why the Court has yet to determine the constitutionality of abortion regulations through its sex discrimination jurisprudence. Men and women are not similarly situated with regard to pregnancy, and therefore the Equal Protection Clause, as currently understood, is not triggered.

Parts II and III explore the numerous arguments prochoice feminist legal scholars make in their effort to understand pregnancy, and restrictions on abortion, as a social rather than biological phenomenon. Where their arguments decry societal structures that are inhospitable to women who are mothers, I agree. However, many of their arguments refuse to take seriously the biological reality that women, rather than men, get pregnant. And, as we have seen, classifications based on such fundamental biological

differences do not trigger the Equal Protection Clause. By highlighting prochoice legal scholars' neglect of the body, I show that the abortion right, unsatisfactory as a privacy or a liberty right, also fails to conform to current Supreme Court views of equality rights.

II. BURDEN OF MOTHERHOOD ARGUMENTS

Burden of motherhood equality arguments for abortion rights focus on the unjust social conditions in which mothers are situated. "Equal citizenship" has become the catchphrase for these arguments, a concept that Justice Ginsburg expressly defined in the aforementioned sex discrimination case, *United States v. Virginia:* "Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature ...." [70] Justice Ginsburg thus explains that the equal protection principle, discernible through the Court's sex discrimination cases since their advent, is encapsulated in the notion of full or equal citizenship, defined as the "equal opportunity to aspire, achieve, ***908** participate in and contribute to society based on their individual talents and capacities." [71] The term equal citizenship is meant to contain the entire body of sex discrimination jurisprudence in its definition. Its use in abortion rights argument, therefore, as in Justice Ginsburg's dissent in *Gonzales*, is a not-so-veiled attempt to bring abortion law into the fold of sex discrimination law. [72] As Professor Siegel has written, "Justice Ginsburg and a growing community of scholars have long argued that this body of equality law governs abortion restrictions." [73] This Part looks first to what equal citizenship might mean as a constitutional principle underlying abortion rights and then discusses the three other burden of motherhood arguments subsumed in the notion of equal citizenship: women's rights to autonomy, to equal status, and to be free from sex-role stereotyping.

A. Equal Citizenship

With an understanding of the motives in making use of equal citizenship rationales in legal arguments for abortion rights, it is necessary to turn to the idea of equal citizenship itself and its relationship to abortion rights. The right to abortion, it is argued, is needed for women to participate as equal citizens. Professor Siegel writes that "[a]bortion laws ... treat women as ... citizens who are expected to perform the work of parenting ***909** as dependents and nonparticipants in the citizenship activities in which men are engaged." [74] Neither Professor Siegel, in the article quoted, nor Justice Ginsburg, who references Professor Siegel's work in her dissent in *Gonzales*, describe the citizenship activities in which men, but not pregnant or "dependent" women, may engage. Elsewhere, Professor Siegel fills out her vision of citizenship to include broadly "dignity" or decisional autonomy, as well as the ability to participate equally with men in the spheres of education, work, and politics. [75] Another constitutional scholar has argued similarly that "[a]s citizens, women have the right to shape their destiny and the course of their lives, what we might call a right of self-government. Antiabortion laws contravene this guarantee by forcing pregnant women to be mothers." [76] As noted, the equal citizenship equality argument subsumes other more well-known equality arguments for abortion rights, including the rights to decisional and reproductive autonomy, equal status with men, and freedom from sex-role stereotyping, discussed below. But what does it mean to assert that abortion is necessary for women to be equal citizens?

Full citizenship, for Professor Siegel at least, appears to include activities in which dependent mothers cannot participate. [77] Professor Siegel thus intimates that dependent mothers ***910** are not full citizens. Indeed, she writes that the "core pursuits of citizenship" have been designed for individuals "unburdened by the obligations of family care." [78] But what are the "core pursuits of citizenship" in which mothers cannot participate? Professor Siegel does not say, but as traditionally understood, the core rights and duties associated with citizenship presumably include, among others, the right to vote, to appeal to and be heard by one's public representatives, to assemble in favor of a political cause, and to serve as a juror. Ordinary family obligations do not conflict with any of these core citizenship activities; indeed, professional obligations are more likely to.

If the citizenship activities to which Professor Siegel refers are not those noted above, in which dependent mothers are able to participate freely, then one assumes that Professor Siegel must mean remunerative activities-that is, paid labor, in the spheres of "work, education, and politics." But when have Americans associated citizenship with paid labor? The right to be remunerated for one's labor surely is an important privilege associated with democratic capitalism, but to argue that citizenship requires remunerative labor falls outside of the American understanding of what it means to be a citizen. Indeed, it would seem to follow from Professor Siegel's argument that unemployed men (and women) are not equal participants in citizenship activities (even if they were to volunteer in charitable, educational, or political enterprises during their unemployment). [79]

But perhaps Professor Siegel's theory of citizenship is not meant to encompass the ordinary citizen. After all, Professor Siegel's complaint is that women who are compelled to be mothers by restrictive abortion laws will "never be ... totally ***911** functioning part[s] of the government which determines [their] rights." [80] If by this she means that women who have dedicated a portion of their lives to raising children are generally not legislators, judges, or presidents (that is, those in the business of determining rights), then perhaps the great majority of men are not equal citizens either. If, on the other hand, she means that dependent mothers are unable to fully participate in democratic activities and in those activities that promote citizenship, she is surely mistaken. Professor Camille Williams captures my response to this alleged nonparticipation of mothers in citizenship activities when she writes that "[m]any of us ... see our work in our families as the first and most important contribution we make to a humane and caring community .... [T]he notion that a woman in her home is isolated from society is archaic and, to many, offensive." [81] Indeed, from the founding of the American republic, society has entrusted parents to guide their children in the development of the core values and virtues associated with democratic citizenship: respect, responsibility, integrity, and justice. If mothers (and fathers) were not to dedicate themselves to inculcating these virtues, the democratic experiment in ordered liberty would surely fail.

Professor Robin West criticizes the Ginsburg-Siegel equal citizenship argument on the grounds that it might "legitimiz[e], and with a vengeance, the [supposed] inconsistency of motherhood and citizenship itself." [82] If motherhood is incompatible with citizenship, she argues, then "it is entirely because of the way in which we have constructed motherhood or constructed citizenship, or both." [83] We err, according to Professor West, by imagining adults without dependents in our idea of citizenship. Professor West is correct to find fault with the autonomous individual as the archetype of the Ginsburg-Siegel ***912** citizenship model. Yet, she seems to concede to Professor Siegel and Justice Ginsburg the notion that citizenship has more to do with remunerative activities than was traditionally understood. Professors Siegel and West's views of citizenship comports neither with most Americans' view of citizenship nor with historical manifestations of active citizenship. After all, so-called dependent mothers were community builders and leaders, active political players, and molders of future citizens--fundamental players in the "intermediary institutions" that Tocqueville and others have understood as central to the flourishing of our constitutional republic--well before women entered the full-time work force in droves over the last few decades. [84]

Professor Neil Siegel argues that "equal citizenship stature" is the "constitutional vision" or guiding principle by which Justice Ginsburg determines a host of constitutional cases that come before the Court. [85] In using the term interchangeably with "equal dignity," "essential human dignity," and "full human stature," Justice Ginsburg "seems to invoke the language of citizenship to express the general idea of inclusion within the American political community." [86] This invocation exposes a further irony in the use of "equal citizenship stature" as an argument for abortion rights: Would not Justice Ginsburg's "heroic vision" of an ever-expanding "inclusion" within the American community apply equally well, if not better, to the most vulnerable and defenseless of human beings, those left unprotected by liberalized abortion laws? [87]

B. Decisional and Reproductive Autonomy

As noted in Part I, one of the principal reasons popular legal arguments in favor of equality rationales have failed is because ***913** current equal protection jurisprudence requires a threshold showing that men and women are similarly situated. Because men and women are not so situated with regard to pregnancy, some prochoice feminists have sought to describe pregnancy at a "higher level of generality" in an effort to trigger the Equal Protection Clause. [88] Thus, these scholars seek to show that men and women are similarly situated-with regard to their common aspirations and life goals, in how they "define their views of themselves and their places in society." [89] Pointing to this and other language from *Casey*, Professor Erin Daly writes, "Restrictive abortion laws that unequally burden women's, but not men's, capacity to *define their own lives* should be invalidated as violating the equality principle." [90] Men and women may not be similarly situated with regard to biological pregnancy, Professor Daly argues, but they are similarly situated in their common desire to define the content of their present and future lives; they are equal in their dignity as self-defining citizens.

The argument that men and women equally share a desire to define their lives is beyond dispute. The Court in modern times has properly renounced historical views of women as dependent creatures incapable of rational decisionmaking, recognizing instead that women, like men, are self-governing, competent individuals. Preventing women from determining their life course

and from shaping their own destinies most certainly denies them the freedom and equality so prized by democratic peoples and inscribed in the Constitution.

Goals and aspirations, decisions and destinies, however, are never formed by disembodied minds. Rather, embodied individuals, actual men and women, are the relevant goal-making ***914** and decisionmaking agents. [91] How much the embodiment of men and women affects the content of their goal-making and decisionmaking is an open question--one beyond the scope of this Article. There is no question, however, that embodiment denotes reproductive differences between men and women, differences that constrain our individual capacities for autonomy at different stages of our lives. [92]

The equality argument from autonomy suggests that just as men can physiologically avoid the supremely consequential procreative potential of the sexual act, so too should women be enabled. That is, because the professional and personal lives of men need not be interrupted by an ill-timed pregnancy, neither should the professional and personal lives of women. Scholars thus urge the Court to recognize that women who wish to have "non-procreative sex" are as "entitled as men ... to constitutional protection of their right to define their own destiny." [93] In other words, women are as entitled as men to remain detached from the potential consequences of sex--consequences that would impinge on their right to autonomously and uninterruptedly control and define the course of their lives. As Professor Laurence Tribe argues, "[w]hile men retain the right to sexual ***915** and reproductive autonomy, restrictions on abortion deny that autonomy to women." [94]

In seeking to look beyond biological differences to those goals in life that are common to the two sexes, Professor Daly believes that she has taken gender difference seriously. She writes, "*Casey* equality assumes that the genders must be equivalent to each other; rather than assuming that one gender, presumably the male, sets the standard to which the other is to be compared." [95] But in assuming the human capacity to remain physically autonomous from the procreative consequences of sexual activity--that is, physiologically detached from a pregnancy that may result--Professor Daly does presume one sex as the standard for equality: the male sex. [96]

One need not be a biologist to notice that sexual intercourse sometimes leads to the creation of a new human life and that human life originates and develops in the body of a woman. Unbeknownst to many members of the American public, which periodically is still polled about its opinions on when human life begins, most prochoice feminists have conceded the humanity of the unborn for some time. [97] Although philosophers of various stripes debate which human attributes make a nascent human being a legally protected human person, [98] most prochoice feminist ***916** legal academics seem willing to concede the value of fetal life. [99] In their view, whatever the status of unborn human life, women's sexual equality depends upon the right to abortion.

The law demands the full equality of the sexes. For the law to treat women and men equally, however, it must not ignore the biological reality that men and women's bodies differ with regard to reproduction, a difference with varied and significant consequences. Men's reproductive design makes them distant from the physical, emotional, and social complexity of pregnancy. It also enables them to shirk the responsibilities that come with siring offspring. Women are not so designed. The life-giving consequences of the potentially procreative sexual act confront them with immediacy and gravity, a vulnerability that callous men have exploited throughout human history. The legal availability of abortion has worked to detach men further from the potentialities of female sexuality, offering them the illusion that sex can finally be completely consequence-free. [100] The trouble is that, for women, sex that results in pregnancy is fraught with consequence. Women must act affirmatively--and destructively--if they are to imitate male reproductive autonomy. [101]

***917** Professor David Smolin captures starkly the cost to women of mimicking male autonomy: "[W]omen will always pay a higher price for their autonomy .... Only women have to experience the pain and physical intrusion of abortion to achieve autonomy." [102] And only women have to suffer the health consequences of their act, potentially impacting their future pregnancies and future well-being. [103]

Prochoice feminist legal scholars argue that it is abortion's opponents who would, in a biologically determinist fashion, create legal doctrines from biological facts. Yet, it is these same scholars who select a particular biological reality--detached male sexuality-to determine how sexual equality should look when it comes to pregnancy. In agitating for abortion to achieve male-like reproductive autonomy, prochoice feminists are not getting beyond the "physiological paradigms" Reva Siegel claims animate antiabortion legislation. [104] Prochoice feminists are holding up male physiology as the human norm. [105] Seeking to

imitate the autonomous, ***918** child-abandoning male through abortion would seem rather contrary to prowoman ideals, but Justice Ginsburg offers the prochoice rationale: "[Women's] ability to realize their full potential ... is intimately connected to 'their ability to control their reproductive lives"' through abortion. [106] Women can reach their full potential, Justice Ginsburg intimates, only by imitating men.

The irony in prochoice feminist reasoning here is tragic in its proportions and yet so rarely acknowledged. The early American feminists fought against the categorization of women as legal nonentities or, viewed more charitably, as united in the legal personhood of their husbands. [107] Prochoice feminists now argue that the legal equality achieved in the modern era is dependent upon women denying that which distinguishes them most from men. Historically, woman was regarded as legally incorporated into man; now, she is equal only insofar as she imitates man. [108] Historical feminists fought the former while today's prochoice feminists thought up the latter. [109] It hardly benefits women to include within the legal meaning of gender ***919** equality the right to repudiate that which is most unique to women: the ability to bear children. As the late Elizabeth Fox-Genovese, distinguished social historian and founder of the Emory University Women's Studies Department, has stated, according to the prochoice feminist view:

> To enjoy full dignity and rights as an individual, a woman must resemble a man as closely as possible. It is difficult to imagine a more deadly assault upon a woman's dignity as a woman. For this logic denies that a woman can be both a woman and a full individual. [110]

To diminish women's difference in this way and emblazon it in constitutional jurisprudence would further disempower an already marginalized group of women in American society. This group--mothers with dependent children--could not be more different from the standard-bearing autonomous male. Once legal equality is conceived of in terms of male autonomy or detachment, the attachment and connectedness of a mother caring for her young children becomes a symbol of weakness and depravity rather than of care and sacrifice. [111] Where autonomy is exalted, vulnerability is pitied. And before long, the vulnerable are society's pariah.

C. Equal Status

Inherent in Justice Ginsburg's use of equal citizenship is the concern abortion advocates have with the interrupted pursuit of "equal status." [112] That is, abortion is necessary to securing women's equal status in a society that devalues motherhood and makes it difficult to pursue status-bearing employment opportunities and motherhood simultaneously. [113] According to Professor Siegel, antiabortion laws "compel women to become mothers, while in no respect altering the conditions that make ***920** the institution of motherhood a principal cause of women's subordinate social status." [114] Professor Siegel painstakingly argues what prolife feminists have been saying for some time, that the public sphere is not structured in a way that values the work of parenting. Professor Siegel's argument continues:

> Those who devote their personal energies to raising children are likely to find their freedom to participate in so-called public sphere activities impaired for years on end, for the evident reason that most activities in the realms of education, employment, and politics are defined and structured as incommensurate with that work. Thus, a woman who becomes a parent will likely find that the energy she invests in childrearing will compromise her already constrained opportunities and impair her already unequal compensation in the work force all the more so if she raises the child alone, whether by choice, divorce, or abandonment. [115]

But prolife feminists respond that abortion is the problem, not the cure. Abortion works to perpetuate both the cultural devaluation of motherhood (and parenting generally) and the social conditions that Professor Siegel rightly argues are inhospitable to childrearing. Abortion eliminates the incentive to make institutional change. [116] Consider the views of Daphne Clair de Jong, founder of Feminists for Life in New Zealand, writing in 1978:

> If women must submit to abortion to preserve their lifestyle or career, their economic or social status, they are pandering to a system devised and run by men for male convenience. The politics of sexism are perpetuated by accommodating to expediential societal structures, which decree that pregnancy is incompatible with other activities, and that children are the sole responsibility of their mother. The demand for abortion is a sell-out to male values and a capitulation to male lifestyles rather than a radical attempt to renegotiate ***921** the terms by which women and men can live in the world as people with equal rights and equal opportunities. Accepting the "necessity" of abortion is accepting that pregnant women and mothers are unable to function as persons in this society. It indicates a willingness to adjust to the *status quo* which is a betrayal of the feminist cause, a loss of the revolutionary vision .... [117]

Clair de Jong and other prolife feminists join Professor Siegel in complaining about the social conditions that often make childrearing and gainful employment (never mind high-status professional work) incompatible. It is inequitable that becoming a parent should disproportionately impact mothers' economic wellbeing, as compared to fathers. [118] It is devastating that fathers can abdicate their parental duties with incommensurate financial and social repercussions, leaving many women to raise children in deplorable conditions. These complaints, however, concern realities that are entirely of social construction. The remedy is to rectify the imbalance of parental responsibility as well as the marketplace mentality, which disfavors family obligation. Such changes would surely be welcomed by men who devote themselves unreservedly to family life. If only prolife and prochoice feminists would unite in the common cause of challenging wayward men to be fathers and employers to be more responsive to the demands of the family. [119] As prochoice feminist Jennifer Hendricks has argued:

> By accepting the social structure as given, Casey's vision of equality embraced the division of the world into separate ***922** spheres and merely gave women the option of being like men .... [It] challenge[d] neither the division of labor that makes motherhood, but not fatherhood, inconsistent with career success nor the structure of a public sphere that is hostile to caretaking demands." [120]

An authentic vision of equality, Professor Hendricks and I seem to agree, has to take seriously both the demands of the family and the cultural devaluation of caretaking work.

The work of caring for children, which women have assumed in disproportionate measures both traditionally and in present times, has been culturally devalued vis-à-vis professional endeavors because nonremunerative work is devalued in our market economy. [121] Yet such a cultural valuation of paid work over care work fails to comport with the views held by most men and women today, especially among those age groups who are actually raising children. [122] Only a fraction of ***923** the working population engage in professional endeavors outside of the home for the sheer pleasure and satisfaction their work offers them and for the personal gratification of enjoying high social status. [123] Most men, and women, who labor outside the home do so not for the status that work affords but because they need to financially support the family--the institution in which they place priority of focus, value, and responsibility. [124] Those men and women for whom professional work affords them great personal satisfaction tend to be highly educated professionals whose intellectually stimulating work bears little resemblance to the labor in which most individuals are employed. [125] A growing segment of the population would prefer to work less, enabling them to spend more time developing the familial bonds that will offer them connection and fulfillment throughout their lifetimes. [126]

Indeed, even after forty years of feminist gains for professional women, most women would elect to work part-time when their children are young, if it were economically feasible, and would especially appreciate the ability to enter and exit the labor market more flexibly without losing gains they have made professionally. [127] The availability of abortion has relieved ***924** a market-driven culture, and indeed the mainstream feminist movement, from attending to the needs of family life, needs that dominate the lives of most working individuals. [128] Were the market, the state, and the academy to give family life and care work the priority and value that most men and women accord them, motherhood would no longer hold the subordinate status it seems to have in the eyes of elite academic feminist scholars. Perhaps, then, abortion would not seem to them so necessary.

