Transforming the Grounds: Autonomy and Reproductive Freedom

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I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since Roe was decided.¹

On July 3, 1989, a plurality of the Supreme Court of the United States issued an opinion in Webster v. Reproductive Health Services² which, while not overturning Roe v. Wade,³ shook the foundations of women’s constitutional rights of liberty and equality. Three Justices indicated that they believed the trimester system set forth in Roe should be abandoned, while another Justice said that he would explicitly overrule Roe. Webster thus becomes the most recent and most dangerous attack on reproductive rights for women since Roe was decided in 1973.⁴

In this paper, we will examine how legal theories of privacy and equal protection have been applied to cases involving women’s reproductive freedom. We will assess some of the past and current assaults on women’s reproductive freedom. The conclusion will suggest that interpretations of privacy and equal protection have not been adequate to safeguard women’s control over their bodies and that an autonomy analysis would achieve better protection of women’s reproductive freedom.

I. Overview

During the 1960’s and 1970’s, women became increasingly active in all aspects of society, demanding that they be treated as equals and given the power to decide whether or not to procreate. The desire to achieve both

† Authors' names are in alphabetical order. We want to thank Mark Blumberg, John Beardsley, Louise Zanar, Kate Martin, Susan Persons, Phyllis Palmer and the women at the 1988 Feminism and Legal Theory conference for their insights and suggestions.

4. This paper, presented at the 1988 Feminism and Legal Theory Conference, was written before the Webster decision. In August 1989, we incorporated Webster into our paper. Webster represents a significant threat to reproductive freedom and an analysis of that decision could easily be the topic of an entire paper. Given the broad scope of this paper, however, we have had to limit our discussion of Webster.
equality in the workplace and the power to make reproductive choices represented challenges by women to their traditional roles, particularly those of mother, homemaker, and wife. The initial response of legislatures and courts to women's demands for increased power over their lives was tentative acquiescence. In 1971, for the first time in its history, the U.S. Supreme Court held that a gender-based statute violated the Equal Protection Clause. In Reed, the Court struck down a statute compelling a preference for males to administer estates and held that laws treating similarly situated men and women dissimilarly violated the Equal Protection Clause of the Fourteenth Amendment. Two years later, in Roe v. Wade, the Court held that among the "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'" is a woman's decision whether or not to terminate her pregnancy. Roe marked the first time the doctrine of privacy, with roots in the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the Constitution, was used to assure the reproductive rights specific to women. Reed and Roe reflected the Court's recognition of the changing role of women in our society.

In the 1980's, government institutions, most notably the Supreme Court in Webster, are joining what appears to be a "backlash" against women's empowerment. A movie review in Ms. argues that: "not since the late forties have movies pushed home, hearth and motherhood with such fer-vor." Such films as Fatal Attraction, The Big Easy and Baby Boom, depict "unmarried working women as deficient in humanity," the corollary being that women become "human" only through motherhood. To cite another example, "surrogacy" has become a profitable business over the last twelve years, despite the fact that there has been no increase in infertility since 1965 among married couples or the general population. A Ms. special report states that "the assumption perhaps inherent in the flourishing infertility industry that a child is worth having at any cost can glorify motherhood to the detriment of other roles that women have fought hard to perform." More evidence of the "backlash" against women is an increasing effort to get the public to perceive the fetus as a separate legal entity from the pregnant woman, with greater rights than the pregnant woman. This phenomenon caused the director of the ACLU Women's Rights Project to remark:

7. Id. at 152.
8. Id.
[W]e will need a new warning in addition to the ones on cigarette packages, in bars, and on non-prescription drugs. "Warning: pregnancy is dangerous to your constitutional rights. You will lose the rights to liberty, to equality and to privacy."13

Like many segments of our society, the courts and legislatures have been ambivalent about and even hostile to the change in women's roles over the last twenty years. Nowhere has this ambivalence been more apparent than in the area of reproductive freedom. Consequently, in no other area of the law are women more vulnerable to new restrictions and erosion of their hard-won gains. Like Sylvia Law, we believe that since Roe women's struggle for control of their bodies has been transformed into debates about medical practice and moral and religious views of the personhood of the fetus."14 Women's lives and sex-based equality have become secondary issues.15 As will be discussed, there have been countless attempts to overturn and restrict Roe in the last fifteen years. Women today face a "theory of fetal rights" that threatens to subordinate women's fundamental rights to presumed "rights" of the fetus and to make adversaries of a woman and her fetus. By viewing the fetus as distinct from the woman, this theory undercuts traditional assumptions that the pregnant woman is entitled, like all persons, to the dignity and respect to make decisions for herself and consequently, the fetus. "Fathers' rights" cases are another example of recent attempts to intrude on a woman's right of autonomy.

II. TRADITIONAL LEGAL APPLICATIONS OF PRIVACY AND EQUAL PROTECTION HAVE NOT PROVED ADEQUATE FOR WOMEN'S REPRODUCTIVE FREEDOM

Noted feminist Catharine MacKinnon states that "the specific exclusion or absence of women and women's concerns from the definition and design of the legal system since its founding, combined with its determined adherence to precedent,"16 leaves women with a problem of systemic dimension. And in no other area of the law does this problem have more of an oppressive and discriminatory potential than in reproductive freedom. The success of the fetal rights advocates and the many attempts to dilute Roe highlight the limits of the privacy doctrine, as currently applied, to secure for women the constitutional guarantee of freedom from unwarranted government intervention.

In 1965, the Supreme Court held in Griswold v. Connecticut17 that

15. Id.
17. 381 U.S. 479 (1965).
there are certain privacy rights found in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments that are "fundamental," and that the Court must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The Court held in *Griswold* that the right to marital privacy meant that the state could not intrude into decisions regarding use of contraceptives in a marriage.

In *Eisenstadt v. Baird*, a case which concerned the use of contraceptives by unmarried persons, the Supreme Court extended the scope of this fundamental right by holding that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Noted constitutional scholar Laurence Tribe explains, "[T]he effect of *Eisenstadt v. Baird* was to single out as decisive in *Griswold* the element of reproductive autonomy, something that was made clear in 1977 in *Carey v. Population Services International*.

