



ARTICLE

ROE'S ROOTS: THE WOMEN'S RIGHTS CLAIMS THAT ENGENDERED ROE

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INTRODUCTION	1875
I. FROM DOCTORS RIGHTS TO WOMEN'S RIGHTS	1879
II. WOMEN VS. CONNECTICUT	1886
III. HOW WOMEN VS. CONNECTICUT IS VISIBLE, AND EFFACED, IN ROE.....	1894
CONCLUSION: DANGEROUS REASONS – EQUALITY'S REPRESSION AND EXPRESSION AS A BASIS FOR THE ABORTION RIGHT.....	1900

INTRODUCTION

This Article examines the understandings animating feminist abortion rights claims in the years before *Roe v. Wade*¹ – claims that helped prompt *Roe*, but were not expressed in the decision. By reconstructing these sex equality claims, we can better appreciate how feminist advocacy engendered *Roe*, and the conflict that ensued.² Recovering this lost history in turn helps us

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Since writing this Article, Linda Greenhouse and I have collaborated on a documentary history that explores some of the questions the Article examines, and many others. See LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING; A DOCUMENTARY HISTORY* (2010). The book makes available a number of documents here discussed, as I note throughout.

¹ 410 U.S. 113 (1973).

² See, e.g., Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 406-24 (2007).

recognize that ongoing evolution in the constitutional basis of the abortion right continues even in our own day.

In the immediate aftermath of *Gonzales v. Carhart*,³ the Supreme Court's 2007 decision upholding the Partial Birth Abortion Ban Act, attention focused on striking features of Justice Kennedy's majority opinion – its deference to congressional fact-finding, its narrowing of the health exception, its use of antiabortion rhetoric, and its discussion of gender-paternalist reasons for restricting abortion.⁴ Few commentators focused on noteworthy developments in the reasoning of Justice Ginsburg's dissent.⁵ Cass Sunstein was one. In an op-ed in the *Los Angeles Times* the day after the decision, he observed:

In the long run, the most important part of the Supreme Court's ruling on "partial-birth" abortions may not be Justice Anthony M. Kennedy's opinion for the majority. It might well be Justice Ruth Bader Ginsburg's dissent, which attempts, for the first time in the [C]ourt's history, to justify the right to abortion squarely in terms of women's equality rather than privacy.⁶

In a strategy memo to the antiabortion movement posted several months later on the internet, James Bopp, general counsel for the National Right to Life Committee, drew strikingly similar conclusions. Bopp cautioned the antiabortion movement against enacting abortion bans to test *Roe* because, Bopp worried, if the Supreme Court faced such a case, Justice Ginsburg would have the opportunity to entrench the equality rationale for abortion restrictions in a plurality opinion that might even attract Kennedy's support:

But if the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg [sic]

³ 550 U.S. 124 (2007).

⁴ See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1697, 1767, 1769 (2008) [hereinafter Siegel, *Dignity*]; see also Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1014-30 (2008); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1641 (2008) [hereinafter Siegel, *Right's Reasons*]; Martha K. Plante, Current Events, "Protecting" Women's Health: How *Gonzales v. Carhart* Endangers Women's Health and Women's Equal Right to Personhood Under the Constitution, 16 AM. U. J. GENDER SOC. POL'Y & L. 387, 400-07 (2008).

⁵ But see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 837-38 (2007).

⁶ Cass R. Sunstein, Op-Ed., *Ginsburg's Dissent May Yet Prevail*, L.A. TIMES, Apr. 20, 2007, at A31.

has long advocated – an “equal protection” analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the dissent, written by Justice Ginsberg [sic], in fact did so. *See id.* at 1641 (Ginsberg, [sic] J., joined by Stevens, Souter, and Breyer, JJ.) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”). . . . A law prohibiting abortion would force Justice Kennedy to vote to strike down the law, giving Justice Ginsberg [sic] the opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as PBA bans, parental involvement laws, women’s right-to-know laws, waiting periods, and other legislative acts that do not prohibit abortion in any way, since Justice Kennedy is likely to approve such laws.⁷

In the past several decades, the nation has watched as the Court has narrowed the *reach* of the right *Roe v. Wade* protects. But, as Bopp emphasizes, the Court, in a less noticed set of developments, has also begun subtly to rearticulate the *rationale* of the abortion right – the complex of constitutional values that the right to choose vindicates.