D. Separate Spheres

According to Professor Siegel, antiabortion laws, beginning in the nineteenth century and running through the 2006 referendum in South Dakota and other recent "women-protective" legislation, have always been predicated on what she has called "physiological naturalism." [129] Such an approach regards the facts of biology as determinative of social (and legal) expectations for the sexes. Because women's bodies naturally gestate fetal life, women are assumed by nature to be designed only, or even primarily, to be wives and mothers. Professor Siegel's concern is that abortion-restrictive regulation "reflects [such] ***925** social judgments about women's roles, and not simply solicitude for the welfare of the unborn." [130]

It is worth noting the attention that Professor Siegel pays to the value of unborn life. She is not overtly dismissive of prolife argument regarding the moral status of the unborn. Professor Siegel even seems willing to concede the legitimacy of the state's "constitutionally benign interest in protecting potential life" so long as the state's legislation on these lines neither discriminates on the basis of sex by perpetuating the "separate spheres" tradition nor, as discussed above, enshrines subordinate status. [131] Rather, Professor Siegel criticizes those who legislate from the perspective of physiological naturalism for both their inattention to the social conditions in which pregnant women and mothers find themselves and their propensity to "define women's needs and interests through motherhood." [132]

It is discriminatory or stereotypical judgments about women's social roles that conflict with the Equal Protection Clause for Professor Siegel, not antiabortion legislation in itself. [133] Professor Siegel lays out an exacting portrait of how a state could theoretically regulate abortion (or, in her view, "compel[] pregnancy") without, in so doing, dictating traditional sex roles for women. [134] A state would have to show: first, that it otherwise promotes the welfare of unborn life by fully supporting women in their efforts to bear and rear healthy children; second, ***926** that it demands of men and the community at large sacrifices commensurate with those borne by women on behalf of the unborn; and, finally, that it is ready to compensate women for "the impositions and opportunity cost of bearing a child they do not wish to raise." [135] She concludes:

> A state that could demonstrate such a consistent course of conduct could indeed claim that it was an accident of nature that the state had to make the pregnant woman a Samaritan for the unborn, and that its decision to do so had no roots in assumptions about her natural obligations or instrumental uses as a mother. [136]

From this statement, it appears that Professor Siegel is not unmindful of women's reproductive capacity. But she strongly disagrees with the view that reproductive capacity translates directly into women's traditional social roles. [137]

Professor Siegel acknowledges that current equal protection jurisprudence is interested solely in preventing the legal perpetuation of traditional sex-role expectations, not in maintaining a misguided illusion of the biological identity of the sexes. [138] Thus, states are very much within constitutional bounds when they legislate on the basis of the distinct biological roles men and women play in reproduction. [139] As Justice Kennedy wrote in *Nguyen*:

> To fail to acknowledge even our most basic biological differences--such as the fact that a mother must be present at birth but the father need not be-- risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. [140]

And Justice Ginsburg herself wrote in *United States v. Virginia*, "Inherent differences between men and women, we have come to ***927** appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." [141] Statutes violate equal protection when they invoke biological differences to enshrine traditional views of family and workplace relations. They steer clear of violation when they regulate in mere recognition of such differences.

Government then cannot constitutionally impose caretaking responsibilities on women that it does not impose on men, but government can regulate in recognition of the biological reality that women, and not men, bear children. Thus, it would seem to follow from Professor Siegel's reasoning about current equal protection jurisprudence, government may compel childbearing to protect fetal life, because pregnancy is recognizably a biological phenomenon. But it may not compel childrearing, because such caretaking is of the social order. [142] Professor Siegel maintains, of course, that pregnancy is not merely biological but is social as well. [143] But the social expectations or conditions surrounding pregnancy that concern Professor Siegel are, again, merely of social construction. Professor Siegel admits as much when she comments on the various injuries to women: "Both the work of childbearing and ... of childrearing ***928** compromise women's opportunities in education and employment; neither ... produces any material compensation; ... [both] often ... entangle women in relations of emotional and economic dependency ...." [144] But she adds, crucially, "None of these consequences is inherent in the physiology of reproduction; all are socially produced ...." [145] Yet, inherent in the physiology of reproduction, is the fact that women's biological nature is potentially procreative, and that when that potential is realized, another human being exists inside her. The state, according to Professor Siegel's own jurisprudential framework, is well within its powers vis-à-vis the Equal Protection Clause to recognize this fact and legislate to protect fetal life.

III. BURDEN OF PREGNANCY ARGUMENTS

Ever since *Roe*, the prolife community has also emphasized and sought to answer, theoretically and practically, many of the burden of motherhood arguments highlighted above. And they are right to do so: Most women who have abortions do so because motherhood, rather than pregnancy, seems unbearable. [146] From the creation of thousands of crisis pregnancy centers and maternity homes across the nation to, more recently, making college campuses and workplaces more hospitable to childrearing, ***929** prolife activists have sought to assist women who bear children with the task of raising those children. There is much more to be done in this area, particularly in streamlining and normalizing adoption, in increasing workplace flexibility, in incentivizing marriage, in decreasing the tax burden on those who support children, and in finding ways to ensure greater social and legal enforcement of paternal responsibility. [147] But although individuals, organizations, and society at large can take on many of the difficulties of childrearing to relieve the burden of motherhood, burden of pregnancy arguments, by contrast, are more difficult to answer with practical assistance.

Many women face serious health challenges when they become pregnant, and pregnancy brings with it the possibility of all sorts of maladies and the certainty of the pains of labor. Pro-choice academics who focus on burden of pregnancy arguments are quick to point out the physical risks and demands of pregnancy. [148] But they are even more emphatic in emphasizing the so-called "conscription" that takes place in the experience of a woman whom the law would restrict from having an abortion. As Justice Blackmun wrote in *Casey*, abortion restrictions "conscript women's bodies into [the service of the state], forcing women to continue their pregnancies, suffer the pains of childbirth, and ... provide years of material care." [149] Because, in this view, social equality requires complete control over reproduction, pregnancy, with all its risks and demands, is a condition to which one must consent.

***930** *A. In Search of Workable Analogies*

1. Judith Jarvis Thomson's Famous 1971 Analogy

Compelling women to undergo nonconsensual pregnancy (which is what abortion restrictions do, according to prochoice legal academics [150]) demands far more physical sacrifice on the part of the pregnant women than the law demands of nearly any other person, especially the man who, in also consenting to sex, is not required to endure the physical risks and burdens of pregnancy. This so-called conscription of the pregnant woman's body has been analogized, most famously in 1971 by Professor Judith Jarvis Thomson, to being nonconsensually attached for nine months to an unconscious violinist who will die if detached from the innocent bystander's circulatory system. [151] As so many have pointed out in criticizing this analogy and the many Thomson-derivative analogies that have followed it, the affirmative act of abortion is a far different act from the failure to rescue a person to whom one owes no special duty involved in the Thomson analogy. [152]

2. Conceding Biological Relation: Robin West

More realistic, though still inherently problematic, analogies notice that the fetus is biologically related to the mother. [153] As Professor Robin West has recognized, the situation is "arguably more like the relationship of parent to child." [154] The parent-child relationship, as Professor West acknowledges, gives rise to special legal duties. [155] Yet, Professor West points out, despite the legal duty a parent has to rescue her infant (say, from ***931** drowning in a pool of water), a parent has no affirmative legal duty to sacrifice part of her own body (for example, bone marrow or an organ) for her born child. [156] With this current state of the law in mind, Professor West seeks to compare the unborn child's unwelcome invasion of the pregnant woman's body to an adult who forcibly seeks to obtain blood or a kidney from her parent. [157] As Professor West points out, the aggressor child in this hypothetical, rather than the victim parent, would be the guilty one. [158] To be licit, of course, the parent would have to consent to such bodily sacrifice for the sake of her child.

But unborn children are developmentally quite dissimilar from adult children or even born infants. Though Professor West should be given credit for comparing pregnancy to other parent-child relationships, it is telling that the best Professor West could come up with is to compare a fetus to a fully grown child. Presumed in her analogy is a relationship between relatively autonomous human beings. After all, a grown child is physically autonomous from his mother in a way that the fetus most surely is not. This is why in American law the duty to rescue that flows from the special relationship of parent to child does not extend to adult children but only to minors (that is, dependents). [159]

This presumption of autonomy is even more apparent in Professor Thomson's attached-violist analogy where mother ***932** and unborn child are analogized to utter strangers. Though Professor Thomson attempts to work dependency into the analogy, it is not a natural dependency of a child on a parent, where special duties hold. [160] The human being at the embryonic and fetal stages of development can be compared neither to a relatively autonomous, adult human being (or even to a born infant) nor to a stranger; rather, this nascent human life is utterly dependent upon its mother for survival, as all human beings are at this stage of human development. [161] Such existential dependence is unique to this phase of human life. Indeed, the relationship between a pregnant mother and her unborn child is unique among all human relationships, which is why it is so very difficult to find a suitable analogy.

B. Locating the Affirmative Duty of Care

The relationship of existential dependency of the human fetus on its mother is what animates the affirmative duty of care that the mother, and the father, have to their unborn child. Consenting to pregnancy surely cannot ground parental duty since, according to the prochoice paradigm, consent could theoretically be given and then revoked at any time during the pregnancy. [162] Few abortion rights proponents would advocate that once a pregnant woman consents to being pregnant, she is no longer permitted to change her mind and abort the pregnancy. [163] The theory that parental duty arises from consent also fails to give any sensible explanation for why parents are suddenly obligated to care for their children after birth. [164] Parental duties for born children, after all, arise not out of consent but because children depend upon their parents for their wellbeing. ***933** The dependency relationship children have with their parents is that which grounds obligations in family law. [165]

Consenting to sex is also not what grounds the duty parents have to their unborn children. Although sexual activity (usually) provides the conditions for conception, it is not the voluntariness of the sexual act in itself that binds those who engage in it to their potential offspring. [166] Rather, sexual intercourse, by its very nature, has the potential to create a human being who is utterly dependent upon those whose union brought her into existence. [167] It is the biological dependency of the child caused by the sexual union of the parents-to-be (rather than either their choice to "keep the child" or even their choice to engage in sex) that itself grounds parental duty. [168] After all, the ***934** law holds that a party who causes the dependency or neediness of another is responsible for assisting the person whose need she caused; if I pushed you into a pool of water, it is my duty to assist in your rescue. [169] As Professor Beckwith so masterfully states, "[T]he parents of the fetus are responsible for assisting it because they are in fact responsible for bringing into existence a being that is needy by nature and thus are responsible for its neediness." [170] Thus, a mother's relationship with her unborn child can hardly be compared to a parent's relationship with a relatively autonomous adult or an innocent bystander's forced association with an unrelated albeit dependent intruder. Rather, the unborn child's mother and father share an affirmative duty to care for the dependent child that their intimate union created.

To think otherwise is to view unborn children as the property of their mothers, as once upon a time, the law viewed wives as the property of their husbands. [171]

C. Relational Feminism and Abortion

The presumption of autonomy on the part of Professor Robin West in her discussion of abortion is particularly ironic because ***935** she, as a mother of "relational feminism," is generally skeptical of the presumption of autonomy in American law. [172] Abortion advocates skeptical of relational feminism have noted that so-called care feminists--like Professors West and Carol Gilligan, for instance--are unable to satisfactorily ground their support for abortion without abandoning their philosophical commitment to an "ethics of care." [173] After all, relational feminists ordinarily find fault with conceptions of obligation that view duty as arising solely from consent. [174] Because they regard human beings as fundamentally embedded in relationships of interdependence, rather than as radically autonomous individuals, they understand that obligations to involuntarily chosen family members deserve at least as much, and usually more, respect than those obligations we choose. "[W]e are born into some obligations, and some are born to us, and life includes the acceptance of those kinds of indissoluble and predefined obligations as well as the one we freely incur." [175] Feminist theologian Maura Ryan discusses how this "involuntary quality of kinship" stands up against the alternative view of the family and community where rights-bearing parties consent to contractual relationships akin to ownership of property, and the force that binds is power rather than duty of care. [176] She writes, "the contractual view ... assumes and perpetuates a traditional patriarchal model of the family (centered around rights and ownership), a model that has proven oppressive and sometimes ***936** dangerous for persons, especially women." [177] And, I would add, their unborn children.

In her effort to unite the burden of motherhood and burden of pregnancy arguments in favor of what she calls the "relationship model of pregnancy," Professor Hendricks believes she has found a more women-centric perspective on abortion. [178] She writes that "the harm of forced pregnancy should be understood *in toto*, as hijacking the body to force the creation of an intimate caretaking relationship." [179] Professor Hendricks's view is that pregnancy is an act of nurturing that many women experience so profoundly that they ought to be able to decide for themselves whether to enter such a relationship. [180] Like Professor Hendricks, Professor Priscilla Smith wants to affirm the importance of motherhood in the experience of many women, an experience she admits has been denigrated by much of liberal feminism. [181] Professors Hendricks and Smith therefore seek to reframe abortion as a "parenting decision" rather than a method to avoid parenting, opining that the experience of women who seek abortions is better understood in this framework. [182] Women abort, Professor Smith tells us, precisely because they so respect the responsibilities of motherhood and the duties they have to their already-born children (or, in some instances, the duty they presumably feel toward a fetus who will likely be born with significant disabilities). [183] This respect for motherhood is evidenced, Professor Smith reports, by the growing percentage of women who seek abortions after they ***937** have already borne children [184] and in the experiences of women who seek late-term and genetic abortions. [185]

These arguments, however, share many of the same weaknesses inherent in Professor Siegel's burden of motherhood arguments. After all, there are two types of mothering at issue: the mothering a woman does while the child is in utero and the mothering she does when the child is born. Both are relationships of nurture, but no one forces a biological mother into a caretaking relationship with her born child; sometimes placing the child in the care of an adoptive family is the most maternal thing she can do. Although many women may abort out of a sense of responsibility--or as Professors Hendricks and Smith might say, out of a duty of care--the duty they may feel to abort is surely not, on any reasonable account, toward their unborn child who, disabled or not, never merits death. It may be, rather, that the duty these mothers feel to abort is toward a medical establishment and peer culture that impresses upon them the irresponsibility of bringing into the world a disabled child, or yet another child into a family that is already comprised of a number greater than allowed by the lights of environmentalism and materialism. [186]

Yet scores of adoptive parents await children of different genetic traits and abilities. [187] The duty of care a mother has toward her unborn child, when matched with an equally pressing responsibility she has to care for already born children, may, in circumstances only she (and her family) can discern, demand that she place the unborn child in the hands of adoptive parents. [188]

Were pregnant women to recognize the humanity and dependency of the unborn child in their wombs (biological realities ***938** that are often kept from them) [189] far more women would understand that their responsibility as a mother begins, not once their child is born, but when she is conceived. This acknowledgment of maternal duty may not lessen the hardship of bearing yet another child, or a first child before one feels prepared, but shielding women from the reality of the dependency relationship with their unborn children reeks of the worst sort of paternalism, and in the experiences of many women, results in more debilitating emotional trauma in the future. [190] Moreover, maternal duty implies paternal duty--the father's responsibility to actively participate in and provide for both mother and child. [191] Further, parental duties, especially in the cases of paternal abandonment and maternal poverty, impose obligations on the rest of the community. Those obligations would become much more serious and far-reaching were abortion utilized less frequently. [192]

In a prepublication version of Professor Hendricks's paper, she anticipated a possible critique of her theory: "Opponents of reproductive rights use a similar conception of pregnancy [as a form of parenting relationship] to suggest that the natural order of biology implies a woman's duty to bear children." [193] She continued, "That implication, however, depends on transforming an ability into a duty." [194] Professor Hendricks is correct that ***939** the natural order of biology does not imply of women some general duty to bear children, but it most certainly implies an individual woman's duty to bear the dependent child presently developing in her womb.

Professors Hendricks and Smith are right to argue that abortion is a parenting decision. As such, it should be disposed of under the rubrics of family law, rather than the law governing the Equal Protection Clause (or the Due Process Clause, for that matter). According to Professor Helen Alvaré, the Supreme Court in *Gonzales v. Carhart* showed a movement toward treating abortion as such, using terms such as "mother" and "unborn child" to describe the parties involved in an abortion and emphasizing the bond that exists between the two. [195] "The *Gonzales* majority opinion," Professor Alvaré writes, "speaks specifically about the theme of the self-evident vulnerability of children and the corresponding duties arising from this." [196] This dialectic of vulnerability and duty, so familiar to family law, is potentially even more striking in the case of abortion, in which an unborn child's vulnerability is exploited by the very person who is obligated to care for her. [197] The state properly intervenes to protect vulnerable children who are subject to their parents' abuse or neglect; once we grant that an individual unborn human being is biologically dependent upon her mother (a concession that follows ***940** directly when one concedes the humanity of the unborn), that child likewise deserves state protection from parental abuse and neglect. Professor Alvaré concludes that, "[n]o member of the parent-child dyad has unlimited legal rights in any other family context outside abortion." [198]

D. Are Women Disproportionately Burdened?

Though I have isolated the unique biological dependency relationship of pregnancy in contrast with ill-conceived analogies of nonconsensual caretaking relationships, I have not explicitly addressed why it is that women are the ones disproportionately burdened by their sexual activity. Professor Robin West complains that we have consigned pregnancy to the "unthinking, unwilled" realm of fate or nature, rather than the realm of choice and freedom, and in so doing have relegated the pregnant woman's body to the "status of chattel." [199] But the medical fact is that pregnancy--that is, the biological state of gestating a new human life--is a natural condition, and so is within the realm of nature. Choice exists before becoming pregnant (assuming one was not raped). But to regard the biological state of pregnancy itself as part of the realm of choice once again supplants female anatomy and physiology with male anatomy and physiology. Although the disposition of the male body allows men to physically abandon the fruits of their sexual activity at will, women must act affirmatively and violently to do so. As noted above, current equal protection jurisprudence allows states to regulate according to these biological differences in men and women. Equal protection is not violated, therefore, when a prohibition so designed disproportionately affects one sex more than the other. As Professor Lawrence Tribe reminds us, "[O]nly men ... are physiologically capable of certain sorts of rape, but this does not make laws against such rape instances of impermissible sex discrimination." [200]

There is no doubt that parenthood entails great duties and sacrifice. Professor Camille Williams writes that in "a very real sense, parents' bodies *are conscripted* for the support of their ***941** children in that the law expects parents to work on a round-the-clock basis to provide for the child's basic needs." [201] Professor Williams also points out that, although crisis pregnancies are surely most challenging, other family crises, such as caring for a severely physically or mentally handicapped parent or child, rival the level of sacrifice entailed. [202] The fact remains, however, that born children and other needy relatives simply do not

require the same kind of physical care or bodily sacrifice that an unborn child does. The father, relatives, and other persons (paid or unpaid) can assist the mother once the baby is born; moreover, she can offer the baby for adoption. But she alone must carry her unborn child.

But this is putting things rather negatively. Pregnancy, with all its risks and demands, is seen primarily as a burden when viewed from the perspective of the unencumbered, autonomous male. Seen from the perspective of most women, and the men who love them, childbearing is a great gift--a gift that has been recognized as such in many preindustrialized countries both historically and today. [203] In the experience of most women, pregnancy is a serious challenge, but one well worth the sacrifices made because of the profundity of the enterprise. Women are so designed as to bring into the world new human beings, who possess dazzling capacities for creativity, reason, and wonder. Because men are not so designed, our industrialized, highly technical, produce-and-consume culture rates the life-giving power of women well beneath whatever products and feats the unencumbered, wombless male can produce and achieve. But women, unlike men, are gifted with the capacity to do both. Professor Sidney Callahan states the point thus:

> In our male-dominated world, what men don't do, doesn't count. [The] female disease or impairment [of pregnancy] ... naturally handicaps women in the “real” world of hunting, war, and the corporate fast track. Many prochoice feminists ... adopt the male perspective when they cite the “basic injustice that women have to bear the babies,” instead ***942** of seeing the injustice in the fact that men cannot. Women's biologically unique capacity and privilege has been denied, despised, and suppressed under male domination; unfortunately, many women have fallen for the phallic fallacy. [204]

In response to the complaint that women rather than men are burdened by pregnancy, Professor Francis Beckwith writes:

> [But] it [does seem] reasonable to believe that it is the mother whose body is designed for pregnancy and child-bearing, and whose parts work in concert to make the maternal human organism conducive and receptive to the protection and nurture of an unborn member of the species. [D]uring that time of a human being's existence it is only she who has the physical attributes to provide shelter and sustenance to this being .... [205]

It is not sexist to state the facts of female reproductive anatomy and physiology. It *is* sexist to despise them.