To the extent that our society has always viewed the family and home as a zone of privacy, these cases accurately reflect traditions "rooted in our national conscience." When, however, the Supreme Court extended this right of privacy in *Roe* to include a woman's right to choose whether or not to terminate her pregnancy, some critics felt the decision went beyond what many believed to be a principle "so rooted as to be ranked fundamental." While reproductive freedom for women may not have been a particularly strong tradition in our society in 1973, rights to marital pri-

18. Id. at 493 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
20. Id. at 453.
22. The traditional zone of privacy has been the family, a zone so protected that a man's home was said to be his castle. Brandeis and Warren, The Right to Privacy, 5 HARV. L. REV. 193, 220 (1890). However, this notion of protection for the traditional male-dominated family is changing, as evidenced by laws criminalizing spouse abuse, child abuse and non-payment of child support.
24. The restrictive criminal abortion laws in effect in a majority of the states in 1973 were enacted, for the most part, in the latter half of the 19th century. These laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, were not of ancient or common-law origin. In fact, in *Roe*, the Court wrote:

[A] common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. . . . [A] woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

vacy, bodily integrity and self-determination for all people were.

Roe v. Wade was tremendously important for women’s freedom. For the first time in our history, the Court recognized a right specifically enabling women to gain a degree of control over their bodies and lives, to have a right of autonomy similar to men.

When we talk about women’s rights, we can get all the rights in the world—the right to vote, the right to go to school—and none of them means a doggone thing if we don’t own the flesh we stand in, if we can’t control what happens to us, if the whole course of our lives can be changed by somebody else that can get us pregnant by accident, or by deceit, or by force. So I consider the right to elective abortion, whether you dream of doing it or not, is [sic] the cornerstone of the women’s movement...

Roe held that in the first trimester of pregnancy, the woman, with her physician, has a constitutional right to choose whether or not to terminate her pregnancy. The constitutional right continues throughout the pregnancy, but throughout the second trimester is weighed against the state’s interest in the woman’s health, and throughout the third trimester is weighed against the state’s compelling interests in the potential human life and the woman’s health. Regarding the fetus, Roe held that, “All this together... persuades us that the word ‘person’ as used in the Fourteenth Amendment does not include the unborn.”

Additionally, Roe held that the state’s interest in the fetus never outweighs its interest in the mother’s health. The Supreme Court reinforced its holding that there can be no trade-off between the fetus and the mother’s health in Thornburgh v. American College of Obstetricians and Gynecologists. In deciding Thornburgh, the Court wrote:

The Court of Appeals ruled that Section 3210(b) was unconstitutional because it required a “trade-off” between the woman’s health and fetal survival, and failed to require that maternal health be the physician’s paramount consideration... We agree with the Court of Appeals and therefore find the statute to be facially invalid.

25. “[T]he overriding function of the Fourth Amendment is to protect personal privacy and integrity against unwarranted intrusion by the state.” Schmerber v. California, 384 U.S. 757, 767 (1966).
27. Luker, supra note 24, at 97 (quoting one of the first women recruited to the Society for Humane Abortions).
28. 410 U.S. at 158.
29. 476 U.S. 747 (1986). (Thornburgh addressed Section 3210(b) of the Pennsylvania Abortion Control Act which established the degree of care for post-viability abortions.)
30. Id. at 768-69 (citing Colautti v. Franklin, 439 U.S. 379 (1979)) (recognizing undesirability of “trade-off” between the woman’s health and additional percentage points of fetal survival”).
Despite the fact that Roe and its progeny may be the most empowering court decisions for women, neither Roe nor subsequent cases discuss its impact on gender equality. Professor Sylvia Law remarks that in Roe, the "rhetoric of privacy . . . blunts our ability to focus on the fact that it is women who are oppressed when abortion is denied."\(^{31}\) Roe would have better secured women's reproductive freedom had it acknowledged its sex-specific impact and its contribution to achieving gender equality. Perhaps because it did not acknowledge issues of equality, or perhaps because there is a lack of consensus on the extent of privacy, Roe has been frequently criticized and its original mandate has been eroded.

Current equal protection analysis has also failed to secure for women the right to be treated as equal citizens. In Professor Kenneth Karst's article on equal citizenship, he states: "Equality, as an abstraction, may be value-neutral, but the Fourteenth Amendment is not."\(^{32}\) At the core of the Amendment, particularly the Equal Protection Clause, is "a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."\(^{33}\) In its application, the Equal Protection Clause will "operate to prohibit the society from inflicting a 'status-harm' on members of a group because of their group membership."\(^{34}\) By limiting or prohibiting women's opportunities to make decisions about their bodies and lives, the courts ignore this principle of equal citizenship.

Although the Supreme Court has repeatedly held that a middle level of scrutiny be applied to gender classifications, and that any sex-based discrimination be supported by "exceedingly persuasive justification . . . which does not itself reflect archaic and stereotypic notions,"\(^{35}\) it has not applied this heightened scrutiny to classifications based on pregnancy.\(^{36}\) Because pregnancy is unique to women and there is no male analogue to women's childbearing ability, the Court has found that men and women are not "similarly situated." Thus, reproductive-based classifications need only meet the most minimal standard of review, leaving women's reproductive freedom virtually unprotected under the Equal Protection Clause. The effect of the Court's current interpretation of equal protection analysis

\(^{31}\) Law, supra note 14, at 1020. The Webster plurality opinions barely mention women at all. Justice Scalia's opinion does not mention women once. These omissions led Justice Blackmun to remark, "[o]f the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous." Webster v. Reproductive Health Services, 109 S.Ct. 3040, 3078 (1989) (Blackmun, J., dissenting).


\(^{33}\) Id.

\(^{34}\) Id. at 8.


is that when legislative classifications are based on "true" biological differences between men and women, then men and women are considered not similarly situated with regard to the legislative ends. Therefore, there is no Fourteenth Amendment violation since gender classifications based on "real" differences do not offend the Court's narrowly defined and male-based equality model.

Examples of cases in which the court has used this kind of analysis are, among others, *Michael M. v. Superior Court* (involving statutory rape: male and female teenagers not similarly situated with respect to sexual intercourse); *Rostker v. Goldberg* (because women cannot go into combat, men and women are not similarly situated with respect to the Military Selective Service Act); and *Parham v. Hughes* (mothers of illegitimate children and fathers of illegitimate children are not similarly situated with respect to their child's wrongful death benefits).

The most extreme example of this line of cases is *Geduldig v. Aiello.* *Geduldig* involved a California state disability insurance plan which covered virtually all disabilities except pregnancy. The Supreme Court put a new twist on the similarly situated argument by finding that, in fact, men and women were being treated equally for insurance purposes; it was only pregnant persons who were being treated differently. Men and women were treated the same for all risks covered in that neither men nor women could recover benefits for pregnancy. The Court therefore found that discrimination on the basis of pregnancy is not gender-based discrimination, so there was no need for heightened scrutiny.

