

## ARTICLES

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

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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

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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.<sup>1</sup>

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*<sup>2</sup> 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."<sup>3</sup>

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

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<sup>1</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

<sup>2</sup> *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>3</sup> *Id.* at 1641 (Ginsburg, J., dissenting); *see also id.* at 1649.

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

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<sup>4</sup>—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,<sup>5</sup> with more than five times as many single-parent households headed by women than men.<sup>6</sup>)

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

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<sup>4</sup> 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).

<sup>5</sup> 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>.

<sup>6</sup> 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>.

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.<sup>7</sup> 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."<sup>8</sup> But over the ensuing century, those who espoused a sex equality approach to reproductive rights came to endorse

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<sup>7</sup> 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).

<sup>8</sup> 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).

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> Conversely, they tend to

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<sup>9</sup> 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)).

<sup>10</sup> GORDON, *supra* note 7, at 295–302.

<sup>11</sup> LUKER, *supra* note 9, at 175–86 (concerns of pro-choice leaders).

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.<sup>12</sup> 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.<sup>13</sup>

If these conditions are met, some who take the sex equality approach to reproductive rights would still sanction restrictions on abortion.<sup>14</sup> 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.<sup>15</sup> Today, most who

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<sup>12</sup> See, e.g., ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM* 288 (1984).

<sup>13</sup> 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).

<sup>14</sup> 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).

<sup>15</sup> 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).

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.<sup>16</sup>

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<sup>17</sup>—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.<sup>18</sup>

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<sup>16</sup> 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.

<sup>17</sup> 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).

<sup>18</sup> 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*



## 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.<sup>19</sup>

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,<sup>20</sup> 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.<sup>21</sup> In *Roe* itself, an

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*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).

<sup>19</sup> 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*].

<sup>20</sup> See Nancy Stearns, *Commentary, Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 1, 2 (1988–89).

<sup>21</sup> 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

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."<sup>22</sup> 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,"<sup>23</sup> 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.<sup>24</sup>

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(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)).

<sup>22</sup> *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).

<sup>23</sup> *Id.* at 32.

<sup>24</sup> *Id.* at 42 (internal citations omitted).

In this era, when it was still an open question whether there would be heightened scrutiny of laws that enforce wealth inequality,<sup>25</sup> and few had yet considered the possibility of treating laws enforcing sex inequality as constitutionally suspect,<sup>26</sup> equality talk for the abortion right was commonly understood to raise questions of class as well as gender.<sup>27</sup> 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.<sup>28</sup> One of the movement’s most systematically litigated cases, *Abele v. Markle*,<sup>29</sup> 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.”<sup>30</sup>

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<sup>25</sup> 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).

<sup>26</sup> 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.”).

<sup>27</sup> 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).

<sup>28</sup> See *supra* note 21.

<sup>29</sup> 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”).

<sup>30</sup> *Id.* at 802 (“equal of men”); *id.* at 804 (“appropriate decision-makers”); see also Kesselman, *supra* note 27.

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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*<sup>34</sup> stated the case for equal protection scrutiny of sex-based state action without mentioning laws regulating reproduction. In 1974, *Geduldig*<sup>35</sup> rejected arguments that laws discriminating against pregnant women reflect sex stereotyping<sup>36</sup> 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.<sup>37</sup>

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<sup>31</sup> Post & Siegel, *supra* note 18, at 1988–89.

<sup>32</sup> *Id.*

<sup>33</sup> 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).

<sup>34</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>35</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>36</sup> 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.

<sup>37</sup> 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

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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> The

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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).

<sup>38</sup> Phyllis Schlafly, *What Is Wrong with “Equal Rights” for Women*, 5 PHYLLIS SCHLAFLY REP. at 3–4 (Feb. 1972).

<sup>39</sup> Siegel, *supra* note 33, at 1389–401.

<sup>40</sup> *Id.* at 1369.

<sup>41</sup> 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

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.<sup>42</sup>

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<sup>43</sup> 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*,<sup>44</sup> arguing that state regulation of reproduction was constrained by equal protection. In 1985, Ruth Bader Ginsburg urged that the Court should have grounded the

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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. (forthcoming 2007) (discussing recent scholarship on *Roe*’s reception).

<sup>42</sup> See Siegel, *supra* note 33, at 1395–401.

<sup>43</sup> 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).

<sup>44</sup> 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).

abortion right on equality reasoning in *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*.<sup>45</sup> In this period, equality reasoning began to emerge as a dominant rationale for the abortion right in the legal academy<sup>46</sup> and to find expression in law. Connecticut and later New Mexico interpreted

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<sup>45</sup> 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).

<sup>46</sup> 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).

their state ERAs to reach regulation of pregnancy and abortion.<sup>47</sup> In 1986, Justice Blackmun concluded the majority's opinion in *Thornburgh*<sup>48</sup> by emphasizing that the Constitution protected the liberties of women as well as men,<sup>49</sup> 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,"<sup>50</sup> 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

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<sup>47</sup> 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").

<sup>48</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

<sup>49</sup> *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).

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



“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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup>

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.”<sup>54</sup>

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<sup>51</sup> *Id.* at 928 (citing Siegel, *supra* note 8, and MacKinnon, *supra* note 46).

<sup>52</sup> 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).

<sup>53</sup> *Id.* at 852.

<sup>54</sup> *Id.* at 898.