Pregnancy would be valued--and cherished--for the gift it is if the great dignity of the human being were more appreciated. What women can do that men cannot is undervalued because the human being, both born and unborn, is undervalued in comparison to material wealth, prestige, and creature comforts. But the cultural view we take of unborn human life, whether it be high or low, translates directly into the respect or disrespect pregnancy affords a woman, both socially and professionally. If pregnancy is just like any other medical condition--or worse, is a condition treated as a burden to women, a state that symbolizes their inability to compete with wombless men--pregnancy will never be accorded the respect and accommodation it deserves. [206] Not all women become mothers, but those ***943** who do depend upon a cultural esteeming of the state of pregnancy--the nurture of an individual and unique human being-- for their social and professional support. To belittle the moral status of the unborn child is to belittle the state of pregnancy, and so the pregnant woman. Indeed, the sacrifices that pregnant women endure during their pregnancies would be more honored (and perhaps more rewarded) were we as a culture honest about the dignity of the human beings who have been entrusted to their care. [207]

Contrary to some prochoice feminist assertions, the pregnant woman is in no way denigrated or marginalized if we recognize the moral status of the unborn. Indeed, a most apt legal analogy for the relationship between mother and unborn child, if one is possible, is drawn from the work of Professor Camille Williams. The pregnant woman, Professor Williams argues, acts as a trustee, while the unborn child is likened to a beneficiary. “As one standing in a position of trust relative to one [who is] vulnerable ... [the] woman is, intuitively at least, held to a high standard of care because she has both legal capacity and power.” [208] In other words, both our social custom and law expect much of trustees, because we regard beneficiaries as worthy of a high standard of care. In like manner, were we to regard the vulnerable unborn as worthy of a standard of care that befits

their dignity as human beings, law and social custom would not only expect much of the women in whose trust the vulnerable unborn are placed, but would also recognize that with such trust-- and duty--comes much influence and power.

944** ***E. Burdening Fathers

Prochoice feminists have sought to make equal what nature has made unequal-- or different--by allowing pregnant women to imitate male sexual detachment through legal abortion rather than legally requiring men to become more demonstrably attached to the children they father. If women are mothers when they become pregnant, men most assuredly are fathers then, too. [209] The law is tasked not with finding a way for women to be imitators of reproductively autonomous men, but with persuading or, if necessary, compelling men who impregnate women that they are equally responsible for the well-being of the child their union created. This starts with ensuring that the father of the unborn child does not coerce the mother into aborting the child or seek to harm the mother when she refuses to do so. Both studies and anecdotal evidence show that such coercion of and violence against pregnant women happens far too frequently. [210] The unborn child's father not only has the duty to protect his child, but also to assist the mother in providing medical care for both herself and the fetus during pregnancy and childbirth.

The trouble with the right that *Roe* and its progeny have granted is that women alone have been given all the power of choice to abort and so are often left with all the responsibility for their child when they do not. Legal scholars from both the left and right have noticed that liberalized abortion laws have effectively offered the man a rationale for neglecting to support a child to whose existence he failed to consent. [211] The unborn child's father ***945** may try to persuade, or even coerce, the child's mother to abort a child he neither wanted nor wishes to support, but in the end, the decision is entirely hers. And so, in his mind, she assumes sole responsibility for the child, because her decision not to abort is the reason the child enters the world in demand of his resources.

Although much more attention must be paid to how the law can effectively hold fathers to their paternal duties both before and after childbirth, Professor Akhil Amar proposes a few ideas worth mentioning. Professor Amar argues that, to make the financial and professional sacrifices of pregnancy more equitable, the law could "require [the biological father] to compensate [the mother] for childbearing expenses, [missed] work, and labor." [212] Moreover, analogizing pregnancy to the military draft, Professor Amar proposes a Mothers' Bill of Rights to benefit women whose education or careers have been disrupted by pregnancy. [213] Professor Robin West has also suggested a cost-sharing regime, a sort of insurance system for unintended pregnancies wherein both parties ("tortfeasors") pay into a system, which then allocates appropriate funds for childcare. [214] Many more, and better, policy ideas would surface if we viewed holding men accountable as more advantageous and equitable than the current disposition of the law, which permits, and encourages, women to mimic male abandonment.

Culture is often a far more effective educator than the law, and so culturally, we must continue to renew the sense that both mothers and fathers share in the deeply important, albeit difficult, ***946** task of parenting. [215] Parents must know that the sacrifices they make and services they render are valued beyond mere political rhetoric. Esteeming parents takes many forms, not the least of which would be substantial public support of caretaking through tax breaks (or subsidies) to adults who care for children.

IV. IN PURSUIT OF A PROWOMAN SEXUAL ETHIC AND AN EMBODIED EQUALITY

If the prochoice movement legitimizes abortion by denying the physiology of women, it also does so by aggrandizing the human need for sex. Many prochoice scholars state upfront that their arguments presume as fundamental the desire to engage in nonprocreative sex. [216] Though it is not my interest to deny any-one his appreciation for sex, two questions come to mind. Might there be something awry in a sexual ethic in which the pleasure of adults trumps the life of a human being? And, would we not want to rethink how to properly satisfy the human need for intimacy if such satisfaction, as currently pursued, often ignores the reproductive potential of the sexual act (a biological reality that can never be entirely within our control)? [217]

***947** A sexual ethic that denies that women have far more at stake in sexual intercourse than men utterly neglects the authentic sexual needs of women. Prochoice feminist Pamela Karlan sheds light on the matter when she says that "telling women that they must make the 'large sacrifices' of carrying a pregnancy to term as the (ultimately unavoidable) price of sexual activity is likely to burden their choice whether to engage in such activity." [218] Professor Karlan is correct, but her insight is far more poignant

and powerful if reversed: Women are likely to exercise restraint in their sexual activity, and ask that their partners do the same, when they recognize that the act in which they seek to engage has the potential to make them a mother, and their partner a father.

Prochoice feminists often regard abortion restrictions as fundamentally depriving a woman of her ability to exercise her moral agency and exert control over her reproductive future. [219] Under ordinary circumstances, women do have the power to exert such control--indeed, the power to choose, with whom and at which stage of life they will engage in potentially procreative sexual activity. Prochoice scholars often lament that connecting the choice to engage in sex with the duty to bear the consequences punishes those women who, unlike rape victims, have willingly engaged in the sexual act. [220] These scholars accuse ***948** prolife activists of outwardly showing concern for fetal life, but in reality, seeking to impose their prudish sexual morality on society, and especially on women. [221]

My argument, however, is far more pragmatic. Both mothers and fathers have an affirmative duty of care for their children, born and unborn. Therefore both women and men ought to engage in sexual intercourse with full knowledge that even in the most "safe" of circumstances a pregnancy may result, transforming them from intimate (or casual) sexual partners into parents. [222] But because women experience the duties that result from pregnancy far more intimately than men do, it is in women's best interest, as a matter of moral agency and ability to exercise "control" over their reproductive future, to guard their sexual appetites until they are prepared to become mothers. [223] This usually also requires that women shield themselves ***949** from social and relational pressures to become sexual before they are prepared to do so. [224] Again, this does not detract from men's responsibility to exercise discipline over their appetites as well, because, in like manner, sexual activity has the potential to make them fathers. It merely calls attention to the biological fact that the consequences of casual sex are far more immediate and serious for women than for men, even if abortion is an open option. [225] As discussed in Part II, women, not men, must undergo abortion to escape the consequences of unintentionally procreative sex. For some women, the escape itself has serious, long-term consequences of its own. [226]

CONCLUSION

Prochoice feminists' quest to locate abortion rights in the Equal Protection Clause is an effort, first, to rectify the legal community's critical view of current constitutional justifications for abortion by appealing to equality arguments that resonate more fully with abortion advocates' views of abortion rights, and second, to provide more solid constitutional support for governmental funding of abortion. But the Equal Protection Clause governs only those regulations that discriminate between persons who are similarly situated. Prochoice feminists have made various attempts to meet that criterion, often by ignoring outright the physiological differences between men and women. ***950** In denying the significance of the body, abortion-rights advocates do a disservice to women who, throughout human history, have been denigrated because of their physical differences from men. The plight of women who have children--whether professional or poor, married or single--will continue to be viewed as theirs alone until pregnancy and motherhood are properly esteemed, rather than viewed as simply another "lifestyle option" in a post-Roe culture taken by "choice." [227]

Prolife feminism is an appeal for an embodied equality, a feminism that not only takes seriously the innate differences between male and female bodies and the procreative potential of the sexual act, but also embraces the development of their common human capacities. Taking seriously the female and male bodies does not mean that all women share a nurturing nature that makes them solely fit to care for children or that men lack the capacity for such caretaking. Experience shows that both women and men are capable of caretaking and more publicly-minded activities, in varying degrees depending on each individual. Taking the body seriously does mean recognizing, however, that with the woman's body comes the potential for becoming a mother, and an actual maternal duty should she become pregnant. Because men's duties as potential, and then actual, fathers are not as deeply inscribed in their bodies, the law, if it is to uphold a genuine equality of the sexes, must act to educate and, if necessary, compel men to embrace paternal responsibilities, the fulfillment of which our society so evidently craves.

Footnotes

a1 J.D., Boston University (2002); M.A., Boston College (1999); B.A., Middlebury College (1996). I owe a deep debt of gratitude to those who read and commented on this Article at various stages: Francis Beckwith, Clarke Forsythe,

David Franks, Laura Garcia, Mary Lemmons, Michael Marcucci, Richard Myers, Kurt Pritzl, O.P. (*requiescat in pace*), Elizabeth Schiltz, Camille Williams, Mary Catherine Wilcox, and my husband, Dan Bachiochi. Without my husband's tireless dedication to our family, this Article never would have come to be.

1 A 2009 Gallup poll saw an increase in prolife sentiment among women over the course of one year. Lydia Saad, *More Americans 'Prolife' Than 'Prochoice' for 1. First Time*, GALLUP, May 15, 2009, http:// www.gallup.com/poll/118399/more-americans-prolife-than-prochoice-first-time.aspx. In 2008, fifty percent of women called themselves prochoice, while only forty-three percent were prolife. *Id.* In 2009, forty-nine percent of women were prolife and forty-four percent were prochoice. *Id.* The prolife Susan B. Anthony List reported that after the 2010 midterm elections the U.S. House of Representatives would see a seventy percent increase in prolife women (and a sixteen percent decrease in prochoice women), and the governors' mansions would see a sixty-six percent increase in prolife women. Susan B. Anthony List, *Scoreboard: Election Night*, SBA-LIST.ORG, http://www.sba-list.org/scoreboard (last visited Mar. 14, 2011).

2 For an exception, see Mary Catherine Wilcox, Note, *Why the Equal Protection Clause Cannot "Fix" Abortion Law*, 7 AVE MARIA L. REV. 307 (2008). Prolife legal argument has concerned itself primarily with criticizing the constitutional rationales for the Supreme Court's abortion jurisprudence and proposing constitutional justifications for the legal protection of the unborn. For representative articles criticizing the rationale of *Roe v. Wade*, see Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973) (comparing *Roe v. Wade* to *Dred Scott v. Sandford* and *Buck v. Bell*); Joseph W. Dellapenna, *Nor Piety Nor Wit: The Supreme Court on Abortion*, 6 COLUM. HUM. RTS. L. REV. 379, 380-412 (1975) (summarizing the Court's approach to abortion and urging Congress to enact a statute that defines personhood); Clark D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 306 (2006) (analyzing the constitutional legitimacy of the substantive due process rationale in *Roe* and urging a constitutional amendment to restore the abortion issue to the states); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007 (2003) (arguing from constitutional text, structure, and history that *Roe* was unwarranted); Philip A. Rafferty, Roe v. Wade: *A Scandal upon the Court*, 7 RUTGERS J.L. & RELIGION 1, 5 (2005) (disputting *Roe*'s assumption that abortion was recognized as a common law right). For representative articles arguing that the unborn are persons under the Fourteenth Amendment, see Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 342 (1993) (arguing for the personhood of the unborn from an originalist perspective); Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1336 (1975) (arguing That *Roe* made a dubious legal distinction); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119 (2007) (arguing that the definition of person under the Fourteenth Amendment should include the unborn); Charles B. Rice, *The* Dred Scott *Case of the Twentieth Century*, 10 HOUS. L. REV. 1059 (1973) (comparing *Roe* to *Dred Scott* on the grounds that in both cases a certain class of human beings were defined as nonpersons); Mark Trapp, *Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 PEPP. L. REV. 819, 823 (2001) (arguing that the Declaration of Independence uses the word "created," which includes the unborn); Tracy Leigh Dodds, Note, *Defending America's Children: How the Current System Gets It Wrong*, 29 HARV. J.L. & PUB. POL'Y 719 (2006) (arguing that the Supreme Court's treatment of the unborn has negatively affected the rights of children).

3 For arguments in favor of abortion rights based on equality, see, for example, Jack M. Balkin, Roe v. Wade; *An Engine of Controversy, in* WHAT *ROE V. WADE* SHOULD HAVE SAID 3, 18-19 (Jack M. Balkin ed., 2005) [hereinafter WHAT ROE]; Kim Shayo Buchanan, Lawrence *v.* Geduldig; *Regulating Women's Sexuality*, 56 EMORY L.J. 1235 (2007); Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77 (1995); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907 (2007); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Kenneth L. Karst, Foreword, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Eileen McDonagh, *The Next Step After* Roe; *Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173 (2007); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865 (2007); Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation*

and Questions of Equal Protection, 44 STAN. L. REV. 261 (1992) [hereinafter Siegel, *Reasoning*]; Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) [hereinafter Siegel, *Sex Equality*].

4 Siegel, *Sex Equality, supra* note 3, at 823-24 n.21 (describing several briefs beginning in 1971 that utilized either sex equality arguments generally or arguments based upon the guarantees of the Equal Protections Clause more specifically).

5 Roe v. Wade, 410 U.S. 113, 153 (1973).

6 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

7 Justices Blackmun and Stevens wrote separate opinions in *Casey* to express the view that restrictions on abortion implicate both due process and equal protection. *See id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."); *id.* at 912 (Stevens, J., concurring in part and dissenting in part) ("*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."); *see also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men .... A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." (citations omitted)). For a discussion of the view that the Court in Casey analyzed the abortion right in equality language but located the right in the Due Process Clause, see David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 911 (2007).

8 *See, e.g.*, Ginsburg, *supra* note 3.

9 Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Justice Ginsburg was joined in her dissent by Justices Stevens, Souter, and Breyer.

10 Feminists opposed to abortion throughout the last century and a half have made compelling arguments that remain relevant and persuasive today. The prolife feminists to whom I refer are the early American feminists, the 1970s feminist defectors from the National Organization for Women who founded Feminists for Life, and philosophers and writers such as Sidney Callahan, Camille Williams, Daphne Clair de Jong, and Elizabeth Fox-Genovese, who together penned several searing criticisms of prochoice feminist arguments in the 1980s and 1990s. For statements made by prolife feminists throughout American history, beginning in the eighteenth century, see PROLIFE FEMINISM: YESTERDAY AND TODAY (Mary Krane Derr et al. eds., 2005); *Feminist History*, FEMINISTS FOR LIFE, http://feministsforlife.com/history/index.htm (last visited Mar. 14, 2011). For other notable arguments, see Sidney Callahan, *Abortion and the Sexual Agenda, in* THE ETHICS OF ABORTION 131 (Robert M. Baird & Stuart Rosenbaum eds., 1989); Elizabeth Fox-Genovese, *Abortion: A War on Women, in* THE COST OF CHOICE (Erika Bachiochi ed., 2004); Elizabeth Fox-Genovese, *Wrong Turn: How the Campaign to Liberate Women has Betrayed the Culture of Life, in* LIFE AND LEARNING XII 11 (2002), *available at* http://uffl.org/vol12/fox12.pdf [hereinafter Fox-Genovese, *Wrong Turn*]; Camille S. Williams, *Abortion and Equality Under the Law, in* THE BILL OF RIGHTS: A BICENTENNIAL ASSESSMENT 125 (Gary C. Bryner & A.D. Sorenson eds., 1993).

11 Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 331 (2010).

12 *Id.* at 331, 338.

13 United States v. Virginia, 518 U.S. 515, 532 (1996) (defining "full citizenship stature").

14 Siegel, *Reasoning, supra* note 3, at 264.

15 *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 74 (1990) ("[I]f equality depends on 'sameness,' then the recurrence of difference undermines chances for equality.").

16 Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

17 *Id.* at 48-49.

18 *See, e.g.*, RICHARD POSNER, OVERCOMING LAW 180-81 (1995) (describing the wide variety of constitutional rights to which scholars have attempted to attach the right to abortion); Daly, *supra* note 3, at 85-86 (arguing for an equal protection rationale for abortion); Gans, *supra* note 7 (arguing for a rebirth of the Privileges and Immunities Clause as the overarching equal citizenship framework within which substantive rights, such as abortion, should be located); Law, *supra* note 3, at 1020 (arguing that equality arguments are better than privacy arguments); Siegel, *Sex Equality, supra* note 3 (making sex equality arguments for abortion rights).

19 *See* Hendricks, *supra* note 11, at 371, 373; Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1403 (2009) ("[W]hat the Court created in *Roe v. Wade* is *not* a right to legal abortion; it is a negative right against the criminalization of abortion in some circumstances.").

20 *See, e.g.*, Ginsburg, *supra* note 3, at 385 ("If the Court had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have seen the public assistance cases as instances in which, borrowing a phrase from Justice Stevens, the sovereign had violated its 'duty to govern impartially.'"). *But see* arris v. McRae, 448 U.S. 297, 322 (1979) (upholding the constitutionality of the Hyde Amendment and noting that equal protection under the Fifth Amendment was not a "source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity"); West, *supra* note 19, at 1403 (arguing that state legislatures would be better suited and more reliable in guaranteeing funding for abortion than the courts).

21 West, *supra* note 19, at 1403.

22 See, for example, *Bmdwell v. Illinois*, 83 U.S. 130, 142 (1873) and *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), in which the Supreme Court upheld state laws restricting women from practicing law and tending bar, respectively. In *Muller v. Oregon*, 208 U.S. 412, 422 (1908), the Court upheld a state law that limited the number of hours that women could be paid as wage-laborers, stating "a proper discharge of [a woman's] maternal functions-- having in view not merely her own health, but the well-being of the race-- justif[ies] legislation to protect her from the greed as well as the passion of man." In 1961, the Court in *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), upheld a statute that allowed women to exempt themselves from serving as jurors to afford them time to perform their special roles as wives and mothers.

23 404 U.S. 71, 77 (1971).

24 411 U.S. 677, 686 (1973).

25 *Id.* at 688.

26 429 U.S. 190 (1976).

27 450 U.S. 464, 469 (1981).

28 Tigner v. Texas, 310 U.S. 141, 147 (1940).

29 *Craig*, 429 U.S. at 197.

30 Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 102-03 (2010); *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, AMERICAN CIVIL LIBERTIES UNION (Mar. 7, 2006), http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff.

31 Franklin, *supra* note 30.

32 *Id.* at 84, 122.

33 420 U.S. 636 (1975).

34 Franklin, *supra* note 30, at 132-42.

35 *Id.* at 138.

36 Geduldig v. Aiello, 417 U.S. 484 (1974). *See* Siegel, *Sex Equality, supra* note 3, at 826-29 (noting several factors that contributed to the disappearance of sex equality arguments for abortion rights after *Roe* and *Geduldig*, only for those arguments 39. to reemerge again in scholarly discussion in the mid-1980s).

37 *Geduldig*, 417 U.S. at 496-97.

38 *Id.* at 496 n.20.

39 *See, e.g.*, Siegel, *Reasoning, supra* note 3, at 354 (stating that "regulation concerning women's capacity to gestate categorically differentiates on the basis of sex, and so is facially sex-based"); *see also* Law, *supra* note 3, at 983 n.107 (citing dozens of law review articles critical of the decision).

40 429 U.S. 125, 145-46 (1976).

41 Jennifer Keighley, *Health Care Reform and Reproductive Rights: Sex Equality Arguments for Abortion Coverage in a National Plan*, 33 HARV. J.L. & GENDER 357, 378-79 (2010).

42 *Id.* at 386.

43 *See id.* at 386-87.