In *General Electric Co. v. Gilbert,* this same analysis was extended to Title VII of the Civil Rights Act. *Gilbert* involved General Electric Company's exclusion of pregnancy from a general coverage disability plan. The Supreme Court held that discrimination against pregnancy was not gender-based discrimination, and thus, not unlawful under Title VII. Congress disagreed and passed the Pregnancy Discrimination Act in response to *Gilbert.*

In a later case, *Nashville v. Satty,* the Supreme Court, prior to the passage of the Pregnancy Discrimination Act, found that an employer violated Title VII by denying women accrued seniority leave if their absence was due to pregnancy. In that case, Justice Rehnquist, in distinguishing

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41. 429 U.S. 125 (1976).
the decision from *Gilbert*, and therefore *Geduldig*, said as follows: "Here, by comparison, petitioner has not merely refused to extend a benefit to women that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer."

In cases where the Supreme Court can perceive a clear male analogue, it has applied heightened scrutiny and found gender-based differences in treatment a violation of the Fourteenth Amendment's Equal Protection Clause. So, for instance, in cases involving equal pay in the military, estate administration, Social Security benefits, and parental support, where men and women were treated differently, the Court found equal protection violations. Specifically, as soon as women's reproductive capacity becomes an issue, their opportunity to have the same life options as men are restricted.

III. SUMMARY OF THESIS: THE RIGHT OF AUTONOMY IS A FUNDAMENTAL RIGHT FOR WOMEN AND MEN

Although women have been "fit" into a legal construction that was not developed to deal with "gender-based classification and reproductive autonomy," there is existing law which, if appropriately applied, will help to secure women's reproductive freedom. Our thesis is that there is a fundamental right to autonomy guaranteed by the Constitution and that men and women are similarly situated with respect to this right to autonomy. Thus, the recent restrictions on women's reproductive freedom violate this fundamental right under due process analysis and under equal protection analysis. Once it is understood that autonomy is a fundamental right, due process prohibits the government from putting restrictions on women's

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46. Id. at 142.
54. The Ninth Amendment obviously does not create federally enforceable rights. It merely says, 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of 'the Blessings of Liberty' mentioned in the preamble to the Constitution. Many of them, in my view, come within the meaning of the term 'liberty' as used in the Fourteenth Amendment . . . First is the autonomous control over the development and expression of one's intellect, interests, tastes and personality.
56. Gerety adds that: "Privacy will be defined here as an autonomy or control over the intimacies of personal identity. Autonomy, identity, and intimacy are all necessary (and together normally sufficient) for the proper invocation of the concept of privacy." *Gerety, Redefining Privacy*, 12 HARV. C. R.- C. L. L. REV. 233, 236 (1977).
freedom unless such restrictions are necessary to meet a compelling state interest and are the most limited alternatives available.

Additionally, sex-based access to autonomy constitutes a serious equal protection violation because equal protection requires that women’s and men’s right of autonomy be equally guaranteed. Recognizing that men and women are similarly situated with respect to the constitutional right of autonomy requires the courts to evaluate whether there is an “exceedingly persuasive justification” for the restriction which does not “itself reflect archaic and stereotypic notions.” Once the fundamental right of autonomy is recognized, it has two effects on an equal protection analysis. Any restriction on autonomy which operates differently with respect to pregnant women than to others will be subject to strict scrutiny because there is governmental infringement of a fundamental right. In addition, because men and women are similarly situated with respect to the right of autonomy, properly analyzed, restrictions on the autonomy of pregnant women are unconstitutionally sex-based and subject, at a minimum, to middle-tier scrutiny.

Long recognized by the courts, though not specifically articulated as such in recent constitutional analysis, the right of autonomy is a “positive” right to bodily integrity and self-determination. It is also a “negative” right, used to “define some reliable limits upon the state’s power to shape the behavior of individuals and groups, whether by controlling the experiences available to them or by regulating the experiences with which their choices confront others.” In the late 19th century, the Supreme Court wrote:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

In this century, the courts have also set limits on the degree to which the government can intrude on personal autonomy, finding such rights as the “right to be let alone,” a right of bodily integrity, and a right to

56. L. Tribe, supra note 21, at 1304.
58. Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).
59. Winston v. Lee, 470 U.S. 753, 760 (1985). As discussed later in this paper, Winston is one of many Fourth Amendment criminal law cases upholding a person’s interest in privacy and security against a competing societal interest in physical invasion of the body to retrieve criminal evidence. Gerety’s comments on autonomy also express this right to bodily integrity:

All of this comes in the end to control over the most basic vehicle of selfhood: the bodies. For control over the body is the first form of autonomy and the necessary condition, for those who are not saints or stoics, of all later forms. Any plausible definition of privacy, then, whatever the sources of its normative commitments, must take the body as its first and most basic reference for control over personal identity.
As recently as 1986, the Supreme Court has stated that:

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.61

While this promise extends to women, we are unable to partake fully of it because of the restrictions on reproductive freedom. Surely, if "the right of every individual to the possession and control of his own person,"62 is to have any real meaning, it must include the right of a woman to decide whether and how to have a child. It must allow women to "determine the uses of their own bodies."63

We offer the autonomy analysis as a way to focus on a substantive aspect of the notion of privacy.64 While the notion of privacy as a right is widely accepted, there remains a lack of consensus on precisely what that right protects.

Now, more than a decade after the Griswold decision, the moral urgency and even the legal viability of some such right [of privacy] is no longer in much doubt. The problem with the right to privacy is not its uncertainty or invalidity generally but its lack of a specific identity in the foreground of legal rights and remedies, particularly under the Constitution. We now know full well that we have a right to privacy in some such broad sense as Justice Brandeis argued in his Olmstead dissent, but what that right comes to in conflict with other rights and interests we cannot easily say—any better than the Supreme Court itself.65

Privacy, as "a concept and a right, stands in great need of the few certainties and limitations that definition affords us."66 Because autonomy is one of those few certainties, we believe it is a more precise term than privacy with respect to reproductive freedom.