It has long been appreciated that Justice Ginsburg might lead the Court to emphasize the equal protection argument for abortion rights. In 1985 and again in 1992, Ginsburg published articles arguing that *Roe* should have been decided on sex equality grounds.⁸ At her confirmation hearing in 1993, Ginsburg was discussing a 1972 case in which she had argued that the Air Force’s decision to fire an officer because she was pregnant violated the Equal Protection Clause.⁹ Asked by Senator Hank Brown whether the same reasoning extended to abortion as well, then Judge Ginsburg answered:

⁷ *See* Legal Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, to Whom it May Concern on Pro-life Strategy Issues 3-4 (Aug. 7, 2007), *available at* <http://personhood.net/docs/BoppMemorandum1.pdf>.

⁸ 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); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992) (“The *Roe* decision might have been less of a storm center had it . . . ho[n]ed in more precisely on the women’s equality dimension of the issue . . .”).

⁹ *See* Brief for the Petitioner, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178). For an account of the *Struck* case in Justice Ginsburg’s understanding of equality, see Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010). *See also* Ruth Bader Ginsburg, *A Postscript to Struck by Stereotype*, 59 DUKE L.J. 799 (2010). For an account locating the claims of pregnancy discrimination in the sex equality arguments of the 1970s

[Y]ou asked me about my thinking about equal protection versus individual autonomy, and my answer to you is it's both. This is something central to a woman's life, to her dignity. It's a decision she must make for herself. And when Government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices.¹⁰

In asserting the sex equality argument for abortion rights, Ginsburg expresses an understanding widely shared in the women's movement in the years before *Roe*. There are, in fact, many expressions of what I term the sex equality argument for reproductive rights: objections to laws restricting abortion that reflect or enforce traditional gender roles in matters of sex or parenting. The sex equality claim for reproductive rights may, but need not, be asserted as a claim on the Equal Protection Clause;¹¹ these same concerns may be articulated in the language of dignity or in the language of liberty, as women claim the right to be self-governing and shape their own life course as full members of the polity. Reconstructing *Roe*'s roots shows that sex equality concepts shaped the initial development of modern substantive due process

women's movement, see generally Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010); Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095 (2010); Reva B. Siegel, *Concurring*, in WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin ed., 2005) (writing *Roe* drawing on legal and social movement sources available at the time *Roe* was decided, with historical note on text). See also Jack M. Balkin, *Introduction: Roe v. Wade: An Engine of Controversy*, in WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra*, at 3, 19-20.

¹⁰ *The Supreme Court; Excerpts from Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES, July 22, 1993, at A20 ("The argument was it's her right to decide either way, her right to decide whether or not to bear a child."). As Ginsburg explained, the decision about whether and when to become a mother was so central to a woman's life that retaining control over it implicated her dignity as a human being, exactly the ground Justice Kennedy emphasized in a key passage of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) he subsequently quotes in *Lawrence v. Texas*, 539 U.S. 558 (2003):

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851, quoted in *Lawrence*, 539 U.S. at 574.