44 *Id.* at 387 n.162. The failed passage of the Equal Rights Amendment in the early 1970s was another blow to equality arguments for abortion rights. *See* Franklin, *supra* note 30, at 140-41.

45 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *see also* Gans, *supra* note 7, at 907, 937 (arguing that, instead of infusing equality arguments into its due process reasoning, the Court in *Casey* should have used the Privileges and Immunities Clause of the Fourteenth Amendment to protect the right to abortion); Siegel, *Sex Equality, supra* note 3, at 830 (noting that Justice Blackmun's majority opinion in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and concurring opinion in *Casey* used more explicit equality arguments).

46 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); United States v. Virginia, 518 U.S. 515 (1996); *see* Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1043-46 [hereinafter Siegel, *New*] (arguing that these cases demonstrate that regulations of pregnant women that rely upon out-dated stereotypes of women's family roles violate the Equal Protection Clause); *see also* Franklin, *supra* note 30, at 143-54.

47 Franklin, *supra* note 30, at 143-52.

48 *Id.* at 160 (quoting Siegel, *Reasoning, supra* note 3, at 264).

49 *See, e.g., id.*; Reva Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1891-93 (2006) [hereinafter Siegel, *You've Come a Long Way*].

50 533 U.S. 53 (2001).

51 *Virginia*, 518 U.S. at 541.

52 *Id.* at 550 (quoting United States v. Virginia, 766 F. Supp. 1407, 1434 (W.D. Va. 1991)).

53 *Id.*

54 *Id.* at 533-34 (“‘Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.”).

55 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003). *Hibbs* presented a less-than-straightforward equal protection question. The question was complicated by a prior issue concerning congressional authority to prohibit discriminatory conduct under Section 5 of the Fourteenth Amendment. The dissent viewed the Rehnquist majority's decision as a departure from Section 5 precedents, in part because of a false reliance upon “a general history of employment discrimination against women,” rather than specific evidence of such discrimination. *Id.* at 746 (Kennedy, J., dissenting) (joined by Justices Scalia and Thomas).

56 *Id.* at 731 (majority opinion).

57 *Id.* at 736 (“Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family care-giver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.”). *But see* SYLVIA ANN HEWLETT, A LESSER LIFE 100 (1986) (arguing that the pursuit of formal equality in antidiscrimination law has brought about a market economy that penalizes women who have children because it treats them like men); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010) (arguing that American antidiscrimination law has augmented rather than rectified work-family conflict, as experienced disproportionately by women). *See also* Joan C. Williams, *Correct Diagnosis; Wrong Cure: A Response to Professor Suk*, 110 COLUM. L. REV. SIDEBAR 24 (2010) (disagreeing with Professor Suk and arguing that specific portions of antidiscrimination law do allow lawsuits by women who have been discriminated against professionally when they have sought to reduce their work time to care for children).

58 *Hibbs*, 538 U.S. at 731.

59 Nyugen v. INS, 533 U.S. 53, 73 (2001).

60 *Id.* at 63.

61 *Id.* at 68.

62 *See* Franklin, *supra* note 30, at 143-54; Keighley, *supra* note 41, at 391-92; Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095, 1107 (2009).

63 Siegel, *You've Come a Long Way, supra* note 49, at 1874-81, 1884 (detailing Chief Justice Rehnquist's court decisions with regard to sex discrimination).

64 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) (emphasis added).

65 Siegel, *You've Come a Long Way, supra* note 49, at 1886 (“*Hibbs* is the first Supreme Court equal protection decision to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes.”).

66 *Hibbs*, 538 U.S. at 731.

67 For a critical appraisal of this view, see, for example, Suk, *supra* note 57, at 42-47 ("[Hibbs] suggests that any state action that helps women balance work and caregiving to the exclusion of men is likely based on stereotypes of women as caregivers, a motivation inconsistent with the antidiscrimination logic of equal protection."). In that regard, one also wonders about the "differential" physical attributes of mothers whose bodies allow them to nourish their infants through breast-feeding, a feat quite impossible for fathers.

68 Franklin, *supra* note 30, at 161.

69 Michael Stokes Paulsen, *Dissenting, in* WHAT *ROE*, *supra* note 3, at 204-05 (emphasis in original).

70 518 U.S. 515, 531 (1996).

71 *Id.*

72 *See* Gonzales v. Carhart, 550 U.S. 124, 171-72 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); *See also* Neil S. Siegel, *"Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision*, 43 NEW ENG. L. REV. 799, 823 (2008); Siegel & Siegel, *supra* note 62, at 1108-10. For Justice Ginsburg's use of the "equal citizenship" in relation to abortion, see Ginsburg, *supra* note 3, at 383. Professor Jeffrey Rosen criticizes the use of the phrase equal citizenship in arguments for abortion rights because its usage is unmoored to the understandings held by those who framed the Fourteenth Amendment's Citizenship Clause. *See* Jeffrey Rosen, *Dissenting, in* WHAT *ROE*, *supra* note 3, at 170, 173 ("[Prochoice legal scholars argue that] by requiring pregnant women to be mothers ... [the] laws deny their opportunity to engage in the occupations of their choice, thereby implicating the privileges and immunities of citizenship. But this is a metaphor, rather than the kind of legal argument that would have been intelligible to the framers of the Fourteenth Amendment [because] ... no formal barriers keep pregnant women from pursuing whatever occupations they choose. Pressures they feel are social, rather than legal ....").

73 Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1766, 1779 (2008) [hereinafter Siegel, *Dignity*].

74 Reva B. Siegel, *Concurring, in* WHAT *ROE*, *supra* note 3, at 81. *See generally* Siegel, *Dignity, supra* note 73; Siegel, *Sex Equality, supra* note 3, at 826 (noting NOW's 1970 strike for equality which, inter alia, argued that "the Nineteenth Amendment's promise of equal citizenship could not be realized unless women were given control of the conditions in which they conceived, bore, and raised children").

75 Siegel, *Concurring, supra* note 74, at 72-73; Siegel, *Dignity, supra* note 73, at 1766 ("Constraints on women that evoke or perpetuate this history violate women's dignity, denying women forms of respect and well-being that they are entitled to as free and equal citizens.").

76 Gans, *supra* note 7, at 929; *see also* Balkin, *Introduction, in* WHAT *ROE*, *supra* note 3, at 22-23; Rosemary Nossiff, *Gendered Citizenship: Women, Equality, and Abortion Policy*, 29 NEW POLL SCI. 61, 68 (2007) ("[F]ull citizenship for women requires complete control over reproduction, ranging, from full access to contraception, abortion and health care, to material support for the costs associated with pregnancy and childcare.").

77 It appears that by "dependent," Professor Siegel means women who have traded market work for caretaking work and thus, like their children, depend on their husbands for their economic wellbeing. Any father worth his paycheck would likely regard himself very much dependent upon such a wife for the care-giving she provides to their children. Many parents agree. *See* Chris McComb, *Few Say It's Ideal for Both Parents to Work Full Time Outside of Home: Four in 10 say one parent should work part time, or work at home*, GALLUP, May 4, 2001, http://www.gallup.com/poll/1558/few-say-its-ideal-both-parents-work-full-timeoutside-home.aspx.

78 Siegel, *Concurring, supra* note 74, at 73 ("Consistent with this [old] understanding of family roles, the nation excluded women from equal participation in education, in work, and in politics, and organized the realms of work, education, and politics on the premise that those who participate in the core pursuits of citizenship are unburdened by obligations of family care."); *see also id.* at 81 ("[T]hose who do the primary work of bearing and rearing children are a dependent class, not full participants in those activities that the society most highly values and centrally associates with citizenship.").

79 The list of people excluded from Professor Siegel's view of citizenship because of their nonparticipation in remunerative activities would seem to compete in size with those included (for example, children, college students, the elderly, the infirm, the short- or long-term disabled, welfare recipients).

80 Siegel, *Concurring, supra* note 74, at 81 (quoting Brief for New Women Lawyers et al. as Amici Curiae Supporting Appellant at 24, 32, Roe v. Wade, 410 U.S. 113 (1973) (no. 70-18)).

81 Williams, *supra* note 10, at 145.

82 Robin West, *Concurring in the Judgment, in* WHAT *ROE, supra* note 3, at 121, 14142 ("We would perversely render the incompatibility of motherhood and citizenship, in effect fully constitutional--by providing a constitutional right to avoid it .... It can't be that by choosing to mother a child, we have foregone rights, privileges, and responsibilities of citizenship."). *But see* West, *supra* note 19, at 1402 ("If equal citizenship is the goal of the Constitution's declarations of equality and liberty, then women seemingly must have a right to legal abortion to achieve it.").

83 West, *supra* note 82, at 121, 143.

84 *See generally* MARINUS RICHARD RINGO OSSEWAARDE, TOCQUEVILLE'S MORAL AND POLITICAL THOUGHT: NEW LIBERALISM 106 (2004).

85 Neil S. Siegel, *supra* note 72, at 800.

86 *Id.* at 839.

87 *Id.* at 835, 839. For a discussion of the inclusion of the unborn in the human community, see Jean Bethke Elshtain, *Preface, in* THE COST OF CHOICE: WOMEN EVALUATE THE IMPACT OF ABORTION, at vii (Erika Bachiochi ed., 2004) ("The long arc that bends toward inclusion of human beings in the moral community lies in a recognition that the arbitrary removal of whole classes and categories of persons from moral concern--whether on the basis of race or gender or ethnicity or religion--is a sign of moral degeneration, not moral progress .... The question of the moral status of the unborn child is part of this long and arduous movement toward inclusion.").

88 Daly, *supra* note 3, at 138. *But see* Hendricks, *supra* note 11, at 338 ("Equality arguments for abortion ... seek comparisons with male experience by describing pregnancy at a higher level of generality .... When the comparisons run

this far afield, liberty becomes the subject of discussion, not equality. Women's liberty should not have to be derivative of men's experiences.").

89 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835 (1992).

90 Daly, *supra* note 3, at 117; *see also id.* at 122 ("Thus, decisions about procreation, including abortion, are protected because they significantly contribute to how one defines oneself. When the State forces a woman to be pregnant, or to abort, she is not who she wants to be, not able to define her own life and destiny, based on her 'own conception of her spiritual imperatives.'" (quoting *Casey*, 505 U.S. at 852)).

91 By calling attention to the embodied nature of men and women, I do not mean to divert attention from the decisional capacity of women as persons who share equal dignity with men, as though women were somehow mere "anatomical" bodies rather than "deliberative agents." *See, e.g.*, Siegel, *Dignity, supra* note 73, at 1698. I do mean, however, to emphasize the way in which many prochoice feminists, in their efforts to defend abortion, have neglected to cognize human "embodied-ness" and, by doing so, have done a disservice to the women they mean to serve.

92 *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14 (1988) ("Women are actually or potentially materially connected to other human life. Men aren't. This material fact has existential consequences."). For a critique of the idea of autonomy as it affects the dependency work most of us are called to at different moments in our lives, see MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); EVA FEDER KLTTAY, KOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1999); ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999). Apart from the obvious challenges to autonomy that pregnancy and parenting generally entail, embodiment challenges autonomy at later stages of life as well. Aging, illness, and disease, both for the patient and caretaker, seriously constrain the ability to autonomously shape one's own destiny.

93 Daly, *supra* note 3, at 124; *see also* Siegel, *Sex Equality, supra* note 3, at 818-19.

94 LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 105 (1990); *see* Samuel W. Calhoun & Andrea E. Sexton, *Is it Possible to Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers*, 49 WASH. & LEE L. REV. 437, 475 (1992) (arguing that in Professor Tribe's view, male-female irresponsibility ought to be the default position with regard to unwanted pregnancies).

95 Daly, *supra* note 3, at 140.

96 I intentionally use the term "sex" here instead of "gender," because I am explicitly discussing the biological differences between men and women, rather than the social or cultural meanings we give those differences. In modern parlance, "gender" is often used interchangeably with "sex," suggesting that biology is utterly insignificant.

97 Naomi Wolf, *Rethinking Prochoice Rhetoric: Our Bodies, Our Souls*, THE NEW REPUBLIC, Oct. 16, 1995, at 29 ("[T]he prolife slogan, 'Abortion stops a beating heart,' is incontrovertibly true."); Francis Kissling, *How to Think About Abortion*, SALON.COM (Nov. 16, 2010, 8:20 PM), http:// www.salon.com/news/politics/war_room/2010/11/16/thinking_about_abortion (noting that "there's the reality that abortion does take life-human life"); Camille Paglia, *Fresh Blood for the Vampire*, SALON.COM (Sept. 10, 2008, 7:47 AM), http://www.salon.com/news/opinion/camille_paglia/2008/09/10/palin/index.html ("I have always frankly admitted that abortion is murder, the extermination of the powerless by the powerful.").

98 *See, e.g.*, LYNNE RUDDER BAKER, PERSONS AND BODIES: A CONSTITUTION VIEW (2000); DAVID BOONIN, A DEFENSE OF ABORTION (2003); PETER SINGER, PRACTICAL ETHICS (1993).

99 *See, e.g.*, Hendricks, *supra* note 11, at 350 (arguing that a particular prochoice argument "allows for the possibility that the fetus has significant moral status, perhaps even the same moral status as a born person, and shows why the right to abortion should nonetheless be protected"); Frances Kissling, Is *There Life After* Roe? *How to Think About the Fetus*, CONSCIENCE, Winter 2004-05, *available at* http:// www.catholicsforchoice.org/conscience/archives/c2004win_lifeafterroe.asp; Robert K. Vishcher, *Culture War Dispatch: Open Hearts & Minds at Princeton*, COMMONWEAL MAGAZINE (Oct. 20, 2010), http://www.commonwealmagazine.org/culture-war-dispatch (reporting that prochoice scholars Peter Singer and Maggie Little acknowledged the humanity (and value, for Little) of fetal life during a debate on the moral status of the fetus at the "Open Hearts, Open Minds, Fair-Minded Words" conference at Princeton in October 2010).

100 *See* CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 99 (1987) ("[U]nder conditions of gender inequality, sexual liberation ... does not liberate women; it frees male sexual aggression."); Richard Stith, *How the Abortion Option Can Make Women More Vulnerable to Exploitation and Abandonment*, MIRROR OF JUSTICE, http:// mirrorofjustice.blogs.com/mirrorofjustice/stith/abortionwomenvulnerable.pdf (last visited Feb. 28, 2011). *See generally* Daniel Callahan, *An Ethical Challenge to Prochoice Advocates: Abortion and the Pluralistic Proposition*, 117 COMMONWEAL 681, 684 (1990).

101 Paulsen, *supra* note 69, at 205 ("It is degrading and offensive to women to adopt the (dare one say) *paternalistic* attitude that a woman cannot be the equal of man politically, economically, or socially unless she is able to kill her unborn child.").

102 David M. Smolin, *Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621, 639 (1989).

103 John M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBSTETRICAL & GYNECOLOGICAL SUR. 70, 75 (2003) (explaining that abortion increases the risk of placenta previa in later pregnancies by fifty percent and doubles the risk of preterm birth); *see* COMM. ON UNDERSTANDING PREMATURE BIRTH AND ASSURING HEALTHY OUTCOMES, PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION (Richard E. Behrman ed., 2007). Fifty-nine studies (from the 1960s through November 1997) show a statistically significant increase in preterm birth after induced abortion. David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16, 22 (2006) (showing an association between abortion and long-term increased risk of depression). *See generally* David C. Reardon & Philip G. Ney, *Abortion and Subsequent Substance Abuse*, 26 AM. J. DRUG & ALCOHOL ABUSE 61 (2000) (showing an association between abortion and substance abuse); Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987-1994: Register Linkage Study*, 313 BRITISH MED. J. 1433 (1996) (showing an association between abortion and suicide). Likewise, studies show short-term complications such as hemorrhaging, uterine perforation and infection. MAUREEN PAUL ET AL., A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 20-21 (1999). Further research into the effect of abortion on women's health is critical. *See* Elizabeth M. Shadigian, *in* THE COST OF CHOICE 63 (Erika Bachiochi ed., 2002) ("Approximately 25 percent of all pregnancies (between 1.2 and 1.6 million per year) are terminated in the United States; if there is even a small positive or negative effect of induced abortion on subsequent health, many women will be effected. Therefore, despite the political stalemate within the medical community, research in this area is a central women's health concern.").

104 Siegel, *Reasoning, supra* note 3, at 265.

105 Williams, *supra* note 10, at 127 ("[O]ne line of thought is that women are denied equal protection under the law because only mothers, but not fathers, have been required to bear the weight of children prior to their birth. Because fathers' bodies are not housing the unborn child, fathers can abandon their children more easily than can mothers; mothers should, therefore, be allowed to abort their unborn children as a means of equalizing their status with potentially irresponsible

fathers .... Justifying abortion on the basis that women must be treated as 'equal' to irresponsible fathers who are already in defiance of the law seems a giant step backward in legal logic as well as in our view of family.").

106 Gonzales v. Carhart, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)).

107 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *430; Daphne Clair de Jong, *Feminism and Abortion: The Great Inconsistency, in* PROLIFE FEMINISM: YESTERDAY AND TODAY 228 (1995) ("[A]ll arguments [in favor of abortion rights] bear an alarming resemblance to the arguments used by men to justify discrimination against women. Principally, the arguments are that the fetus is not human, or is human only in some rudimentary way; that it is a part of its mother and has no rights of its own .... A fetus, while dependent on its mother, is no more a part of its mother than she is a part of her husband .... The fetus lives its own life, develops according to its own genetic program, sleeps, wakes, moves, according to its own inclinations.").

108 De Jong, *supra* note 107, at 232 ("Women will gain their rights only when they demand recognition of the fact that they are people who become pregnant and give birth--and not always at infallibly convenient times--and that pregnant people have the same rights as others. To say that in order to be equal with men it must be possible for a pregnant woman to become un-pregnant at will is to say that being a woman precludes her from being a fully functioning person .... Women who want equality [seem to] really want to be imitation men.").

109 Erika Bachiochi, *The Uniqueness of Women, in* WOMEN, SEX, AND THE CHURCH 37, 42-43 (2010).

110 Fox-Genovese, *Wrong Turn, supra* note 10, at 9-10.

111 *See* Williams, *supra* note 10, at 149 ("Such a policy ... may heavily disadvantage women unwilling to exercise their 'right' to abandon (abort) their children."). It is possible that, for some prochoice feminist legal scholars, the potential that upholding male experiences of autonomy would further disempower women who have elected to care for their own children is inconsequential. "Relational feminists," however, take issue with both elevating male reproductive autonomy as the norm, and any efforts to belittle "care work." I discuss relational feminism and its relationship with prochoice argument in Part III.

112 Siegel, *Reasoning, supra* note 3, at 370-79.

113 *Id.* at 376-77.

114 *Id.* at 370; *see also* Siegel, *Sex Equality, supra* note 3, at 818.

115 Siegel, *Reasoning, supra* note 3, at 376-77.

116 Prochoice scholar Robin West has described the part abortion has played in slowing efforts to reform the workplace to support mothers. *See* West, *supra* note 19, at 1411 ("[C]onstitutionalizing this particular right to choose ... legitimates ... the lack of public support given parents in fulfilling their caregiving obligations."); *see also* Teresa Stanton Collett, *Dissenting, in* WHAT *ROE, supra* note 3, at 189 ("Women are making great progress in our society, and it is not by means of denying their capacity to conceive and bear children. By adopting this Court's counsel of despair, employers and society at large lose all incentive to adapt to women's unique nature.").

117 De Jong, *supra* note 107, at 233-34; *see also* Sidney Callahan, *Abortion and the Sexual Agenda, in* THE ETHICS OF ABORTION: PROLIFE VS. PROCHOICE 167, 177 (Robert M. Baird & Stuart E. Rosenbaum eds., 3rd ed. 2001)

("Since attitudes, the law, and behavior interact ... unless there is enforced limitation of abortion, which currently confirms the sexual and social status quo, alternatives will never be developed. For women to get what they need to combine childbearing, education, and careers, society has to recognize that female bodies come with wombs.").