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61. Thornburgh, 476 U.S. at 772.
62. Union Pac., 141 U.S. at 251.
64. Our approach is therefore similar to Kenneth Karst's attempt to anchor the notion of equality through use of equal citizenship as the substantive content of the equal protection clause. Karst, supra note 32.
65. Gerety, supra note 54, at 244 (emphasis in original).
66. Id. at 296.
IV. LIMITATIONS OF CURRENT LAW: ACCESS TO ABORTION, FATHER'S RIGHTS AND FETAL RIGHTS

The increasing threats to women's reproductive freedom illuminate the shortcomings of current applications of privacy analysis and equal protection and highlight the need for recognition of a woman's right to autonomy. For sixteen years, there have been attempts to limit the reach of Roe and overturn the decision. Among the most successful attempts to challenge Roe was Webster v. Reproductive Health Services. In Webster, state-employed health professionals and private nonprofit corporations providing abortion services brought suit for declaratory and injunctive relief challenging the constitutionality of the Missouri statute regulating the performance of abortion. The preamble of the statute stated that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health and well-being." The statute prohibits the use of public employees or facilities to perform or assist an abortion not necessary to save the mother's life and prohibits the use of public funds, employees or facilities for the purposes of encouraging or counseling a woman to have an abortion not necessary to save her life. The statute also requires that a physician must determine if the fetus is viable if there is a possibility that the woman is twenty or more weeks pregnant.

The Court upheld these provisions, using much of the same analysis and nearly identical language found in Harris v. McCrae to defend the prohibition on public employees and facilities. In Webster, Justice Rehnquist wrote that "the State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in

68. Id. at 3049. The plurality wrote that this provision does not regulate abortion or interfere with a woman's decision, but simply expresses a value judgment made by the state legislature. However, as evidenced by an August, 1989 decision by Judge George Gerhard, an Associate Circuit Judge in the St. Louis County courts, the Supreme Court's "approval" of this provision has not gone unnoticed. Gerhard invoked this provision to acquit anti-abortion protestors of trespassing charges. The judge allowed the protestors to use a "justification defense" — to say they had broken a lesser law to prevent a greater evil. Brotman, Abortion Decision Fallout Gathers, Chic. Trib., Aug. 20, 1989, at A1.
69. 448 U.S. 297, 315-17 (1980). In Harris, the Supreme Court upheld the constitutionality of the Hyde Amendment. The Hyde Amendment prohibits the use of Medicaid funds to pay for abortions, unless the life of the pregnant woman would be endangered if the fetus were carried to term. Every other medically necessary procedure may be funded when the woman is categorically eligible. Medical necessity is not sufficient, however, in the case of abortion and funding is denied where the woman's life is not threatened. Thus, a great many women are denied reproductive freedom because they cannot afford abortions. The language of the law reads: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." Since 1977, a version of this amendment has been included in every Labor, HHS or Labor, HHS and Education appropriations bill. The language of the original amendment is included in the FY 1989 bill. See Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-436, §204, 102 Stat. 1681, 1699 (1988).
the path of a woman who chooses to terminate her pregnancy.’”70 He concludes that “[n]othing in the Constitution requires States to enter or remain in the business of performing abortions.”71

This analysis reflects a total lack of concern for both a woman’s access to her constitutional right of privacy and for her health, in which the state is said to have a compelling interest. Most of the hospitals in Missouri are publicly funded. Even if it is medically necessary for a woman to have an abortion, under the statute it is not likely that she will be able to have the operation performed in a hospital in Missouri.

McCrae and Webster both reveal the Supreme Court’s lack of commitment to protecting women’s constitutional rights. Although extremely opaque, the Webster plurality’s decision, in effect, discards the framework of Roe without showing “what, if anything, was wrong with the landmark decision being gutted.”72 By calling abortion a “‘politically divisive’”73 issue, better left to the legislative process, Justice Rehnquist makes clear his own reluctance to secure for women their constitutional rights. That an issue is politically divisive should not deter the Court from protecting the constitutional rights of individuals.

Congress appears to be equally unconcerned with women’s right to reproductive autonomy, evidenced by its continued support of the Hyde Amendment. Since 1973, hundreds of bills have been introduced in Congress aimed at overturning or limiting the reach of Roe.74 In passing the FY 1989 District of Columbia Appropriations Act,75 Congress, for the first time, stipulated that the District of Columbia could not use any of its local funds to pay for abortions, unless the life of the pregnant woman would be endangered if the fetus were carried to term. Thus, since the District of Columbia is also prohibited by the Hyde Amendment from using federal funds to pay for abortions, the District is left without any funding for abortions for indigent women.

The executive branch, as well as a majority of states, have followed the examples set by the Supreme Court and Congress. The executive branch’s tenacity on this issue is demonstrated by the Reagan Administration’s regulations proposing a drastic revision of long standing rules relating to Title X (the federally funded family-planning program),76 issued after nu-

70. Webster, 109 S.Ct. at 3052 (citing Harris v. McRae, 448 U.S. 297, 315 (1980)).
71. Webster, 109 S.Ct. at 3052.
73. Webster, 109 S.Ct. at 3058 (citing Justice Blackmun’s dissent).
74. “Within the decade after Roe v. Wade was decided almost 500 bills relating to abortion in some way were introduced in Congress. The greater number of these proposals have sought to restrict the availability of abortions, although a few measures have been introduced to make abortions more widely available.” Carr, Congressional Research Service Issue Brief, “Abortion: Legislative Control,” Feb. 13, 1989, at 1.
merous Title X anti-abortion amendments failed to pass Congress. The regulations:

prohibit recipients of Title X funds from providing abortion counseling or referrals, require that grant recipients physically and financially separate Title X-funded activities from any activities that provide or discuss abortions, and forbid grant recipients from lobbying for, distributing information about, or in any way advocating abortion.\(^77\)

However, federal district courts in Denver, Colorado and Boston, Massachusetts have enjoined the Department of Health and Human Services from enforcing the regulations.\(^78\) The decision of the New York Federal District Court to enjoin the regulations has been vacated.\(^79\) All of these decisions have been appealed.