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).<sup>55</sup> It plainly shaped the Court's ruling in *Hibbs*<sup>56</sup> that Congress had authority under the Fourteenth Amendment to enact the Family and Medical Leave Act<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

A similar reading of *Hibbs* and *Geduldig* appears in *Tucson Woman's Clinic v. Eden*,<sup>60</sup> 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

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

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

<sup>57</sup> *Id.* at 727.

<sup>58</sup> *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.

<sup>59</sup> See generally Siegel, *supra* note 37.

<sup>60</sup> 379 F.3d 531 (9th Cir. 2004).

do not reasonably explain the discrimination at hand.”<sup>61</sup> 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.”<sup>62</sup>

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*.<sup>63</sup> 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.<sup>64</sup> The equality framework supplies explicit, textual authority for a right

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<sup>61</sup> *Id.* at 548.

<sup>62</sup> *Id.*

<sup>63</sup> 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).

<sup>64</sup> 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*

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.<sup>65</sup> 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.<sup>66</sup>

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(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).

<sup>65</sup> 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.

<sup>66</sup> See Siegel, *supra* note 8.

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.<sup>67</sup> Despite the ban's defeat, the woman-protective antiabortion argument is spreading.<sup>68</sup> As the

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<sup>67</sup> 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 Blustein, *Mommy Dearest?*, AM. PROSPECT, Oct. 3, 2006, at 22; Stephanie Simon, *Antiabortion Campaign Waves Feminist Flag*, L.A. TIMES, Oct. 9, 2006, at A1.

<sup>68</sup> 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.feministsforlife.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](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](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

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.<sup>69</sup>

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.<sup>70</sup> Even this brief

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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%20of%20Freda%20McKissic%20Bush%2C%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=ZDM3OGUzNTE5OWU5N2Q4NTJlYzgWYzE4OTdhYmJkZmI=&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 Ehsen, *States Lining Up to Copy South Dakota Ban*, STATE NET CAPITOL J., Mar. 13, 2006.

<sup>69</sup> 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).

<sup>70</sup> 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

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.<sup>71</sup>

As this Symposium goes to press, the questions it explores find vivid expression in the Court's most recent abortion decision, *Gonzales v. Carhart*.<sup>72</sup> 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.<sup>73</sup> Justice Ginsburg led the dissenting justices in a wide-ranging

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"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).

<sup>71</sup> *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.

<sup>72</sup> 127 S. Ct. 1610 (2007).

<sup>73</sup> *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.

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."<sup>74</sup> 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. . . ."<sup>75</sup> 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

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

<sup>75</sup> *Id.* at 1649.



moral agency.”<sup>76</sup> 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*.<sup>77</sup>

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.<sup>78</sup>

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.<sup>79</sup> 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*.<sup>80</sup> 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.<sup>81</sup>

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.

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<sup>76</sup> Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1091 (2007).

<sup>77</sup> Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093 (2007).

<sup>78</sup> Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865 (2007).

<sup>79</sup> David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907 (2007).

<sup>80</sup> *Id.*

<sup>81</sup> 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).

These articles illustrate that, with the reversal of *Bowers v. Hardwick*<sup>82</sup> and increasing constitutional protection for same-sex sexual expression, constitutional protection for abortion is once again understood as constitutional protection for intimate sexual expression.<sup>83</sup> Symposium organizer Kim Buchanan reads the Court's decision in *Lawrence v. Texas*<sup>84</sup> 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.<sup>85</sup> 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"<sup>86</sup> 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."<sup>87</sup> The equal sexual liberty analysis that Buchanan derives from *Lawrence* imposes important limitations on *Geduldig*<sup>88</sup> 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."<sup>89</sup> In *Heterosexual Reproductive Imperatives*, David Cruz challenges ideologies about reproduction invoked to justify laws discriminating against both women and sexual minorities.<sup>90</sup> 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.<sup>91</sup> 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

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<sup>82</sup> 478 U.S. 186 (1986).

<sup>83</sup> 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.").

<sup>84</sup> 539 U.S. 558 (2003).

<sup>85</sup> Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1237 (2007).

<sup>86</sup> *Id.* at 1238.

<sup>87</sup> *Id.*

<sup>88</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>89</sup> Buchanan, *supra* note 85, at 1265.

<sup>90</sup> David B. Cruz, *Heterosexual Reproductive Imperatives*, 56 EMORY L.J. 1157 (2007).

<sup>91</sup> *Id.*

women, lesbian 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.<sup>92</sup> 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,”<sup>93</sup> 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.<sup>94</sup> 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.”<sup>95</sup> 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.<sup>96</sup>

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

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

<sup>93</sup> *Id.* at 941.

<sup>94</sup> *Id.* at 942.

<sup>95</sup> 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).

<sup>96</sup> *Id.* at 995–96.

analyze institutions from slavery to surrogacy.<sup>97</sup> 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.”<sup>98</sup> This last right, Balkin emphasizes, is best understood as a constitutionally protected “choice under conditions of sex inequality.”<sup>99</sup> 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.”<sup>100</sup> 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.”<sup>101</sup>

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.

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<sup>97</sup> Pamela D. Bridgewater, *Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction*, 56 EMORY L.J. 1215 (2007).

<sup>98</sup> Jack Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 850 (2007).

<sup>99</sup> *Id.* at 851 (internal quotation marks omitted).

<sup>100</sup> *Id.* at 853.

<sup>101</sup> *Id.* at 857.