118 Elizabeth R. Schiltz, *Should Bearing the Child Mean Bearing All the Cost? A Catholic Perspective on the Sacrifice of Motherhood and the Common Good*, 10 LOGOS 15, 20 (2007) (noting that some feminist theorists argue that the disproportionate cost paid by women means others-men, childless women, and market institutions--are "free-riders," benefiting from mothers' labors but not contributing to the cost); *see also id.* at 16.

119 West, *supra* note 19, at 1427 ("[P]ro-choice advocates might find common cause with prolife movements that responsibly seek greater justice for pregnant women who choose to carry their pregnancies to term, working families, and struggling mothers.").

120 Hendricks, *supra* note 11, at 354-55; *see* Helen M. Alvaré, Gonzales v. Carhart: *Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409, 444 (2008) ("Denying that women are drawn to their unborn children, as well as to spending considerable time and effort rearing born children, only results in policies reinforcing an outdated and largely male model of social life and employment--a model in which no institution need "flex" or change to allow women and men to meet children's needs. On the other hand, recognizing that both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet is both more realistic and a more likely premise for a successful argument in favor of family-friendly work and education policies. This is true even if, as past decades have shown, women are more likely than men to take advantage of these policies by, for example, working flexible or part-time hours."). *See generally* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) (arguing that present-day employment understandings in both law and policy take as their model the autonomous male worker, unencumbered by responsibilities to children).

121 *See, e.g.*, ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED (2001); *Survey: Moms' Work Would Bring in $138,095 a Year*, CNN.COM (May 3, 2007, 9:47 AM), http:// www.cnn.com/2007/US/05/02/mothers.worth/index.html (reporting 1997 Salary.com study evaluating market rate of various "jobs" the work of a mother entails). *But see* Williams, *supra* note 10, at 143 ("That parenting is not monetarily rewarded by the state is an objection to a capitalist economy, not proof that mothers are second-class citizens."). For a discussion of remedying the cultural devaluation of care work, see Schiltz, *supra* note 118, at 16 (arguing that both Catholic social teaching and the "dependency" strain within feminist thought make similar arguments about the problematic devaluation of care work and the need to restructure the workplace to support mothers).

122 *See, e.g.*, PEW RESEARCH CTR., FEWER MOTHERS PREFER FULL-TIME WORK 1 (2007), *available at* http:// pewsocialtrends.org/files/2010/10/WomenWorking.pdf; McComb, *supra* note 77.

123 PEW RESEARCH CTR., AMERICA'S CHANGING WORKFORCE: RECESSION TURNS A GRAYING OFFICE GRAYER 16 (2009), *available at* http:// pewsocialtrends.org/files/2010/10/10americas-changing-workforce.pdf (reporting that most 16-64 year olds work because they "need the money" and ninety-four percent do so because they need to support themselves or their family).

124 *Id.* at 24.

125 TOM W. SMITH, JOB SATISFACTION IN THE UNITED STATES 1 (2007), *available at* http:// www.news.uchicago.edu/releases/07/pdf/070417.jobs.pdf (finding that the most satisfying jobs are held by professionals, while the least satisfying are low-skill manual and service occupations).

126 *See, e.g.*, ELLEN GALINSKY ET AL., FEELING OVERWORKED: WHEN WORK BECOMES TOO MUCH 6 (2001) (reporting that fifty-four percent of employees report feeling overworked at least sometimes in the previous

three months); OR. CHILD CARE INFO. P'SHIP, EMPLOYER-SUPPORTED CHILD CARE IN OREGON 2 (2003) (finding that "[t]he biggest concern among young workers--49% of women and 45% of men--[was] not having enough time for [both] family and work responsibilities (quoting PETER D. HART, HIGH HOPES, LITTLE TRUST: A STUDY OF YOUNG WORKERS AND THEIR UPS AND DOWNS IN THE NEW ECONOMY (1999))).

127 *See, e.g.*, MARTHA FARRELL ERICKSON & ENOLA G. AIRD, THE MOTHERHOOD STUDY, STUDY: FRESH INSIGHTS ON MOTHERS' ATTITUDES AND CONCERNS (2005) (surveying more than 2,000 demographically diverse U.S. mothers eighteen and older with at least one child under the age of eighteen); Kim Parker, *The Harried Life of the Working Mother*, PEW CENTER: SOCIAL DEMOGRAPHIC TRENDS (Oct. 2009) http://pewsocialtrends.org/2009/10/01/the-harried-life-of-the-working-mother/. For a discussion of an ambitious set of proposals to make industry more flexible, see SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS (2007).

128 *Election Poll Finds Work and Family Issues-Amid Economic Worries-Are a Frequent Daily Concern for Majority of America's Voting Parents*, IMPACT WIRE (Nov. 13, 2008), http://www.impactwire.com/article.asp?i=election-poll-finds-work-and-family-issues--amid-economic-worries--are-a-frequent-daily-concern-for&c=11132008&s=500.

129 For Professor Siegel's discussion of "physiological naturalism" as a theory, see Siegel, *Reasoning, supra* note 3, at 267-80, and in practice in nineteenth-century abortion laws, see *id.* at 280-332. For a searing criticism of Professor Siegel's view of nineteenth-century history regarding restrictions on abortion, see JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 371-86 (2006). For Professor Siegel's discussion of the South Dakota Task Force, see generally Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (criticizing the women-protective rationales used by the South Dakota Task Force Report in an effort to restrict abortion). Professor Siegel's article is critical of the Report's depiction of women as "confused and coerced decision makers," which, she argues, uses "stereotypical reasoning about women's agency." *Id.* at 1030, 1034. *But see* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (arguing that the abortion-restrictive decision in *Gonzales v. Carhart*, which sought to protect women from mental trauma resulting from abortion, is not dissimilar from the abortion-permissive decision in *Roe*, which sought, in part, to protect women from mental trauma resulting from unwanted pregnancy).

130 Siegel, *Reasoning, supra* note 3, at 266. Even if Professor Siegel were correct about the rationale behind nineteenth-century abortion laws, which Dellapenna's groundbreaking historical work makes suspect, see DELLAPENNA, *supra* note 129, it is cynical, at best, to impute stereotypical assumptions on prolife advocates' attempts at restricting abortion. In an age when ultrasound grants us an unprecedented look at the unborn child and when younger people are growing more prolife, it is not so far-fetched to believe that most prolifers are not closet misogynists but are actually what they claim to be. For a recent poll reporting the growth of antiabortion sentiment among those aged 18-29, see Lydia Saad, *Generational Differences on Abortion Narrow*, GALLUP, Mar. 12, 2010, http://www.gallup.com/poll/126581/generational-differences-abortion-narrow.aspx.

131 *See, e.g.*, Siegel, *Concurring, supra* note 74, at 78; Siegel, *New, supra* note 46, at 1047; Siegel, *Reasoning, supra* note 3, at 335.

132 Siegel, *New, supra* note 46, at 1015.

133 *Id.* at 1047 ("When South Dakota asserted an interest in prohibiting abortion to protect an embryo or fetus that is physically within a pregnant woman, it stated a regulatory aim that might justify singling out a pregnant woman under the line of cases [*Hibbs, Nguyen, Virginia*] we have just been examining.").

134 Siegel, *Reasoning, supra* note 3, at 350 ("Abortion-restrictive regulation is state action compelling pregnancy ....").

135 *Id.* at 366-67.

136 *Id.* at 367.

137 *See* Siegel, *Concurring, supra* note 74, at 72.

138 Siegel, *New, supra* note 46, at 1045-46.

139 *Id.* at 1045.

140 Nguyen v. INS, 533 U.S. 53, 73 (2001) ("The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.").

141 United States v. Virginia, 518 U.S. 515, 533-34 (1996) (internal quotation marks omitted).

142 My analysis necessitates the validity of adoption as a viable alternative to abortion. Prochoice argument consistently discounts the viability of adoption, because the adoption alternative neglects to respond to the burdens of pregnancy arguments, see Hendricks, *supra* note 11, at 367; because of social pressures or expectations in some communities against offering children for adoption, see Siegel, *Reasoning, supra* note 3, at 371-72; because the woman may suffer guilt and shame at failing to be what constitutes a "good mother," see Jack M. Balkin, *Judgment of the Court*, in WHAT *ROE, supra* note 3, at 41; or because the likely emotional bonds formed during pregnancy will make women who were "compelled to bear a child" feel a duty to raise the child, see Siegel, *Reasoning, supra* note 3, at 371-72. All of these are serious concerns, but apart from the first (burden of pregnancy concerns, addressed in Part III), they speak of a broken social system which ought to be reformed, rather than of any principled rationale for abortion. If social pressures keep a woman who is ill-prepared to care for her child from offering that child for adoption, we ought to work tirelessly to reverse such messaging, especially in light of the dearth of domestic adoption possibilities for couples who long to adopt. If a woman finds herself eager to care for a child with whom she has developed bonds during pregnancy, we ought to work tirelessly to support her in being able to do so. That adoption is not presently a compelling alternative for many women speaks far more to the ease with which liberal abortion laws enable women to dispense of their unborn children, thus enabling societal forces on the whole to neglect needed reforms to adoption laws, practices, and attitudes.

143 Siegel, *Reasoning, supra* note 3, at 267.

144 *Id.* at 377-78.

145 *Id.* at 378. Though Professor Hendricks does not explicitly mention this tension between what I would call "social motherhood" and "biological motherhood" in Professor Siegel's work, Professor Hendricks is concerned that arguments like Professor Siegel's that are focused on the social burdens of motherhood are vulnerable to criticisms like those of Professor Daphne Clair de Jong and other opponents of abortion. *See* Hendricks, *supra* note 11, at 354, 357 & n.137 (quoting Teresa Stanton Collett, *Dissenting*, in WHAT *ROE, supra* note 3, at 187, 194). If abortion is necessary to equalize the sexes under conditions of inequality, then abortion rights would seem to have a "built-in sunset clause" if and when sexual equality is achieved. *Id.* at 357. Professor Hendricks argues that "burden of motherhood" arguments "detach the abortion right from women's bodies" and so do a disservice to women and their experiences of pregnancy. *Id.* at 353.

146 *See, e.g.*, Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPRODUCTIVE HEALTH 110, 110 (2005); Hendricks, *supra* note 11, at 352 n.116

(citing 2004 study that found that the vast majority of post-abortive women elected to have an abortion for emotional, relational, or economic reasons); Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interest in Motherhood*, 17 BROOK. J.L. & POL'Y 97, 106-07 & nn.27-28 (2008); Williams, *supra* note 10, at 136 (arguing that the bodily invasion argument for abortion may actually be reduced to a social argument demanding a right to be free of some of the consequences of sexual activity).

147 Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the 'First Right' for Women ?: Some Consequences of Legal Abortion, in* ABORTION, MEDICINE AND THE LAW 154 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) ("*Roe* is rarely cited as a precedent for women's rights in any area other than abortion. Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from *Roe v. Wade*."); Paul Benjamin Linton, Planned Parenthood v. Casey: *The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 42, 44-45 nn.128-32 (1993) ("Whatever progress has been made in the law in combating sex discrimination is attributable to other, independent constitutional doctrines or to congressional or state action, rather than to any particular reliance on *Roe*.").

148 *See* Hendricks, *supra* note 11, at 340-43. The right to "bodily integrity" is another form of the body-focused burden of pregnancy argument. *Id.* at 339-40.

149 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., dissenting in part and concurring in part).

150 *See, e.g.*, Siegel, *Reasoning, supra* note 3, at 350.

151 Thomson, *supra* note 16, at 48-49; *see also* Hendricks, *supra* note 11, at 349-50.

152 *See, e.g.*, PATRICK LEE, ABORTION UNBORN HUMAN LIFE 109 (2d ed. 2010); STEPHEN D. SCHWARZ, THE MORAL QUESTION OF ABORTION 115-17 (1990); Francis U. Beckwith, *Personal Bodily Rights, Abortion, and Unplugging the Violinist*, 32 INT'L PHIL. Q. 105, 115 (1992); Hendricks, *supra* note 11, at 351-52 (noting weaknesses with the Thomson analogy from a relational feminist perspective).

153 The great majority of the time, the fetus and mother are genetically related. In the small minority of in vitro fertilization (IVF) or surrogate cases, the fetus may not be related to the mother, but there would still be the intention, on the part of the woman, to create or implant a child who would be wholly dependent on her for sustenance until birth.

154 West, *supra* note 82, at 133.

155 *Id.*

156 *Id.* Professor West notes that were the law to change to require more of mothers and fathers vis-à-vis their born and unborn children, "the disparity between the law's treatment of pregnant women and others may lessen." She argues that governmental support for pregnant women and mothers, or "some sort of mandated contribution to the welfare of the pregnant women ... by fathers" would also alter the legal balancing. *Id.* at 134-35.

157 *Id.* at 133.

158 *Id.* ("[T]here is a difference between the sacrifice demanded of parents and the sacrifice demanded of pregnant women: The requirement that parents care for their born children notably does not extend to a requirement that the parent sacrifice any part of his physical body to do so. A parent is not required to donate even a milliliter of blood, much less a kidney,

or bone marrow, even to save the life of his born children, and even though the parent of the born child quite willfully and consensually brought the child into the world. Such a parent would be neither criminally nor civilly liable for his refusal to do so .... [S]hould the born child--perhaps a grown born child-- attempt to extract the blood or the kidney from the parent by force ... the state would step in when called upon to help the parent ward off the child's attack. The child, not the parent, would be charged with a crime.").

159 I do not mean to imply that parents ought to be forced by the state to extract bone marrow for younger children. This is a question that is well beyond the scope of this Article.

160 Professor Thomson's analogy states that the violinist's circulatory system is attached to and so dependent upon the protagonist's very body. Thomson, *supra* note 16, at 49.

161 Callahan, *supra* note 10, at 132 ("Pregnancy is not like the growth of cancer or infestation by a biological parasite; it is the way every human being enters the world.").

162 *See* Andrew Peach, *Abortion and Parental Obligation, in* LIFE AND LEARNING XIV 193, 200 (Joseph W. Koterski ed., 2004).

163 *Id. But see* West, *supra* note 82, at 134-35 (arguing that late term abortion may be restricted if a woman revealed her consent by failing to obtain an abortion in a timely manner).

164 Peach, *supra* note 162, at 207.

165 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *434, *435 ("The duty of parents to provide for the maintenance of their children is ... an obligation ... laid on them ... by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish."); *see also* John Eekelaar, *Are Parents Morally Obliged to Care for Their Children?,* 11 OXFORD J.L. STUD. 340, 340 (1991) (questioning the contractarian theory of moral obligation in light of its inability to account for parental obligation). For a discussion of parental obligations in family law, see Part III.D.

166 Peach, *supra* note 162, at 199-200 ("[C]hoices *per se* do not really obligate anyone--it is the realities that those choices bring about that truly do the obligating.") That we are only obligated when we choose to be obligated underlies both the antiabortion argument that if one consents to sex, then one consents to pregnancy, and the prochoice view that the duties of parenthood only hold when one consents to pregnancy. For a critique of this view generally (without reference to abortion), see Pierre Manent, *Modern Individualism, in* A FREE SOCIETY READER 213 (Michael Novak et al. eds., 2000).

167 Francis Beckwith, *Defending Abortion Philosophically: A Review of David Boonin's* A Defense of Abortion, 31 J. MED. & PHIL. 177, 191-92 (2006); *see also* Calhoun & Sexton, *supra* note 94, at 452.

168 Beckwith, *supra* note 167, at 195. For a disagreement between Professors Peach and Lemmons regarding the nature of obligation, see R. Mary Hayden Lemmons, *The True Source of Parental Obligations, in* LIFE AND LEARNING XIV 219, 221 (Joseph Koterski ed., 2004). Professor Lemmons argues that Professor Peach is unable to ground parental obligation in biological relation alone, as in the case of an unrelated embryo implanted into a woman's womb. My view is that, although Professor Peach gets us past the contractarian assumptions in the consent to pregnancy/consent to parenthood *and* consent-to-sex/consent-to-pregnancy frameworks, Professor Beckwith's argument (that the parents acted to bring into existence a being who is needy by nature) grounds parental obligation to any who participate in the creation of an embryo (whether through intercourse or in a test tube). *See also* Callahan, *supra* note 10, at 135 ("Parent-child relationships are one instance of implicit moral obligations arising by virtue of our being part of the interdependent human community. A woman, involuntarily pregnant, has a moral obligation to the now-existing dependent fetus

whether she explicitly consented to its existence or not. No prolife feminist would dispute the forceful observations of prochoice feminists about the extreme difficulties that bearing an unwanted child in our society can entail. But the stronger force of the fetal claim presses a woman to accept these burdens; the fetus possesses rights arising from its extreme need and the interdependency and unity of humankind. The woman's moral obligation arises both from her status as a human being embedded in the interdependent human community and her unique lifegiving female reproductive power.").

169 Bruce Chapman, *Ethical Issues in the Law of Tort, in* JUSTICE, RIGHTS, AND TORT LAW 20-21 (Michael D. Bayles & Bruce Chapman eds., 1983); *see also* Beckwith, *supra* note 167, at 195.

170 Beckwith, *supra* note 167, at 195.

171 *See, e.g.,* Hunter Baker, *Storming the Gates of a Massive Cultural Investment: Reconsidering* Roe *in Light of its Flawed Foundation and Undesirable Consequences*, 14 REGENT U. L. REV. 35, 42 (2001) ("When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit." (quoting Letter from Elizabeth Cady Stanton to Julia Ward Howe, (October 16, 1873), (recorded in Howe's diary at Harvard University Library))); Cindy Osborne, *Pat Goltz, Catherine Callaghan, and the Founding of Feminists for Life, in* PROLIFE FEMINISM: YESTERDAY AND TODAY 219, 222-23 (Derr et al. eds., 2d ed. 2005) ("Having known oppression, we cannot stand by and allow the oppression of an entire class of weaker human beings. Having once been owned by our husbands, we cannot condone a position that says the unborn are owned by their mothers. Remembering a time when our value was determined by whether a man wanted us, we refuse to bow to the patriarchal attitude that says the unborn child's value is determined by whether a woman wants her.").

172 *See generally* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (revealing the essentially male perspective inherent in liberal legal theory's emphasis on autonomy and individualism). This strain of feminism has also been referred to as "care feminism," "dependency feminism," and "cultural feminism."

173 *See, e.g.*, Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 882 (1993) (arguing that, although justifications for abortion have rightly been based on bodily and decisional autonomy, relational feminists are critical of such autonomy--a criticism that tends to undermine their support for abortion); *see also* Hendricks, *supra* note 11, at 364, 365 n.166.

174 *See, e.g.,* VIRGINIA HELD, THE ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL 13-14 (2005); NANCY HIRSCHMANN, RETHINKING OBLIGATION: A FEMINIST METHOD FROM POLITICAL THEORY 8 (1992).

175 Maura A. Ryan, *The Argument/or Unlimited Procreative Liberty: A Feminist Critique*, 20 HASTINGS CENTER REP. 6, 10 (1990); *see also* Callahan, *supra* note 10, at 135 ("To be embedded in a family, a neighborhood, a social system, brings moral obligations which were never entered into with informed consent.").

176 Ryan, *supra* note 175, at 10.

177 *Id.*

178 Hendricks, *supra* note 11, at 339, 361.

179 *Id.* at 362.

180 *Id.*; *see also* Smith, *supra* note 146, at 158; Celeste Michelle Condit, *Within the Confines of the Law: Abortion and a Substantive Rhetoric of Liberty*, 38 BUFF. L. REV. 903, 909 (1990) (reviewing LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990)) (arguing "[a] mother by definition is a person-in-a-relationship" and because women become mothers through pregnancy, women must be free "to secure the status of 'not-mother"').

181 Smith, *supra* note 146, at 99, 145-51; *see also* Robin West, *The Supreme Court, 1989 Term--Foreward: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 81-82 (1990).