States have also passed statutes regulating abortion access. For instance, Minnesota requires a minor to:

notify both parents at least forty-eight hours before a planned abortion or demonstrate to a court in an expedited confidential proceeding either that she is ‘mature and capable of giving informed consent’ or that the performance of an abortion without such notification would be in her ‘best interests.’\(^80\)

One of the most extreme threats to a woman’s right of autonomy has manifested itself in the form of “fathers’ rights” litigation.\(^81\) In 1988, individual men sought and obtained temporary restraining orders (TRO’s) in a number of states, including Pennsylvania, Utah, Indiana and Minne-

\(^80.\) Hodgson v. Minnesota, 853 F.2d 1425, 1453 (8th Cir. 1988), cert. granted 109 S.Ct. 3240 (summarizing applicable Minnesota minors abortion law, MINN. STAT. ANN. §§ 144.343(2)-(7) (West 1987)).
\(^81.\) Surprisingly, the courts and the media have treated the claim of fathers’ rights as if it were a new phenomenon rather than the repackaging of an old and long discarded social and legal construct. Throughout much of history, law has accepted and reinforced the theory of ‘father-right.’ In Augustus’ Rome, the law acknowledged the patria potestas, the power of the father over life and death of the members of the household. Men’s rights extended to control of their wives’ behavior and property, including the right to use and dispose of it at will, as well as to complete control over children and childrearing decisions. Women who defied their husbands were often threatened not just with divorce and destitution but also with the loss of their children . . . . It is only recently that father-right has been replaced by the concept of human rights. The men who go to court today take advantage—consciously or unconsciously—of the lack of full recognition that women’s rights are also human rights. They seek to return to that time, simpler for them, when men were not only the fathers of their children but of their wives as well. We now understand, however, that neither women nor children can be treated as commodities. It is that principle that the law must affirm as a right. [emphasis added]

sota, enjoining women from exercising their right to obtain an abortion.\textsuperscript{82} None of these orders have withstood appeal,\textsuperscript{83} but all have involved an unconstitutional delay in obtaining an abortion for the woman involved.

At least three TRO's have been issued by Indiana courts alone. In one of the cases, Jane Doe, eighteen years old, was enjoined from obtaining an abortion by John, a man who had been her boyfriend for only three months.\textsuperscript{84} In that case, the court weighed the man's rights of custody and procreation against the woman's right of privacy. In labeling it the right to privacy, the court was able to ignore the tremendous loss of liberty and autonomy involved in the state forcing a woman to undergo unwanted pregnancy and unwanted parenthood at the request of another. The court failed to address the question of whether the state could force someone to be a parent because it viewed Ms. Doe as merely a fetal vessel.

In arriving at his decision, the judge admitted testimony by John regarding the most intimate details of Jane's life. Jane refused to testify on the ground that her reasons for terminating the pregnancy were too personal and that the court's inquiry was unlawful.

The judge issued an order finding that:

\begin{quote}
The rights of the father in his unborn children are of constitutional dimensions under the Fourteenth and Ninth Amendments to the United States Constitution as well as being derived from the Indiana common law. Those constitutional rights of the father outweigh the constitutional rights of the mother, on the basis of the facts found above in this particular case.\textsuperscript{85}
\end{quote}

The facts that the court found significant in deciding this case were that:

\begin{quote}
There is no evidence of harm, medically diagnosed or otherwise, that would befall the Respondent if she gave birth to the child she now carries. The appearance and demeanor of the Respondent in the courtroom, as observed by the Court, indicated that she is a very pleasant young lady, slender in stature, healthy, and well able to carry a baby to delivery without an undue burden.\textsuperscript{86}
\end{quote}

Although these findings of fact might be more appropriate in a case involving horses or cows, the court's "facts" and their conclusions of law that Ms. Doe's "... reasons for abortion are indicative of an extremely

\textsuperscript{82} Johnsen and Paltrow, \textit{Boyfriends and Husbands Use Courts to Block Women's Abortions}, Spring/Sun. 1988 \textsc{Civ. Liberties}, at 7 (available from authors).

\textsuperscript{83} See \textit{e.g.}, Doe v. Smith, 108 S.Ct. 2136 (1988) (order denying Writ of Injunction).


\textsuperscript{85} \textit{Id.}, slip op. at 5.

\textsuperscript{86} \textit{Id.}, slip op. at 2.
inmature (sic) young woman which lessens the weight and nature of her privacy interest,"87 led to an order enjoining Ms. Doe from obtaining an abortion.

These cases reflect an interpretation of men's procreative rights which wholly subordinates women and violates any concept of equal citizenship. The courts completely failed to recognize a woman’s fundamental right of autonomy. Additionally, the court orders are in clear conflict with the Supreme Court’s ruling in Planned Parenthood of Central Missouri v. Danforth, in which the Court wrote: “the State cannot delegate to a spouse a veto power . . . during the first trimester.”88 In Danforth, the Court rejected arguments often raised by fathers’ rights advocates, establishing a simple legal rule for decisionmaking — the woman’s choice prevails:

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.89

As the defendant’s lawyers in the Doe case stated, we believe:

“The injunction issued by the juvenile court violates not only Doe’s constitutional right to privacy, but also constitutes impermissible sex discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution . . . .”90

The violation of the Equal Protection Clause exists because men and women are similarly situated with regards to the constitutional right of autonomy.

It is unlikely that this threat to women’s reproductive freedom will soon disappear. James Bopp, the plaintiff’s lawyer in the case of Doe v. Smith, and general counsel to the National Right to Life Committee, has created a “Father’s Rights Litigation Kit.” It contains all the documents needed to bring a case seeking to enjoin a woman from having an abortion. Mr. Bopp acknowledges, however, that the Kit avoids the issue of “fetal rights” because the courts are unlikely to find that argument persuasive,

87. Id., slip op. at 3.
89. Id. at 71 (emphasis added).
90. Doe v. Smith Appellant Brief, supra note 63, at 41.
“as those rights have already been rejected by *Roe v. Wade.*”\(^9\) Yet, the assumption behind a claim of “fathers’ rights” is that the fetus is a person.

Women’s reproductive freedom is not only threatened by the attack on abortion rights, but by an increasing emphasis on non-abortion related fetal rights. A recent report demonstrates how the new reproductive technologies raise challenges to reproductive freedom “now that a fetus can be treated as a patient somehow separate from the woman who is pregnant.”\(^9\) The new reproductive technologies:

.... raise issues that are especially challenging for feminists who have had to confront serious questions about whether the cost of gaining these fertility options may be a loss of reproductive control for women—a lessening of choice. For the technology also invites doctors, lawyers, and legislators who assist or regulate non-traditional birth to intrude on a private and intimate experience. Some fear that motherhood will be denigrated by dividing its genetic from its gestational functions and that it will become more difficult, as a result, for a woman to retain control of her body.\(^9\)

Fetal rights cases represent a renewed attempt to define and control a woman’s life by her reproductive capacity, as well as an attempt to imprison her throughout her pregnancy. They represent the greatest threat to women’s abilities to lead autonomous lives since women won the right to abortion. Asserting “concern” and personhood for the fetus, the state and other third parties attempt to control the behavior and lives of the pregnant women.\(^9\)

The fetal rights cases fall into three categories. The first involves “fetal neglect” where courts have been requested to find the woman either civilly or criminally liable for her conduct during pregnancy; the second category involves cases where courts have been requested to authorize certain medical procedures, such as Cesarean sections, despite the mother’s lack of consent. The third category finds the state “protecting” the fetus without any request to do so from another party; and the fourth involves cases where third parties wholly unrelated to the pregnant woman attempt to intervene in the abortion decision.