182 Hendricks, *supra* note 11, at 366, 368; Smith, *supra* note 146, at 103-09.

183 Smith, *supra* note 146, at 106-27.

184 *Id.* at 105-06 (reporting that at least sixty percent of women having abortions already have children, up from forty-four percent in 1983).

185 *Id.* at 109-10, 115-18.

186 For a collection of stories by women who resisted the social or medical pressure to abort physiologically imperfect children, including those who were prenatally misdiagnosed, see generally MELINDA TANKARD REIST, DEFIANT BIRTH: WOMEN WHO RESIST MEDICAL EUGENICS (2006).

187 Michael Alison Chandler, *A Leap of Love: Adoptions of Children with Down Syndrome are on the Increase*, WASH. POST, Nov. 9, 2008, at A1 (reporting that 200 families are on a waiting list to adopt a child with Down Syndrome in the United States).

188 *See supra* note 142 and accompanying text on adoption.

189 Women's Right to Know (informed consent) laws exist in only thirty-one states. AMS. UNITED FOR LIFE, DEFENDING LIFE 2009: A STATE-BY-STATE LEGAL GUIDE TO ABORTION, BIOETHICS, AND THE END OF LIFE 153 (Denise M. Burke ed., 2009).

190 *See supra* note 103 and accompanying text on medical impact. See also Jeannie Suk, *supra* note 129, for a prochoice feminist who, in theory, takes seriously the possibility of emotional distress after abortion.

191 *See infra* Part III.E.

192 *See generally* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2005) (proposing public policies to offset costs associated with caring for children); ROSS DOUTHAT & REIHAN SALAM, GRAND NEW PARTY: HOW REPUBLICANS CAN WIN THE WORKING CLASS AND SAVE THE AMERICAN DREAM (2008) (arguing that whichever political party recognizes the need for economic policies that support caretakers will ultimately prevail); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 53-58 (1987) (comparing generous maternity and child care policies of Western Europe with minimalist policies in the U.S. in light of far stricter abortion regulation in the former than the latter).

193 Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion* 38 (Legal Studies Research Paper Series, Research Paper No. 80, 2009), *available at* http://works.bepress.com/cgi/viewcontent.cgi?

arricle=1002&context=jennifer_hendricks. The quoted material was omitted from the article as eventually published in the *Harvard Civil Rights-Civil Liberties Law Review*.

194 *Id.*

195 Helen M. Alvaré, Gonzales v. Carhart:. *Abortion Law that Looks Like Family Law, in* LIFE AND LEARNING XVII 129, 150 (2007), *available at* http://www.uffl.org/vol17/ALVARE07.pdf (also published as Helen M. Alvaré, Gonzales v. Carhart: *Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409 (2008)). Abortion jurisprudence in the pre-*Conzales* era generally presumed a confrontational rather than bonded mother-child relationship. Indeed, *Gonzales*'s notion that a mother-child *relationship* is at stake in abortion strikes at the very heart of earlier abortion jurisprudence, and certainly prochoice argument, that the abortion right centers on women's right to "autonomy." "No matter which dictionary one consults, 'autonomy' appears as a concept opposite to the notion of 'relationship.'" *Id.* at 153.

196 *Id.* at 151.

197 Early in her article, Professor Alvaré takes up the objection that a mother's relationship with her born child differs significantly from her more fledgling relationship with her unborn child. Professor Alvaré responds that "these are differences in degree, not in kind, between parental relationships with unborn and born children, and between the vulnerability of born and unborn human life." *Id.* at 132. *See also* Williams, *supra* note 10, at 131 ("Current abortion law is incompatible with the purposes of family law. Family law seeks to protect the vulnerable; *Roe* stripped the most vulnerable members of the human family of legal protection. Family law restrains the powerful from exploiting the weak; *Roe* increased the ability of mothers to legally harm their unborn children.").

198 Alvaré, *supra* note 195, at 168-69. Professor Alvaré rightly criticizes the *Gonzales* opinion for giving short shrift to both the feelings and duties fathers have toward their unborn children.

199 West, *supra* note 82, at 134.

200 Calhoun & Sexton, *supra* note 94, at 473 n.187.

201 Williams, *supra* note 10, at 136 (emphasis added).

202 *Id.* at 131.

203 Paglia, *supra* note 97 ("[I]t is equally foolish to expect that feminism must for all time be inextricably wed to the prochoice agenda. There is plenty of room in modern thought for a prolife feminism--one in fact that would have far more appeal to third-world cultures where motherhood is still honored and where the Western model of the hard-driving, self-absorbed career woman is less admired.").

204 Callahan, *supra* note 10, at 138.

205 Beckwith, *supra* note 167, at 198.

206 *See* Rosemary Oelrich Bottcher, *Abortion Threatens Women's Equality, in* PROLIFE FEMINISM: YESTERDAY AND TODAY 238, 239 (1995) ("Those who advocate legal abortion concede that pregnant women are intolerably handicapped; they cannot compete in a male world of wombless efficiency."); Alvaré, *supra* note 195, at 170 (arguing that denying women's bonds with their unborn children portrays childbearing and maternal responses as disabilities,

and concluding that insisting "both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet, is both more realistic, and a more likely premise for a successful argument in favor of family-friendly work and education policies") (internal citation omitted); Fox-Genovese, *Wrong Turn, supra* note 10, at 12 ("[T]he courts have assumed that the pregnant woman deserves to be freed from the pregnancy--from the baby she is carrying--which amounts to the claim that being a woman is itself a disability and inherently an undesirable condition. The emphasis upon a pregnant woman's right to an abortion effectively undercuts the dignity of the woman who is pregnant and, by extension, of all women who may become pregnant."). Joan C. Williams argues use of the term "accommodation" perpetuates the masculine, unencumbered "ideal worker" norm, and so "re-inscribes gender inequality." *See* Williams, *supra* note 57, at 27. She is probably right about this.

207 *See* Callahan, *supra* note 10, at 136 ("As long as most women choose to bear children, they stand to gain from the same constellation of attitudes and institutions that will also protect the fetus in the woman's womb--and they stand to lose from the cultural assumptions that support permissive abortion.").

208 Camille S. Williams, *Feminism and Imaging the Unborn, in* SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE 65-67 (Brad Stetson ed., 1996) ("The view that the unborn have social and moral status elevates human gestation and maternity to a meaningful, charitable, purposeful act.").

209 For a discussion of parental duties vis-a-vis the unborn, see Calhoun & Sexton, *supra* note 94, at 451 n.71.

210 *See, e.g.,* FREDERICA MATHEWES-GREEN, REAL CHOICES: LISTENING TO WOMEN; LOOKING FOR ALTERNATIVES TO ABORTION 206 (1997); Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 462 (1977); Isabelle L. Horton & Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality--Maryland, 1993-1998*, 285 JAMA 1455 (2001); Judith McFarlane et al., *Abuse During Pregnancy and Femicide: Urgent Implications for Women's Health*, 100 OBSTETRICS & GYNECOLOGY 27 (2002); Brian McQuarrie, *Guard, Clinic at Odds at Abortion Hearing*, BOS. GLOBE, Apr. 16, 1999, at B6.

211 West, *supra* note 19, at 1411 ("Narrowly, by giving her a choice, her consent legitimates the parental burden to which she has consented .... The choice-based arguments for abortion rights strengthen the impulse to simply leave her with the consequences of her bargain. She has chosen this route, so it is hers to travel alone. To presume otherwise would be paternalistic. The woman's 'choice' mutes any attempt to make her claims for assistance cognizable."); *see* Hendricks, *supra* note 11, at 359; Paulsen, *supra* note 69, at 206 ("[The Court] ... tell[s women] that abortion is their sacred 'right.' And others--men--for whom the creation of this right appears to terminate their own responsibilities, will tell women that abortion is their sacred duty."); Siegel, *Reasoning, supra* note 3, at 273-74 (arguing that *Roe's* privacy rationale "invites criticism of the abortion right as an instrument of feminine expedience ... because it presents the burdens of motherhood as woman's destiny and dilemma--a condition for which no other social actor bears responsibility."); Stith, *supra* note 100, at 6.

212 Akhil Reed Amar, *Concurring in* Roe, *Dissenting in* Doe, *in* WHAT *ROE*, *supra note* 3, at 164; *see also*, Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011) (proposing a pregnancy-support tax deduction to incentivize paternal pregnancy support).

213 Amar, *supra* note 212, at 164-65 ("[T]he law ... obliges her to give up nine months of her life to sustain the unborn life but does not oblige him to give up even nine dollars."); *see also* Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010) (suggesting that men who impregnate women be required by law to make monetary contributions to mitigate unequal reproductive burdens borne by women).

214 *See* West, *supra* note 82, at 134; Robin West, Prepared Remarks at Open Hearts, Open Minds, Fair-Minded Words Conference (Oct. 15-16, 2010).

215 As then-presidential candidate Barack Obama said in a Father's Day speech: “We need fathers to realize that responsibility does not end at conception. We need them to realize that what makes you a man is not the ability to have a child--it's the courage to raise one.” Senator Barack Obama, Father's Day Speech at Chicago Apostolic Church of God (June 15, 2008).

216 *See, e.g.*, Hendricks, *supra* note 11, at 333 (“[S]exuality is too integral to human flourishing for the right to say ‘no’ ... to be the sine qua non of women's control over reproduction.”); Peach, *supra* note 162, at 195 (“[I]ntercourse is too important ... to be reserved for times when pregnancy is an acceptable outcome.” (quoting Mary Ann Warren)); Siegel, *Sex Equality, supra* note 3, at 817 (“A sex equality analysis views sexual intimacy as a human need worthy of fulfillment; it respects sexual relationships that fulfill this need even when such relationships diverge from the heterosexual, procreative, and marital forms that custom privileges.”).

217 Professor Robin West has suggested contraceptive use ought to be a moral duty for sexual partners not yet prepared for parenthood. *See, e.g.*, West, *supra* note 19, at 1429. In theory, she, like many other well-intentioned prochoice (and prolife) advocates, seeks to reduce abortion rates while encouraging pleasurable sexual activity by consenting adults. *Id.* at 1430. Yet failure rates for all contraceptive methods are quite high, leading to scores of unintended pregnancies nationally. *See* Kathryn Kost et al., *Estimates of Contraceptive Failure From the 2002 National Survey of Family Growth*, 77 CONTRACEPTION 10 (2008). Professor Helen Alvaré argues that comprehensive sex education programs often treat the connection between sex and babies as rather tangential. She quotes a public school sexeducated woman: “we learned not that sex creates babies, but that unprotected sex creates babies .... Because I saw sex as being by default closed to the possibility of life, I thought of unplanned pregnancies as akin to being struck by lightning while walking down the street--something totally unpredictable ....” Helen Alvaré, *Beyond the Sex-Ed Wars: Addressing Disadvantaged Single Mothers' Search for Community*, 44 AKRON L. REV. 167, 208 (2011) (arguing that sex education programs, whether comprehensive or abstinence-based, ought to find ways to speak to women's desire for relationship and community rather than simply educate to prevent pregnancy and disease).

218 Karlan & Ortiz, *supra* note 173, at 875.

219 *See, e.g.*, Siegel, *Sex Equality, supra* note 3, at 818-19.

220 *See, e.g.*, Daly, *supra* note 3, at 124; Hendricks, *supra* note 11, at 336; Siegel, *Reasoning, supra* note 3, at 364. In principle, the value of fetal life does not depend upon whether conception was caused by consensual intercourse or rape. Again, consent to sex does not ground parental duty; engaging in an act that causes the biological dependency of one's unborn child grounds such duty. Still, because victims of rape do not willfully engage in an act that may produce such a foreseeable result, but are rather preyed upon by violent aggressors, prolife legislators are often willing to allow for rape exceptions to abortion regulations, especially if such an exception would serve as a compromise measure for more extensive regulations. From a prolife feminist perspective, however, abortion is viewed as a second violent assault on the rape victim rather than a path toward healing; more humane responses have been shown successful. *See, e.g.*, Sandra K. Mahkom, *Pregnancy and Sexual Assault, in* THE PSYCHOLOGICAL ASPECTS OF ABORTION 53-72 (David Mall & Walter F. Watts eds., 1979). For a discussion of the interplay of principle and prudence in politics, see generally CLARKE FORSYTHE, POLITICS FOR THE GREATEST GOOD: THE CASE FOR PRUDENCE IN THE PUBLIC SQUARE (2009).

221 *See, e.g.*, TRIBE, *supra* note 94, at 238, 241; Calhoun & Sexton, *supra* note 94, at 443.

222 *See supra* note 217 and accompanying text on contraceptive failures.

223 The early American feminists understood that truly respecting women meant taking seriously their procreative capacities. Not only were these women prolife through and through, but they also embraced an ideal of “voluntary motherhood” in which women and men, in appreciation of the creative potential of the sexual act, engaged in the act according to the so-called rhythm of the female reproductive system. *See, e.g.*, LINDA GORDON, THE MORAL

PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 57 (2002); Angela Franks, *The Gift of Female Fertility, in* WOMEN, SEX, & THE CHURCH (Erika Bachiochi ed., 2010); Linda Gordon, *Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States, in* WOMEN AND HEALTH IN AMERICA: HISTORICAL READINGS 253 (Judith Walzer Leavitt ed., 2d ed. 1999); Hendricks, *supra* note 11, at 332 (noting first-wave feminist public opposition to abortion and contraception); Siegel, *Sex Equality, supra* note 3, at 819 (acknowledging that nineteenth century feminists "did not endorse abortion or contraception," but instead practiced sexual restraint within marriage to regulate birth). An early forerunner to the highly scientific and effective method of fertility awareness method (or natural family planning) utilized today by both orthodox Catholics and back-to-the-earth feminists, this method required self-restraint on the part of the man in particular, an essential characteristic of an authentically prowoman sexuality. For a popular secular account of natural family planning, see generally TONI WESCHLER, TAKING CHARGE OF YOUR FERTILITY (2006). Sidney Callahan, in her criticism of the "masculiniz[ation] of female sexuality," comments upon how the ethic of commitment and self-discipline, so revered in the world of work by feminists, is denounced as unnatural in the sphere of sexuality. *See* Callahan, *supra* note 10, at 139-40 ("While the ideal has never been universally obtained, a culturally dominant demand for monogamy, self-control, and emotionally bonded and committed sex works well for women in every stage of their sexual life cycles. When love, chastity, fidelity, and commitment for better or worse are the ascendant cultural pre-requisites for sexual functioning, young girls [are protected], adult women justifiably demand male support in childrearing, and older women are more protected from abandonment as their biological attractions wane."). But commitment and sexual restraint, while not at all antithetical to sexual pleasure, are the necessary ingredients of true "reproductive choice," or as earlier feminists called it, voluntary motherhood.

224 Prochoice scholar Robin West writes ably about the pressures young women face to engage in sex before they are ready, arguing that a young woman has a moral duty to both her present and future self to abstain from sex she does not want and that a young man likewise has a duty to not pursue sex undesired by the woman:

> [U]nwanted sex ... is alienating to the woman who experiences it: she gives her body over--willfully, but still she gives it over--for use by a man, as a part of a bargain that she has struck that gives her no pleasure ... [this] is a serious but largely unrecognized and deeply alienating harm ... [that] is compounded [were she to become pregnant].

West, *supra* note 19, at 1429-30.

225 *See* Morro, *supra* note 213, at 923 (recognizing sexual intercourse unequally burdens women, making them far more vulnerable in the event of pregnancy).

226 *See supra* note 103 and accompanying text on medical effects.

227 West, *supra* note 19, at 1411 ("The choice-based arguments for abortion rights strengthen the impulse to simply leave her with the consequences of her bargain.").

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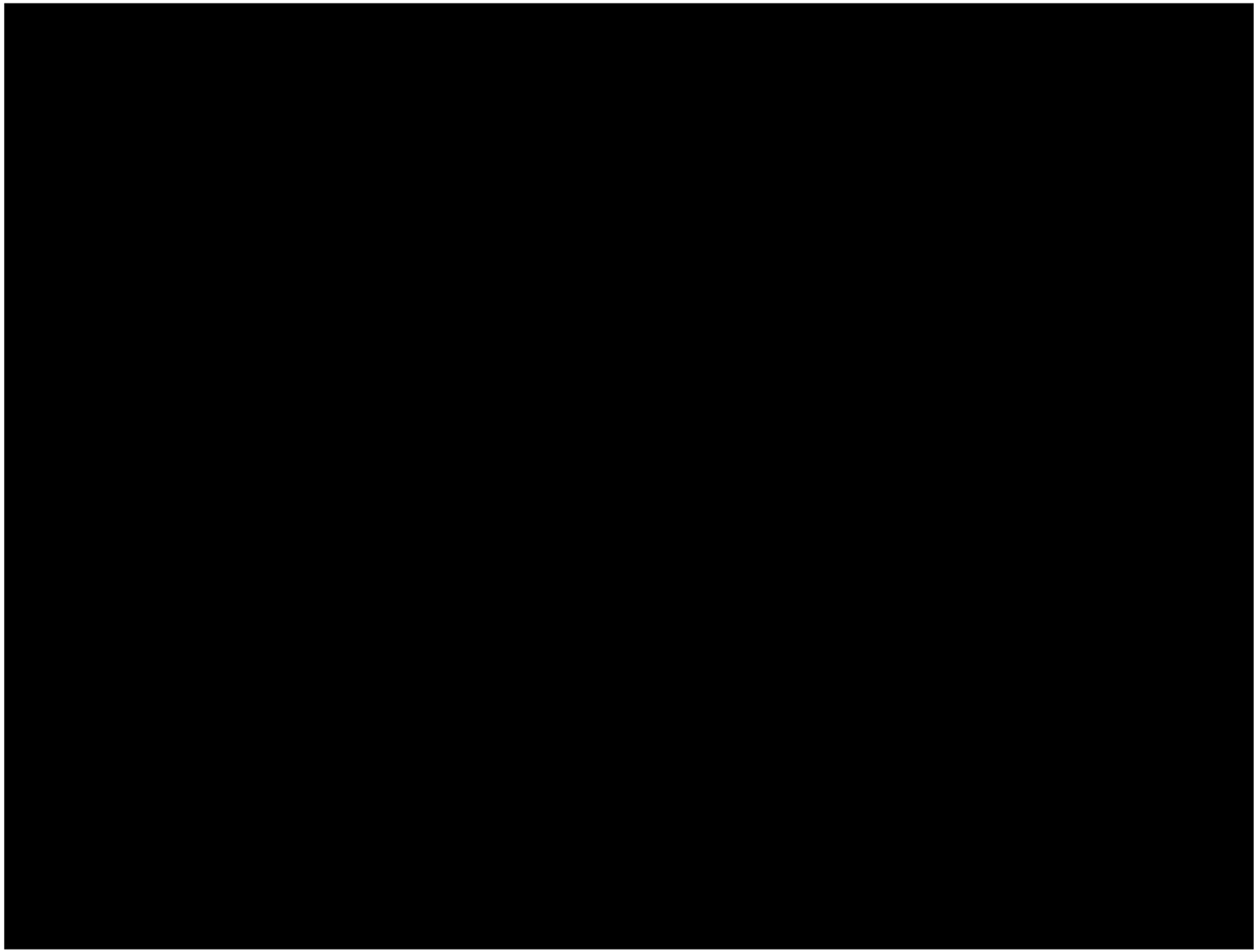
Roe v. Wade, 410 US 113, 93 S Ct 705 (1973)

- A challenge to a Texas statute making it a crime to perform an abortion except to save a woman's life.
- The Court considered history showing that abortion was not clearly illegal at common law, particularly before "quickening."
- A constitutional right to privacy was established by prior case law.
- The right to privacy at issue was founded in the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action."
- The right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."
- Restrictions on this fundamental right could be justified only by a "compelling state interest."
- The State could not restrict abortion during the first trimester, because the woman's rights predominated.
- After the first trimester, the State could regulate abortion to protect the pregnant women's health.
- After viability, the State's interest in protecting potential life began to dominate, and the State could decide to ban abortion, except where necessary to preserve the women's life or health.

Planned Parenthood of Southeastern PA v. Casey, 505 US 833, 112 S Ct 2791 (1992)

- A challenge to Pennsylvania laws imposing various restrictions on abortion, including a 24-hour waiting period.
- The Court confirmed that the Fourteenth Amendment's Due Process Clause provide a right to privacy that encompasses a right to abortion.
- The Court emphasized the value of *stare decisis*.
- Confirmed that women had a right to abortion before viability.
- States could place regulations before viability to both protect the women's health and to protect the State's interest in potential life.
- Restrictions on abortion could not be an "undue burden" or a "substantial obstacle" to women's right to terminate pregnancy, pre-viability.



Stare Decisis

“Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges.”

-N. Gorsuch, A Republic, If You Can Keep It 217 (2019).

Overturning *Roe* Restores Rights & Empowers Women

"Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power."

Dobbs, 142 S.Ct. at 2277

Nature of the Error

"...wielding nothing but 'raw judicial power,' the [*Roe*] Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."

Dobbs, 142 S.Ct. at 2265 (internal citation omitted)

Quality of the Reasoning

"The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body."

Dobbs, 142 S.Ct. at 2268 (emphasis in original)

Workability

"Casey's 'undue burden' test has scored poorly on the workability scale."

Dobbs, 142 S.Ct. at 2272

Disruptive Effects on Other Areas of the Law

"The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine. They have disregarded standard *res judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted *First Amendment* doctrines."

Dobbs, 142 S.Ct. at 2275-76

Reliance Interests

"... traditional reliance interests [are] not implicated because getting an abortion is generally unplanned activity..."

Dobbs, 142 S.Ct. at 2276 (internal quotations omitted)

Quality of Reasoning

- "The majority's core legal postulate, then, is that we in the 21st century must read the *Fourteenth Amendment* just as its ratifiers did."
- "If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.
- "But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation."

Dobbs v. Jackson Women's Health Org., 142 S Ct 2228, 2324 (2022).

Workability Redux

"The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country."

Dobbs v. Jackson Women's Health Org., 142 S Ct 2228, 2319 (2022).

Reliance

"The ability of women to participate equally" in the "life of the Nation"—in all its economic, social, political, and legal aspects—"has been facilitated by their ability to control their reproductive lives." Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

Dobbs v. Jackson Women's Health Org., 142 S Ct 2228, 2330 (2022) (quoting *Planned Parenthood v. Casey*, 505 US 833, 843, 112 S Ct 2791, 2803, (1992)).

Cane v. State of Arizona

Dr. Cane is appealing the Arizona Supreme Court's decision upholding the state's Pregnancy Protection Act. The Act:

- Defines any person in the state capable of giving birth as a "Potential Mother."
- Defines any person in the state who is or becomes pregnant as a "Mother."
- Defines any fertilized egg/fetus as a "child."
- From conception to birth permits civil and criminal liability for any person who seeks/aids/or performs any act that would cause the termination of the pregnancy/death of a child after 8 weeks of pregnancy. Exception when the life of the mother is at risk.
- Requires a state agency to identify a legal father for all children of unwed Mothers during birth or after a birth, and order (1) child support effective the date of birth and (2) requires the Father to pay for one half of all prenatal medical care.
- Any person who becomes pregnant is immediately eligible for state medical insurance at no cost, and/or is eligible to be added to the Father's medical insurance, for a period of one year from conception. Any person who gives birth is eligible for state unemployment for a period of 6 weeks after birth at 70% of their pay rate.

GJS Inn of Court
March 2023 Script

I. NPR Intro – 2 mins.

(Judge Lavin)

Judge Lavin Good morning. You're watching a PBS News Special Report.

In June 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, which overruled its previous cases confirming a constitutional right to abortion during the first several month of pregnancy.

In the intervening years, there have been numerous legislative efforts in both states and Congress aimed at either prohibiting all abortion, in some cases, or codifying a right to abortion by statute, in other cases.

There have also been numerous lawsuits challenging those laws and arguing that the right to abortion is a constitutional right.

Polls show that a majority of Americans believe an abortion should be legal in all or most circumstances, but a vocal minority believes it should be illegal in all circumstances.

Both before and after the *Dobbs* decision, demonstrators and protestors on both side of the debate have regularly taken to the streets to advocate for their positions.

This morning, we will talk to legal experts and then take you inside the courtroom for oral argument in *State v. Cane*, a case out of Arizona that raises several legal issues concerning the right to abortion and the attempt to resurrect a federal protection of abortion under the equal protection clause.

First, we are joined by legal experts Holly Pettit and Kim Le to discuss how we got to this point.

Holly, welcome to the program.

II. Pre-*Dobbs* History – 10 mins

(Kim + Holly)

Holly Pettit Thank you for having me.

Judge Lavin The U.S. Supreme Court previously recognized a constitutional right to abortion in *Row v. Wade*, correct?

Holly Pettit That is correct.

{Display Slide 1 – *Roe v. Wade*}

Roe v. Wade involved a challenge to a Texas statute that made it a crime to perform an abortion unless the purpose of the abortion was to save a woman's life.

Norma McCorvey, referred to in the case as Jane Roe, argued that the statute was unconstitutionally vague and interfered with her constitutional right to privacy.

The Court reviewed the history of laws relating to abortion and concluded that common law before the mid 19th Century (when states began passing abortion bans) did not clearly make abortion illegal, particularly before "quickening," or when the fetus began moving in the womb.

The Court moved on to discussing the right of privacy that had been recognized in the Court's prior decisions, based on multiple provisions of the Bill of Rights and the Fourteenth Amendment. The Court stated it believed a right to privacy was founded in the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action."

The right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," the Court concluded. This right is a fundamental right, and restrictions on that right could be justified only by a "compelling state interest."

Judge Lavin Even after *Roe*, many state laws still restricted the right and opportunity to get an abortion. How was that allowed under *Roe*?

Holly Pettit The *Roe* Court expressly tried to strike a balance between the rights of a pregnant women to control her own body and life and the interests of the State in protecting "potential life."

During the first trimester, the State could not interfere at all with the decision to terminate a pregnancy. After the first trimester, the State could regulate abortion to protect the pregnant women's health. After the fetus's viability, where the fetus has the capacity to live outside the mother's womb, the State could ban abortion, except where necessary to preserve the women's life or health.

Given that flexibility and explicit authority to regulate abortion in some circumstances, many states continued restricting access to abortion.

In 1992, the Court decided *Planned Parenthood v. Casey*, which affirmed some of the general principles in *Roe v. Wade*, but also allowed states more opportunities to regulate abortion.

{Display Slide 2 – *Planned Parenthood*}

Judge Lavin In what way?

Holly Pettit *Casey* involved a challenge to Pennsylvania laws that imposed various restrictions on the right and access to abortion, including a 24-hour waiting period.

The Court confirmed *Roe's* ruling that the Fourteenth Amendment's Due Process Clause provided a right to privacy that encompasses a right to abortion.

A women's right to decide the course of her life—including whether to bear a child—is essential to her right to liberty protected by the Fourteenth Amendment, the Court stated.

The Court also recognized the value of *stare decisis* and hoped to keep the law as settled as possible.

However, *Casey* went further than *Roe* in allowing State regulation of abortion before viability, in that it allowed regulation to protect the State's interest in the potential life, not just the health of the mother.

The State could not place an "undue burden" or a "substantial obstacle" in the way of a women's right to terminate pregnancy, pre-viability, the Court decided.

Judge Lavin So that "undue burden" test was the primary standard that courts had to apply before *Dobbs*?

Holly Pettit Yes, and states were constantly pushing back to determine what restrictions would be allowed, and protests occurred on both sides of the issues.

As you noted, *Dobbs* again changed the legal landscape.

{PLAY LINK IN SLIDE 3}

Judge Lavin Kim Le, can you explain to us what the Court decided in the *Dobbs* decision?

KIM (pre-recorded):

On June 24, 2022, the U.S. Supreme Court released its decision in *Dobbs v. Jackson Women's Health Organization*. The Court held that the Constitution does *not* confer a right to abortion and overturned *Roe v. Wade*, and *Planned Parenthood of Southeastern Pa. v. Casey*.

In the court's decision, authored by Justice Alito, the majority dismissed claims that a right to abortion was protected under the Equal Protection Clause of the Fourteenth Amendment. The court stated that abortion is not a sex-based classification and therefore not subject to the heightened scrutiny that

applies to such classifications. Rather, the court held that regulations of abortion are governed by the same standard of review as other health and safety measures.

The Court further explained that the right to an abortion is *not* "rooted in the Nation's history and tradition" and not an essential component of ordered liberty. The court emphasized that most states prohibited abortion at the time the Fourteenth Amendment was enacted.

Finally, the Court considered whether abortion could be part of a broader right to liberty that would be supported by other precedents such as the right to marry. The Court distinguished those broader fundamental rights from the right to abortion in that it destroys potential life.

The Court acknowledged concerns related to the doctrine of stare decisis, the need for a court to follow its own precedents, but decided that the nature of the court's error was too great, the quality of the reasoning in Roe and Casey were poor, that the trimester and viability guidelines established in Roe and affirmed by Casey were not workable.

The Court returned the authority to regulate or prohibit abortion to the states.

Following the *Dobbs* decision in 2022, several states, including Idaho, issued a ban on all abortions from conception, with exceptions for rape, incest, or a medical threat to the life of the mother. Women seeking abortion began crossing state lines to obtain abortions in less restrictive states such as Oregon and California. Protests erupted around the United States.

Some states amended their state constitutions to expressly protect the right to an abortion, while other states amended their constitution to expressly reject the right to an abortion.

Over the next eight years, abortion became a central issue in elections- eventually leading to the Democratic control of the Executive and Legislative branches in 2028. The judicial branch, however, remains largely conservative.

JUDGE LAVIN: Thank you for that background, Holly and Kim.

The plaintiff in this case is an OBGYN, Dr. Cane from the state of Arizona who is suing on the basis that the state's new "Pregnancy Protection Act" violates the constitutional rights of her and her patients under the equal protection clause. The state also announced its intent to bring criminal charges against Dr. Cane for ingesting medication to induce an abortion.

Arizona's new law defines any person capable of becoming pregnant as a "Potential Mother" and defines a fertilized egg/fetus as an "Unborn Child."

From conception to birth the law permits civil and criminal liability for any person who seeks/aids/or performs any act that would cause the termination of the pregnancy/death of a child after 8 weeks of pregnancy. There is an exception when the life of the Potential Mother is at risk.

Potential Mothers are eligible for state medical insurance at no cost retroactive to the date of conception and they remain eligible for 3 months after birth of a child. Unmarried Potential Mothers are also eligible to be added to the father's medical insurance from conception for a period of one year. Unmarried women may recover one half of all medical bills associated with the pregnancy from the father.

Unlike prior laws addressing abortion heard by the court, this law goes further than just regulating pregnancy. The law requires a state agency to identify the Father of any child born to an unwed Mother and order child support retroactive to the date of birth; and grants any person who gives birth 6 weeks of unemployment at 70% of their salary.

Before oral arguments begin, let's turn to an august panel of scholarly types to hear about Congress' power—or lack thereof—to preserve a nationwide right to abortion through legislation.

II. Legislative Panel – 12 mins

(Sean + Aaron + Mark)

Aaron: Well, hello my fellow supreme court scholars. It's good to see you both. I haven't seen either of you since the Red Mass this past fall (rich guy smarmy chuckle)

I'm a relatively new dad, so I've been drinking a lot of brandy lately and spending my time thinking about how the US Congress can rely on 14A to enforce a right that this court says did not exist in Dobbs?

Sean: Well, I too spend my days and nights thinking about this very issue. I think believe the correct approach to interpreting this provision is articulated in Katzenbach v. Morgan & Morgan, 384 US 641 (1966) which involved a state challenge to provisions of the Voting Rights Act.

In his challenge, the NY Attorney General raised this specific issue: can Congress pass legislation prohibiting state action if the Supreme Court has not determined that the specific state action violates the Constitution? The Court said that Congress may pass such legislation under § 5 of the Fourteenth Amendment—

Mark: (*interrupting Sean*) Well, I'm a married father of four, so I too don't bother sleeping, but instead fill my dulcet nights thinking that in arriving at its decision, the Court found that there is no legislative history supporting the narrow view of Congressional power. The Court further reasoned that the narrower view would limit Congress's "to the insignificant role . . . of merely informing the judgment of the judiciary…." In other words, without the power to create and expand rights, Congress would merely be limited to passing legislation rubber stamping the rights that the Court determines to exist. Finally, the Court examined the reasoning behind § 5.

Aaron: I was very excited when they laid out that reasoning, I almost spilled my Courvoisier! I was pleased to see that the Court determined that § 5 provided the same "broad powers expressed in the Necessary and Proper Clause" found in Art. I, § 8, cl. 18. This then led to the Court examining whether the provision of the Voting Rights Act at issue survived a rational basis review (i.e., whether it was appropriate legislation to enforce the Equal Protection Clause) under the McCulloch v. Maryland standard. Interestingly, as part of this discussion the Court discussed the "ratchet theory." This theory, as part of the broader view of § 5 powers, says that while Congress has the power to enforce or guarantee the rights protected under the Fourteenth Amendment, § 5 does not grant Congress the power to restrict, abrogate, or dilute those guarantees. In other words, Congress may find and protect rights, but it cannot ratchet them back.

Sean: But isn't is safe to say that here, Congress isn't finding a new right. That right was already found by the court in Roe and then affirmed again, decades later, in Casey. Additionally, the holding in Dobbs was that the issue should be decided by the people through their elected representatives. It did not specify state that this was a state issue. The people elected Congress and Congress has spoken. The court should not impose its policy preferences in this debate.

Aaron: Well concluded my friend. When I watch my son sleep, I often think to myself (as I think you two do as well) that the article only properly bears a narrow interpretation and the correct view is articulated in City of Boerne v. Flores, 521 US 507 (1997), which involved the Religious Freedom Restoration Act, a law which expressly sought to overturn Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 US 872 (1990).[3] The RFRA sought to change the standard that applies in challenges to governmental laws affecting religious exercise, and make it so that they are only permissible if they are necessary to achieve a compelling purpose (i.e. move the standard from rational basis to strict scrutiny).

Sean: Why Aaron, you indeed practically live in my head! The Court in Boerne found that the RFRA exceeded Congress's power. In so deciding, the Court did not overturn Katzenbach, acknowledging that § 5 is "a positive grant of legislative power." Instead, the Court simply narrowed the reach of this positive grant of power. The Court found that this is a remedial power that extends "only to enforcing the provisions of the Fourteenth Amendment…[and] Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."

Mark: You two are so right! We've all got to remember that the enactment of 14A has to be understood as the means by which the federal government could ensure the rebel states complied with the requirements of 13A, so as to ensure that slavery did not continue behind the fig leaf of states rights. 14A's origins were anchored to protecting specific constitutional rights. Over time the scope of our constitutional rights has widened (except for Dobbs <sad trumpet sound>), but those rights have always been rooted in the constitution.

Aaron: Yes you both make good points, they kind of points I would make if I wrote this whole portion of this presentation by myself.

I have another question: Doesn't the codification of Roe, merely ensure the provision of abortion procedures as an activity with a substantial effect on interstate commerce?

Sean: You're like a legal ventriloquist, you can just put words in my mouth. You raise an interesting question. I will point out that during certain historical periods, the court has deferred to congress' determinations and findings as to whether an activity had a sufficient effect on interstate commerce to come within the scope of congress' power.

Mark: Contrary wise, since US v. Morrison, 529 U.S. 598 (2000), the court has been less deferential to these congressional determinations the answer has been clear that a codification of Roe falls outside of congress' authority under the interstate commerce clause.

First, purely intrastate activity must be economic in nature to fall within congress' power. Abortion does not. The performance of an abortion procedure is a purely intrastate activity. The decision to get one is not an economic decision, it is a medical decision. Medical decisions are intensely private and personal.

They engage ethical, moral, and (for some) religious considerations. The primary concern is the health and wellbeing of the patient. That the patient may use the services of a business to carry out the decision does not transform a non-economic activity into an economic one.

Aaron: You are right (I'm sad to have to agree with Mark), I will add that Secondly, the decision as to whether to have an abortion falls within the traditional realm of state regulation. As observed by Justice Rhenquist in Morrison "Petitioner's reasoning, moreover, will not limit congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law, and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy will undoubtedly be significant."

Childrearing would necessarily include the decision whether to have a child at all. While that decision may have economic effects it is not in itself an economic decision. To hold otherwise would destroy the federal system of government, as there would be no limit to congress' usurpation of States' Police Power under the guise of regulation of interstate commerce.

Sean: Ok, ok, mildly new topic, I think there is a distinction, I'm wondering about the differences. The codification of Roe can be distinguished from Morrison, where congress created a federal civil cause of action for gender-based violence , and Lopez, the criminalization of firearm possession with 1000 feed of a school, were not related to activities that were sufficiently economic in nature to come within the ambit of the commerce clause. Here, we have the provision of healthcare services, which has long been recognized and regulated as a national market. The question is about regulating what services the healthcare industry can provide. Allowing a patchwork of state restrictions on healthcare services to develop will affect the national supply of family planning healthcare services. Congress' power to regulate those intrastate activities on the basis of their supply and demand effects is well supported by precedent. The court should not impose its policy preferences on this debate. It should leave policy to the legislative branch and defer to congress' determination that this is an interstate commerce issue.

Aaron: I'll drink brandy to that.

Mark: the next round is on me!

III. Stare Decisis Commentary – 10 mins

(Brian + Julia)

[JUDGE LAVIN]: While the scholars have been debating, our listeners have been commenting. I keep seeing the same questions over and over: What happened to *Roe v. Wade?* What happened to precedent?

Our next guest may have some answers. Professor Hickman teaches Constitutional Law at the Ruth Bader Ginsburg School of Law in Portland, Oregon. Welcome professor Hickman.

Professor: Thank you for having me.

{Stare Decisis slide 4}

[JUDGE LAVIN]: So, let's get right to it. Professor Hickman, what happened to precedent?

In 1973, the United States Supreme held in *Roe v. Wade* that our Constitution protected a woman's right to an abortion. But the *Dobbs* court, nearly fifty years later, ruled that there is no such protection. Can they do that?

Professor: Yes, they can. There is a legal principle called *stare decisis* which says prior decisions should generally be followed, but there are times when overturning a prior decision is proper. Unfortunately, there is no bright-line test, and there is plenty of room for disagreement.

[JUDGE LAVIN]: Understood. How did the Dobbs majority justify their departure from Roe?

Professor: The Dobbs court devoted several pages of their opinion to *stare decisis*. They note that the doctrine is, quote, "not an inexorable command" and "at its weakest when we interpret the Constitution."

[JUDGE LAVIN]: At its weakest when we interpret the Constitution? You mean it is easier to take away a Constitutional right than a right created by statute? How can that be?

Professor: That's correct. The explanation they provide is that it is very difficult to amend the Constitution, so if the court makes an incorrect ruling on constitutional rights, the only way to fix the problem is to reverse the prior decision. The Dobbs court pointed out that this happened numerous times before, and today we celebrate decisions which overturned prior Constitutional precedent.

[JUDGE LAVIN]: I suppose that may be correct. What was the decision that said states could impose segregation?

Professor: That was Plessy v. Ferguson, a 1896 decision by the Supreme Court. It was reversed in 1954 by *Brown v. Board of Education*.

The Dobbs court pointed to *Brown* and also to *Adkins v. Children's Hospital*. That was a 1923 decision which held that setting a minimum wage for women was unconstitutional. It was reversed in 1937 by *West Coast Hotel*. The decision, quote, "signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation." Our modern social "safety net" would not exist without *West Coast Hotel* and its reversal of prior Constitutional precedent.

[JUDGE LAVIN]: So, the *Dobbs* court is saying overturning Constitutional precedent can be a good thing?

{Overturning Roe… slide 5}

Professor: Absolutely, and adding to that, the *Dobbs* court characterizes its decision as actually returning rights rather than destroying them. By citing to cases such as *Brown v. Board of Education* and *West Coast Hotel*, the Court is sending the message that the overruling of *Roe*, too, should be viewed as a positive development, not a negative one.