Two examples of the first category of cases are *People v. Stewart*\(^9\) and *In re Baby X.*\(^9\) In October 1986, after her son who was born brain damaged died, Pamela Rae Stewart was charged with medical neglect of her

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93. Thom, *supra* note 12, at 70.
fetus under a provision of Section 270 of the California Penal Code which
makes it a misdemeanor "to willfully omit to furnish medical attendance
or other remedial care." The prosecution alleged that Ms. Stewart caused
her son's death by taking drugs during pregnancy, engaging in sexual in-
tercourse contrary to doctor's orders and "fail[ing] to seek prompt medical
attention when she experienced bleeding."97 Stewart had first gone to the
doctor in her six month of pregnancy. She went to the hospital at least
two times prior to delivery, one time asking that a Cesarean be performed.
She said that the doctor never told her that she had placenta previa, nor
did he explain the seriousness of her condition.98 Ms. Stewart served six
days in jail before a California Municipal State judge dismissed the
charges, finding that the California Legislature had not intended that the
child support statute be used to impose "additional burdens" on women
during pregnancy.99

In Michigan, Baby X, a newborn infant suffering from narcotics with-
drawal symptoms, was found to be neglected, based on evidence of the
mother's prenatal "abuse" or "neglect." The court concluded that a child
"has a legal right to begin life with a sound mind and body,"100 and that
the court could therefore examine all prenatal conduct bearing on that
neglect. The court ordered the child to be placed in the state's custody. In
Butte County, California, District Attorney Mike Ramsey has adopted a
policy of bringing drug use charges against any woman whose newborn
tests positive for drugs.101 Earlier this year, Winnebago County, Illinois
State's Attorney Paul Logli charged Melanie Green with involuntary
manslaughter and delivery of a controlled substance to a minor. According
to the coroner, her two-day old baby died of heart failure caused by expo-
sure to cocaine while in the womb. The Winnebago County grand jury
refused to indict on either charge.102

98. Placenta previa is a condition in which the placenta is nearer to the cervix than is the baby.
As a result, the placenta could be stripped away from the uterus with harmful and possibly cata-
strophic effect to the baby, or in premature birth.
Stewart, California Senate Bill 1070 was introduced to extend all child neglect statutes to fetuses. The
bill was offered in committee as an amendment to the Child Abuse Reporting Law. It was defeated in
committee.
100. In re Baby X, 293 N.W.2d at 739.
In a related Illinois case, the Illinois Supreme Court found no cause of action by or on behalf of a
fetus, subsequently born alive, against its mother for the unintentional infliction of prenatal injuries.
The court wrote:
It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to
and assertable against its mother. The relationship between a pregnant woman and her fetus is
unlike the relationship between any other plaintiff and defendant. No other plaintiff depends
exclusively on any other defendant for everything necessary for life itself. No other defendant
must go through biological changes of the most profound type, possibly at the risk of her own
life, in order to bring forth an adversary into the world. It is, after all, the whole life of the
pregnant woman which impacts on the development of the fetus. As opposed to the third-party
Virtually anything a woman might intentionally or unintentionally eat, drink, or do, even before conception, might negatively affect her fetus. Additionally, the state of health of the woman’s sexual partner at the time of conception may affect the fetus, a fact that is ignored in discussions of “fetal rights.” To impose liability for resulting fetal damage (if such cause and effect could even be proved) would mean that the state can regulate all manner of conduct before and during a woman’s pregnancy—restricting her freedom, abridging her constitutional right of autonomy and violating “. . . the right to be let alone . . . the most comprehensive of rights and the right most valued by civilized man.”

Additionally, the threat of criminal prosecution or civil liability would constitute a powerful weapon available to the state “and to all men to use against their partners both during and after pregnancy.”

Surely, if there is any meaning at all to the right of autonomy, it includes the right to choose how to conduct oneself as to the daily matters of eating, drinking and movement without fears of government regulation and government reprisal. Without such a right, the woman “would be held liable for any behavior during pregnancy having potentially adverse affects on her fetus.” Implicit in Roe v. Wade is the assumption that it is more appropriate for women, rather than the state, to make procreative decisions. By regulating a woman’s conduct during pregnancy, the court assumes that the person who is in fact best qualified to make decisions, both for herself and for the fetus, does not have the ability to do so.

To allow the state to assume the role of protector of fetal interests poses the anomalous situation of the fetus as an adversary of the pregnant woman’s every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman’s fault: it is a fact of life.”


The Court also wrote that:

Judicial scrutiny into the day-to-day lives of pregnant women would involve an unprecedented intrusion into the privacy and autonomy of the citizens of this State . . . .

. . . In holding that no cause of action will lie for maternal prenatal negligence, this court emphasizes that we in no way minimize the public policy favoring healthy newborns. Pregnant women need access to information about the risks inherent in everyday living on a developing fetus and need access to health care for themselves and their developing fetuses. It is, after all, to a pregnant woman’s advantage to do all she can within her knowledge and power to bring a healthy child into this world. The way to effectuate the birth of healthy babies is not, however, through after-the-fact civil liability in tort for individual mothers, but rather through before-the-fact education of all women and families about prenatal development.

Id. at 361.

103. Olmstead, 277 U.S. at 478.
107. L. Tribe, supra note 21, at 1352.
man.\textsuperscript{108} As more than one commentator has pointed out, such a situation serves neither the best interest of the woman nor of the fetus.\textsuperscript{109} The imposition of criminal sanctions is more likely to deter women from seeking medical aid than to deter harmful conduct. If the state is truly interested in promoting the health of the fetus, one option would be to provide adequate medical services to all pregnant women.\textsuperscript{110}

Resorting to the law to monitor pregnant women's actions could even encourage women to choose contraception or abortion if the alternative were criminal prosecution, civil liability, or more direct coercion, such as institutionalization during pregnancy or a forced Cesarean section.\textsuperscript{111}

Further, state regulation would virtually imprison pregnant women, treating them as lesser citizens because they are pregnant, and violating their constitutional right of autonomy.