[JUDGE LAVIN]: Well, we know there are millions who disagree with that claim. Obviously, the fact that there were other cases, like *Brown*, where reversing Constitutional precedent was proper does not justify overturning just anything. How, exactly, did they justify their decision?

Professor: The Court was very specific. They identified five factors. I can quickly go over each one for you if you like.

[JUDGE LAVIN]: Sure, please go ahead.

{Nature of the Error slide 6}

Professor: First, we have the "nature of the error." The court emphasized *Roe's* destruction of the people's right to legislate on a question of, quote, "profound moral and social importance". They assert that abortion rights were effectively reserved to the States in the Constitution. By holding that the Constitution protects a right to abortion, the *Roe* court had unjustly limited the States' power.

[JUDGE LAVIN]: Limited the States' power to do what? Pass laws that tell women what to do with their bodies?

Professor: Well, the *Dobbs* court does not put it that way. Instead, they claim that by reversing *Roe* they restored rights that are guaranteed by the Constitution but were yanked away through, quote "nothing but raw judicial power."

[JUDGE LAVIN]: So, the *Dobbs* court is fighting for the people's rights. That's how they put it?

Professor: Essentially.

[JUDGE LAVIN]: Alright. Well, please tell us about the second factor.

{Quality of the Reasoning slide 7}

Professor: The second factor is the "quality of reasoning." Here is where the *Dobbs* Court spends most of its ink, repeatedly criticizing the methods and reasoning of the *Roe* Court.

Specifically, the *Dobbs* Court complains that *Roe*, quote, "concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution" or any other source.

Basically, the *Dobbs* majority is criticizing *Roe* as something one would expect from a legislature, not a Court. The decision, they say, reflects that the Court engaged in fact-finding, provided a slanted discussion of history, and ultimately arrived upon a trimester-based rule system that has been difficult to apply in practice.

Further, the use of trimesters is arbitrary. And, the point of viability can vary greatly in reality, as health, access to care and development varies from person to person, fetus to fetus. Do we need to change the date of viability, they ask rhetorically, when medical advances improve the odds of the unborn to survive outside the womb?

[JUDGE LAVIN]: So, the *Dobbs* Court was not a fan of the *Roe* Court's reasoning. What's next?

{Workability slide 8}

Professor: The third factor is the "workability" of the rules and, as the *Dobbs* Court put it, "*Casey*'s 'undue burden' test has scored poorly on the workability scale."

[JUDGE LAVIN]: Why do they say this? Weren't the boundaries for abortion laws well-established during the decades after *Roe* and *Casey*.

Professor: Actually, there have been a number of disagreements between courts. As the majority pointed out, there has been disagreement over parental notification rules, disagreements over the extent to which delay constitutes an undue burden, and disagreements over whether a State may regulate abortions because of the fetus's race, sex, or disability.

[JUDGE LAVIN]: But, aren't there many laws or Constitutional rights that lead to disagreements and litigation? There's a lot of disagreement over where the line should be for free speech, but that does not mean that the right of free speech should be taken away.

Professor: That is correct, and the *Dobbs* majority would not disagree with you. Rather, they are pointing out that workability is one factor, not the only factor, which played a role in their decision to overturn *Roe.*

[JUDGE LAVIN]: Understood. What is the next factor?

{Disruptive Effects... slide 9}

Professor: Number four is the prior decision's quote, "disruptive effect on other areas of the law". The majority claims Roe had numerous disruptive effects, writing that "The Court's abortion cases have diluted the strict standard for facial constitutional challenges... [and]... have ignored the Court's third-party standing doctrine." Abortion cases, they claim have, quote, "disregarded standard *res judicata* principles...[and]... have distorted *First Amendment* doctrines."

They provide case examples for each of those points, but I doubt you have the time for that.

[JUDGE LAVIN]: That's right, we are just going to have to trust you. What is the final factor.

{Reliance Interests slide 10}

Professor: The final factor is reliance. Have people relied on *Roe* in making decisions about their life? The *Dobbs* court says no, explaining that, quote "abortion is generally unplanned activity." In other words, abortions are unplanned by their very nature, so there is no reliance.

[JUDGE LAVIN]: I'm not sure I can agree with you on that one...

Professor [interrupting]: Oh, please, I don't agree either. I'm just telling you what the Dobbs Court said, not what I think. I think *Dobbs* is wrong. The majority failed to adequately consider the right of women to control their own bodies. *Roe* recognized this right as fundamental. *Dobbs* takes it away, plain and simple. Basically, *Dobbs* decided that a woman's right to control her body is secondary to the rights of the State.

[JUDGE LAVIN]: Some of the Supreme Court Justices said basically the same thing, didn't they?

Professor: Yes indeed. Justices Breyer, Sotomayor and Kagan dissented strongly. They see the loss of abortion rights as a tragedy, and a dangerous step towards the fall of other rights protected by the 14th Amendment.

[Judge Lavin]: That's alarming. Doesn't the 14th Amendment protect same sex and interracial marriage?

Professor: That's right. The dissent calls the majority's approach to overturning precedent "cavalier," and they accuse the majority of abandoning *stare decisis* and overturning *Roe* and *Casey* just because, quote "the composition of [the] court has changed."

[Judge Lavin]: They sure have a strong disagreement. When the majority and dissent talk about *stare decisis* are they even looking at the same rule?

{Quality of Reasoning slide 11}

Professor: For the most part, but as noted before, there is no bright-line test, leaving plenty of room for disagreement. For example, while the majority talks about the "nature of the error" behind *Roe v. Wade*, the dissent disagrees that there was any error in the first place.

The dissent acknowledges that abortion is a divisive issue, but they see *Roe* and *Casey* as striking an appropriate balance. They complain that the majority discarded that balance and overruled *Roe* and *Casey* because it, quote, "always despised" them and "now ha[s] the votes to discard them."

[Judge Lavin]: Sounds like they are calling the reversal of Roe a politically motivated decision.

Professor: Indeed.

[Judge Lavin]: How does the dissent respond to the majority's position that a right to abortion isn't grounded in the text of the Constitution?

Professor: The dissent rejects the majority's narrow, originalist view of the Constitution. They do not believe that the predominant beliefs at the time the 14th Amendment was adopted should mark the outer limits for the liberties protected by the Amendment. This is especially true considering that the men who ratified the 14th Amendment did not perceive women as equals and did not recognize women's rights.

The dissent points out that the Supreme Court has repeatedly found there is a realm of personal liberty into which the government cannot enter. This is how the 14th Amendment has been interpreted to protect, among other things, the rights to interracial and same sex marriage, contraception, and, of course, until just recently, a women's right to choose.

The dissent warns that quote "no one should seriously believe that the majority is done" because *Roe* and *Casey* were part of the same "constitutional fabric which protects autonomous decision making over the most personal of life's decisions."

[Judge Lavin]: That's a little alarming. How about the workability factor? What did the dissent have to say there?

{Workability Redux Slide 12}

Professor: Well, in short, they believe that *Roe* and *Casey*'s legal framework is workable. While there has been some disagreement between court decisions, there always is, and *Casey*'s "substantial obstacle" test is the same test used for analyzing restrictions on speech, voting, and interstate commerce.

[Judge Lavin]: So, nothing unworkable about a test courts readily apply in other areas of the law. What else did the dissent have to say?

{Reliance Slide 13}

Professor: Well, they certainly disagree with the majority's conclusion that nobody was relying on the right to abortion. They write that, quote "the most striking feature of the majority ['s opinion] is the absence of any serious discussion of how its ruling will affect women. It reveals how little it knows or cares about women's lives or about the suffering its decision will cause."

The dissent complains that overturning *Roe* and *Casey* will have a profoundly disruptive effect. Taking away the right to an abortion will quote "diminish women's opportunities to participate fully and equally in the nation's political, social, and economic life." Because of this decision, countless women will have to make different decisions about "careers, education, relationships, and whether they try to become pregnant." Women today now have fewer rights than their mothers and grandmothers.

[Judge Lavin]: Sometimes I still can't believe this happened. Thank you for your time.

Professor: Thank you for having me.

IV. Equal Protection Argument – 12 mins

(Kendall + Megha + Sam Z. as needed)

Judge Lavin as NPR host:

As listeners are no doubt aware, due to recent budget cuts, the supreme court has been hearing cases by a panel of two randomly appointed judges rather than all justices. Cane v. Arizona has drawn our two newest justices, Judge Zeigler appointed by president Biden and Judge Bruun appointed by President DeSantis.

{*Cane v. State of Arizona* Slide 14}

We now join the supreme court as counsel for Dr. Cane begins her argument.

Cane vs. State of Arizona

Megha Desai

Mr/Madam Chief Justice and may it please the court. My name is Megha Desai and I am here on behalf of Dr. Cane.

The state of Arizona has violated Dr. Cane's and her patient's rights under the equal protection clause of the US constitution by passing a law that discriminates against her and her patients on the basis of their sex.

When a law classifies based on sex (including pregnancy), this law must survive "heightened scrutiny." To survive heightened scrutiny, the State of Arizona must offer an "exceedingly persuasive justification" for its sex-based classification: specifically, it must show that its decision to regulate by sex-discriminatory means is substantially related to the achievement of important governmental objectives.

Judge Bruun: Surely not all laws that state any differences between men and women are unconstitutional?

No your honor, as this court held in U.S vs. Virginia in 1996, a state must satisfy heightened scrutiny by offering an exceedingly persuasive justification for the sex based classification.

Judge Zeigler: but this is intermediate scrutiny not strict scrutiny correct?

Yes your honor, the . . .

Judge Bruun (interrupting): What about Geduldig? Didn't we say that under the equal protection act regulating sex specific procedures does not trigger scrutiny unless there is proof of animus?

In 1973 the Court did make that finding, but this Court's more recent findings, such as Virginia have held that regulations of pregnancy can be sex-based when they are tied to expectations and stereotypes related to a person's biological sex.

To be constitutional, regulations of pregnancy must be substantially related to an important government objective. As this Court held in *Virginia,* in meeting this burden, the State may "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females," nor may sex classifications "be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

Here, this law is not substantially related to an important government objective . . .

Judge Bruun: Is it an important government objective?

According to the State of Arizona the government objective is in protecting unborn children and potential mothers. The State's rationale of protecting the health of potential mothers is illusory. If its claim were genuinely based in science, the State would address the scientific finding that childbirth is many times more dangerous than abortion—as this Court and others have recognized. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016) (observing that "[n]ationwide, childbirth is 14 times more likely than abortion to result in death").

Moreover, the state's own description demonstrates the unconstitutional bias in the law under this statutory scheme. The law defines all people cable of giving birth as "potential mothers" defining any person with female sex organs by a stereotype about the role of females as mothers. This court made it abundantly clear in its precedent that a state cannot classify males and females in order to create or perpetuate the legal social and economic inferiority of women.

Judge Bruun: Are you saying that women who give birth are inferior to those who don't give birth?

No your honor, but defining women only by their ability to procreate does ignore all other aspects of their lives and contributions to society in favor of bearing children. The law also echoes paternalistic stereotypes by requiring women to bear the children and Fathers to provide financially.

Incidentally this law also demonstrates bias against any family structure where there is not a traditional "Father" such as a family with unmarried lesbian parents or a woman who utilizes a sperm donor.

Judge Bruun: How? They get 8 weeks, are you really telling me that a person needs two months from the time of conception to decide they don't want a baby?

Your honor, "weeks" of pregnancy does not count from the time of fertilization, it counts from the time of the person's last period. 8 weeks of pregnancy falls 5 weeks after the sexual act that leads to pregnancy, or 4-6 weeks after fertilization and implantation. Depending on a person's cycle they may be only a few days or weeks late. Such a narrow period of time does not allow a person a reasonable time to realize they are pregnant, let alone take the necessary steps to find an appointment and achieve medical intervention.

Your question also demonstrates ways in which our society places the burden of pregnancy and the burden of knowledge about pregnancy disproportionately on Women.

Judge Bruun: Doesn't this law address that by requiring Fathers to share in the burden of medical care and ensuring those women who give birth have paid leave.

One real cost is limiting a woman's ability to control her reproductive health, and as this court previously held (in Casey) in order for a woman to participate equally in the economic and social life of the nation they must be in control of when and if they give birth to a child. The State of Arizona has robbed women of that right.

Moreover, the costs of pregnancy are far more than the financial burdens associated with medical care and recovery from birth. Most prenatal medical appointments are only available during the workday requiring women miss work every few weeks. Pregnancy can be associated with illness, exhaustion, lack of sleep, brain fog, and minor and significant physical discomfort. Pregnancy can also exacerbate a person's existing medical conditions, or create new medical problems such as gestational diabetes. There are real burdens associated with pregnancy in and of itself.

Judge Zeigler: And Dr Cane has one of these conditions, correct?

Yes, your honor. Dr. Cane has epilepsy fully controlled by medication. Without her medication she would be unable to safely perform many aspects of her job, including patient examinations and surgical procedures. The medication causes severe birth defects and can cause miscarriages. A person like Dr. Cane cannot safely carry a child and work.

Judge Zeigler: So when she became pregnant she had a medical abortion.

Yes your honor.

Judge Bruun: Then this law doesn't affect her, she took the pills early enough so it doesn't matter.

It is unclear your honor. After she publicly told her story, the state subpoenaed her medical records and Apple history to determine the date of her last period. The potential criminal matter has been held until this case could be heard.

But more importantly a male doctor would never be put in the same position Dr. Cane is.

Judge Bruun. But that is an accident of birth, not a function of the state's law.

It is a function of the state's choice to regulate bodies that can become pregnant. This court has held that sex classifications cannot be justified by physical differences between men and women (Virginia).

The aspects of the Arizona law that promote the equality of persons who choose to give birth may pass constitutional scrutiny, such as making medical care more available to pregnant women and unemployment eligibility after giving birth, are sex-based classifications that promote equal employment opportunity or advance the full development of our Nations people (Cal. Fed)

This court has held that sex-based classifications that promote equality are constitutional, it is when laws perpetuate the myth that women are inferior or must perform certain household duties. Judge Rehnquist wrote in Hibbs that Congress had the authority to pass the Family Medical Leave Act, in part to remedy and prevent inequality experienced by women because of historical ideology around the roles of women.

Laws regulating pregnancy that are sex-based qualifications violate the Equal Protection Clause when they are rooted in sex-role stereotypes that injure or subordinate women.

The Arizona law singles out pregnant women for regulation and deprives Women, but not Men of the right to make choices about whether or not to have children. It deprives Dr Cane and the Women of Arizona of the Equal Protection of the law.

Kendall:

Mr/Madam Chief Justice and may it please the court. My name is Kendall Gourley-Paterson and I am here on behalf of the state of Arizona.

The law passed by the state of Arizona is constitutional.

I begin with the level of scrutiny this court should apply Judge Bruun correctly identified that the level of scrutiny in this case is not intermediate scrutiny, but rational basis review.

Judge Bruun: Glad someone thinks I know things.

This court has repeatedly held that laws regarding pregnancy, do not necessarily trigger the intermediate scrutiny applied to laws that classify on the basis of sex.

Judge Zeigler: Are you really trying to say pregnancy does not affect women?

No Your honor, but pregnancy does not affect all women. This law only affects a subset of women, those who are pregnant. It is only when laws regulating pregnancy, a subset of women,k and promote stereotypes about . . .

Judge Zeigler: Doesn't this law defines any person capable of becoming pregnant as a "Potential Mother" and regulates them, how is that mot regulating all women?

Potential Mothers are only those capable of giving birth, again a subset of women, not all women so . . .

Judge Zeigler: Hold on, aren't women still capable of giving birth even after menopause women in their 60s have given birth by implanting a fertilized egg.

I believe so your honor, but those pregnancies would be the result of a desired pregnancy and would not be affected by this laws due to . . . .

Judge Zeigler: Assuming everything goes well.

Your honor?

Judge Zeigler: Let's take the example of a pregnant octogenarian, her grandchild cannot conceive and she offers up her uterus to carry her great grandchild. Two fertilized eggs are implanted and both develop. At the 10-week scan, one fetus has not developed properly and will not survive birth. The other fetus is doing great. Wouldn't this law prevent the family from deciding to protect the healthy fetus by terminating the unhealthy fetus.

Yes your honor. The state has a legitimate interest in promoting the healthy delivery of unborn children and ensuring Mothers have access to pre and post-natal care.

Judge Zeigler: but not an important government objective?

Both your honor, but the correct level of scrutiny is rational basis review because this law does not promote stereotypes about women and the relationships between women and men. Rather it presumes the women are working and will need time off from work to recover from birth. This law promotes equality between the sexes and should be analyzed under rational basis review. But even if this court applies intermediate scrutiny protecting the health and welfare of potential mothers and unborn children is an important government objective.

Like Roe and Dobbs, Dr. Cane's argument fails because it focuses only on mothers, and does not take into consideration the significant state interest in ensuring the health and safety of unborn innocent children. This law ensures prenatal medical care for all unborn children and ensures all pregnant women receive medical care before and after birth.

Judge Zeigler: but then they lose care"

No your honor, then mothers and children would still be covered under the state program for all citizens based on their income. A person who becomes pregnant and does not wish to raise a child has the

option to have free medical care, give birth, give the child up for adoption, and then recover from the birth with paid leave.

> **Judge Zeigler: One of the things I notice about the is law is that it is very vague about actions that could trigger civil liability and criminal charges. If Dr. Cane had not terminated a pregnancy, ingested her prescriptions medications, and suffered a miscarriage, could she be held criminally liable?**

That would ultimately be a decision for the district attorney.

> **Judge Zeigler: But the state could charge her correct?**

Potentially your honor, but . . .

> **Judge Zeigler: so due to her medical condition, Dr. Cane does not have a way to avoid criminal liability if she becomes pregnant.**

Only if she chooses to wait, or fails to use birth control.

> **Judge Zeigler: So according to your argument the state has an important state interest in ensuring that any person who becomes pregnant delivers that child**.

Yes and has access to the medical care that would provide the best . . .

> **Judge Zeigler: And that state interest outweighs Dr. Cane and the women of Arizona's right to bodily autonomy.**

It is not just those two interest there is also the interest of an unborn . . .

> **Judge Zeigler: I'm not talking about hypothetical people, I'm taking about existing individuals. You are telling me that the state has a right to force a person to give birth against their will, correct?**

Well . . .

> **Judge Bruun: What about the draft?**
>
> **Judge Zeigler: Sorry Judge, I didn't realize you planned on participating.**
>
> **Judge Bruun: We force citizens to sign up for the draft, go to war, risking their life and health.**

Yes you honor, and this court has determined that it is constitutional to require men and not women to sign up for the draft, to put their employment, physical well being and potentially lives at risk, to protect the country. Similarly the state can require women to . . .

> **Judge Zeigler: The last active draft was 1973, it was so unpopular we have not conscripted forces in over 50 years.**

True your honor—

Judge Zeigler: —and we held that heightened scrutiny applied when assessing the draft under the equal protection clause didn't we.

Yes your honor, and under that standard we still require men to sign up for the draft to serve the important state interest in protection of our country . . .

Judge Zeigler: Are you really trying to make the argument that the state can conscript women into carrying children against their will in the same way the country can force men to go to war against their will?

I am arguing that the equal protection clause of the united states constitution allows The People to make laws that require men and women in certain circumstances to put their bodies and health on the line so long as there is a reasonable link to a legitimate state interest, or if the court applies a heightened scrutiny it is substantially related to the achievement of an important government interest. Arizona passed a law that is substantially related to the important government interest in protecting unborn children and their mothers, it does not violate the equal protection clause.

Judge Zeigler: We'll see about that.

V. NPR Concluding Remarks – 1 min

(Judge Lavin)

JUDGE LAVIN: Far from settling the fraught legal landscape that has defined abortion for the last 50 years, the Supreme Court's overturning of *Roe* with its *Dobbs* decision has ushered in a new era of legislation, litigation and uncertainty for Americans across the political divide.

QUESTIONS