The second area of fetal rights cases also substantially encroaches on a woman's right of autonomy, both with regard to her decision making capacity and her bodily integrity. Two cases illustrating this latter category are \textit{Jefferson v. Griffin Spaulding County Hospital Authority}\textsuperscript{112} and \textit{In re A.C.}\textsuperscript{113} In \textit{Jefferson}, a woman in her 39th week of pregnancy experienced a complete placenta previa. It was virtually impossible for this condition to correct itself prior to delivery. According to her physician, there was a 99 percent chance the child would not survive a natural delivery and a 50 percent chance the mother would not survive. The mother refused, based on religious grounds, to have her baby delivered by Cesarean section. The court ordered that the Cesarean be performed if the physi-

\textsuperscript{108} Note, supra note 105, at 1009.

\textsuperscript{109} Johnsen, \textit{New Threat}, supra, note 94 at 35; Note, supra note 105, at 1009.

\textsuperscript{110} An alternative approach to improving prenatal care is available that does not involve the many drawbacks of creating legal conflicts between the pregnant woman and her fetus. We can treat the woman and the fetus as a single entity, recognizing that a pregnant woman already has a great stake in promoting the well-being of the fetus she carries. Our interest in helping the fetus, and thereby the future child, could thus be furthered by helping the pregnant woman. Johnsen, \textit{New Threat}, supra note 94, at 39.

In the first nationwide hospital study, conducted by the National Association for Perinatal Addiction Research and Education (NAPARE), it was found that at least 11% of pregnant women had used one or more illegal drugs, with 75% of them using cocaine. The president of NAPARE, Dr. Ira J. Chasnoff, states that "... prosecution would exacerbate the problems caused by the deficiency in medical care for poor, pregnant women. 'America has one of the highest rates of infant mortality in the developed world, primarily because of a lack of access to health care'. . . . [T]his is a medical issue that has been turned into a legal issue." Somerville, supra note 102, at 41. See also Reardon, \textit{Baby's Cocaine Death Adds to Debate on Protection of the Unborn}, Chic. Trib. May 14, 1989, at C1; Besharov, \textit{Crack Babies: The Worst Threat is Mom Herself}, Wash. Post, Aug. 6, 1989, at B1.

\textsuperscript{111} Johnsen, \textit{New Threat}, supra note 94, at 36. Illinois State Senator Richard Kelly, an abortion opponent, and a proponent of legislation requiring civil action against mothers for injuries due to illegal drug use while pregnant, will not introduce such legislation because of his fear that such a law would lead to more abortions. Marcotte, \textit{Crime and Pregnancy}, 75 A.B.A. J. 14, 16 (Aug. 1989).

\textsuperscript{112} 247 Ga. 86, 274 S.E.2d 457 (1981).

cian found it necessary to sustain the life of the child. Citing *Roe,* the court stated that “a viable unborn child has the right under the U.S. Constitution to the protection of the State through such statutes prohibiting the arbitrary termination of the life of an unborn fetus.” The court also directed that temporary custody of the unborn child be awarded to the State of Georgia Department of Human Resources.

In another example of forced surgery, on June 16, 1987, George Washington University Hospital sought a court order to compel a woman terminally ill with leukemia to undergo a Cesarean section to deliver a twenty-six week old fetus. The mother was heavily sedated and seemed to vacillate on the issue of consent, although when last asked, she stated, “I don’t want it done.” No one, including A.C.’s physician, her husband, or her mother wanted this surgery forced upon A.C. The District Court ordered the Cesarean, basing its decision on its belief that A.C. would not survive a significant time after the surgery and that the fetus had a chance of survival if taken prior to A.C.’s death. The Appeals Court, in upholding the trial court’s order held that: “The Cesarean section would not significantly affect A.C.’s condition because she had, at best, two days left of sedated life.”

The fetus, on the other hand, had a chance of surviving delivery, despite the possibility it would be born handicapped. The Cesarean was performed and the child died hours after birth. The mother died two days after the operation. However, as Barbara Ehrenreich points out, in a sense, A.C. had already disappeared, “reduced from a woman with an identity and options to a set of initials—little more than an ‘address’ for a fetus.” This image of the fetus as a “freestanding life form” not only distorts the fetus, but eliminates the woman.

By “eliminating” the woman, these decisions violate the right of bodily integrity which is implicit in the right of privacy and explicit both in the common law and Fourth Amendment cases. Common law has long recognized that an individual has the right to be free from nonconsensual invasions of bodily integrity. The Supreme Court has also held that the Constitution, particularly the Fourth Amendment, protects the individual’s right to bodily integrity. Included in the Fourth Amendment cases are *Rochin v. California,* (forcible pumping of a suspect’s stomach violates the individual’s Fourteenth Amendment due process rights) and

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116. *In re A.C.,* 533 A.2d at 611.
117. Id. at 613.
118. Id. at 617.
120. Id.
121. For a comprehensive discussion of these issue, see Gallagher, *Prenatal Invasions and Interventions: What’s Wrong with Fetal Rights,* 10 Harv. Women’s L. J. 9 (1987).
122. 342 U.S. 165 (1952).
more recently, *Winston v. Lee*\(^{123}\) (removal of a bullet from a suspect's body against his will violates his Fourth Amendment rights). The Supreme Court held that, “... the overriding function of the Fourth Amendment is to protect personal privacy and integrity against unwarranted intrusion by the State.”\(^{124}\) If suspects in a crime are accorded such strong constitutional protection of their bodily integrity, pregnant women must be accorded at least these protections.

These fetal rights cases conflict with the general common law principle that there is no duty to come to the rescue of another.\(^{125}\) This common law principle is routinely upheld by courts, even where a case involves a relative's only chance of survival. In *McFall v. Shimp*, Mr. Shimp was not required to donate bone marrow to save his cousin's life.\(^{126}\) The fetal rights cases conflict with this principle, again by ignoring or undervaluing the extent of the intrusion and deprivation of liberty involved for the pregnant woman. If A.C. had been a man with only two days left to live, it is highly unlikely that the court would have ordered that he undergo any kind of operation to save the life of another, no matter what his relation to that person might have been. Yet, A.C. was forced to undergo surgery so that the state could attempt to save a fetus. The courts cannot constitutionally order pregnant women to “rescue” fetuses.

These cases also conflict with *Roe* and subsequent cases on a number of other grounds. As discussed earlier, the state’s compelling interest in the health of the mother always overrides its interest in the fetus.\(^{127}\) Furthermore, these cases “treat the maternal-fetal relationship as it does conflicts between two distinct and independent entities,”\(^{128}\) obscuring the fact that the fetus, until born, is part of the woman. It is not a separate person, either biologically or legally.\(^{129}\)

Conceptualizing the fetus as separate from the pregnant woman has led to the third category of cases in which the state acts as “protector” of the fetus, without any request to do so from another party. In Washington, D.C., Brenda A. Vaughan, a first-time offender convicted of second-degree theft, was locked up in a jail until her baby was born even though the prosecutor had agreed to probation. Having tested positive for cocaine use when she came before Associate Judge Peter Wolf of the D.C. Superior Court, he said, “I'm going to keep her locked up until the baby is born because she's (sic) tested positive for cocaine when she came before

\(^{123}\) 470 U.S. 753 (1985).

\(^{124}\) Id. at 760 (quoting Schmerber v. California 384 U.S. 757, 767 (1966)).

\(^{125}\) See Gallagher, supra note 121, at 25. See also L. Tribe, supra note 20, at 1354.


\(^{127}\) The Webster plurality failed to address the effect of finding a compelling state interest in the fetus throughout pregnancy. Such a compelling interest would eliminate entirely women's constitutional right to reproductive privacy.

\(^{128}\) Johnsen, New Threat, supra note 94, at 35.

\(^{129}\) *Roe*, 410 U.S. at 158.
me . . . . She's apparently an addictive personality and I'll be darned if
I'm going to have her baby born that way." Vaughan was released on
September 14, 1988, the day before the baby was due, after receiving two
sentence reductions in an early-release program that takes effect when
prisons are too crowded.

Ms. Vaughan was sentenced to jail, not because she passed bad checks,
but because she was pregnant. She was not being punished for her crime,
but for her status as a pregnant woman. Lynn Paltrow, counsel for the
ACLU Reproductive Freedom Project, called the sentence “contrary to
common sense and the Constitution,” adding that, “prison is the last place
you want to put somebody who needs good health care.”

Lastly, in the fourth category of cases, a man requested guardianship of
his comatose, pregnant wife for the purposes of authorizing an abortion he
believed (with doctor’s advice) might improve her chances of recovery.
Two anti-abortion activists who had never even met the Klein family
sought to intervene and prevent the abortion. Relying in part on Roe, a
New York appellate court ruled that “these absolute strangers to the
Klein family, whatever their motivation, have no place in the midst of this
family’s tragedy.”

Chillingly, all of these threats to women’s reproductive freedom are not
receding. The Webster decision reveals that the Supreme Court is increas-
ingly willing to define the fetus as separate from the mother, with sepa-
rate rights. Justice Rehnquist stated that “ . . . we do not see why the
State’s interest in protecting potential human life should come into exis-
tence only at the point of viability, and that there should therefore be a
rigid line allowing state regulation after viability but prohibiting before
viability.” A finding of a compelling state interest from the moment of
conception would legitimate radical intrusions on a woman’s autonomy.

Abortion restrictions, father’s rights and fetal rights cases reveal the in-
adequacy of the privacy right, as applied, to allow women to act autono-
mously in decisions affecting their bodies and lives. The doctrine of equal
protection has also failed to guarantee an equal right of autonomy. Preg-
nancy cannot be permitted to limit or deny women’s access to the respect,
dignity and constitutional rights guaranteed to all citizens.

V. AUTONOMY ANALYSIS

At the heart of the issues surrounding a woman’s access to abortion and
her ability to decide how and when to have children remains the fight for

130. Churchville, D.C. Judge Jails Woman As Protection For Fetus, Wash. Post, July 23, 1988,
at A1.
133. Id., slip op. at 4.
134. Webster, 109 S.Ct. at 3057.
control over decision-making. Women must be able “to choose their roles in a male-dominated society,” and their procreative decisions must belong only to them. These decisions cannot be made by doctors, judges, courts, husbands, lovers, boyfriends or any other third party. It is not they who will be deprived of autonomy.

In order to enable women to function as full members of society, the courts must recognize that their current applications of the privacy doctrine and equal protection analysis restrict women’s constitutional right of autonomy, which includes the rights of bodily integrity and self-determination. The courts must broaden their application of these doctrines through use of an autonomy analysis which recognizes that women need reproductive freedom in order to have the same opportunity to determine the course of their lives as men. This analysis provides a framework for articulating the rights of pregnant women and for weighing when the state may restrict those rights, whatever is put in balance on the other side of the equation. A fundamental right of autonomy requires the use of heightened scrutiny when evaluating restrictions on women’s reproductive freedom. For instance, under our analysis, the courts would be unable to ignore the potential restriction fetal rights legislation places on a woman’s constitutional right of autonomy. The state would bear the burden of proving that such legislation is necessary to serve a compelling state interest and that there is no less drastic alternative. By using heightened scrutiny, very few restrictions on a woman’s autonomy would be found constitutional.

The autonomy analysis would require that the courts use heightened scrutiny even under an equal protection claim. Such a claim would require higher scrutiny than the Supreme Court’s current analysis, which incorrectly emphasizes the biological differences between men and women instead of the similar autonomy rights shared by the sexes. The Court must recognize that men and women are similarly situated with regards to the autonomy right and are constitutionally required to have equal access to it.

Without heightened scrutiny, our legal system will continue to burden women in a way that was found to be unlawful in Nashville Gas Co. v. Satty. The burden we suffer is solely because of our sex.

VI. Conclusion

Although women are being “fit into” a male “modeled” legal system, there are existing constitutional protections, which if applied correctly by

135. Karst, supra note 32, at 58 n.325.
136. Justice Douglas wrote that involuntary pregnancy and childbirth would “deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.” Bolton, 410 U.S. at 214 (1973) (concurring).
the courts, would help ensure that women have reproductive freedom. An autonomy analysis reveals that restrictions on women’s reproductive freedom violate fundamental due process rights and equal protection. If courts continue to evaluate women’s claims to reproductive freedom without understanding the autonomy right, they will continue to unconstitutionally treat “women solely as reproductive vessels whose decisions and autonomy are so undeserving of respect that women may not even control if and when they reproduce.”