¹¹ See Siegel, *supra* note 5, at 821, 823 ("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. . . . 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.").

doctrines and are still continuing to shape its development today. It is now common to find abortion rights asserted as compound claims on dignity, liberty, and equality, as they initially were.¹²

In the remainder of this Article, I will be reconstructing the equality argument for the abortion right as it was originally asserted by the women's movement in the years before *Roe*. To do so, I tell the story of *Abele v. Markle*¹³ – otherwise known as *Women vs. Connecticut* – a suit the women's movement brought challenging Connecticut's abortion ban decided in the Second Circuit the year before *Roe*. I then compare *Abele* and *Roe*. As we will see, *Abele* significantly influenced *Roe* and is in fact cited in it, but *Roe*'s reasoning substantially obscures the sex equality claim that in part prompted the decision.

I. FROM DOCTORS RIGHTS TO WOMEN'S RIGHTS

As stories of *Roe* have typically emphasized, criminal prosecution of doctors who performed abortions and their patients was common in the 1960s, but these prosecutions met with increasing public disapproval – especially in the case of Sherri Finkbine, a woman who sought to end her pregnancy after discovering that she had ingested thalidomide, known to cause severe developmental malformations.¹⁴ In 1962 the American Law Institute (“ALI”) proposed liberalizing abortion law through model legislation allowing so-called therapeutic abortions¹⁵ which gave doctors substantial discretion in determining when abortion was lawful. The ALI reforms proposed a framework in which a committee of two doctors could authorize abortions for three types of causes: rape or incest, the mother's physical or mental health, or fetal anomalies.¹⁶ The medical model of abortion reform was gender-

¹² Compare Betty Friedan's initial articulation of feminist demands for repeal of laws criminalizing abortion, *see infra* text accompanying notes 21-25, with Justice Ginsburg's testimony in her confirmation hearing, *see supra* text accompanying note 10. On dignity arguments for the abortion right, see Siegel, *Dignity*, *supra* note 4, at 1735-66. On the interplay of liberty and equality arguments for the abortion right, see Siegel, *supra* note 5, at 831.

¹³ 342 F. Supp. 800 (D. Conn. 1972).

¹⁴ DAVID J. GARROW, *LIBERTY AND SEXUALITY* 285-89 (1998); *see also* Sherri Chessen Finkbine, *The Lesser of Two Evils*, Speech Before the Society for Humane Abortion (Jan. 9, 1966), in GREENHOUSE & SIEGEL, *supra* note *, at 11-18 (reprinting the transcript from a 1966 conference on “abortion and human dignity” where Finkbine gave a first-person account of her experience).

¹⁵ GENE BURNS, *THE MORAL VETO* 163-64 (2005).

¹⁶ The American Law Institute's Model Penal Code reforms stated:

A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.

paternalist. It protected women and their families against the hazards of illegal abortion in exceptional circumstances where pregnancy was understood to be onerous because coerced or otherwise posing a threat to the health of women or their children – a determination that doctors would be authorized to make with increasing autonomy from government. Historian Gene Burns describes 1966-1970 as a period in which “an elite movement of physicians, clergy, and legislators succeeded in convincing numerous state legislatures to liberalize their abortion laws.”¹⁷ But reform, he emphasizes, bogged down as it got caught up in other forces. During the 1960s, support for abortion reform began to flow from new sources – from a movement for population control, from a burgeoning “sexual revolution,” and from a movement for women’s rights that exploded in the late 1960s. As Burns and Linda Gordon emphasize, feminist claims fundamentally altered the dynamic of the physician-led reform movement.¹⁸

The women’s movement challenged the medical model of liberalization. The movement sought political authority for women, both in shaping abortion law and in making the abortion decision itself. In February of 1969, Redstockings, a women’s liberation group, protested the New York legislature’s hearings on abortion reform, objecting to the absence of women in the hearing, and, a few weeks later holding a public speak-out at the Washington Square Methodist Church entitled *Abortion: Tell It Like It Is*. The event provided women a public platform in which to describe their experiences with the abortion laws, on the model of feminist “consciousness-raising.”¹⁹ Susan Brownmiller has described the March 1969 speak-out as “an emblematic event for Women’s Liberation. . . . The importance of personal testimony in a public setting, which overthrew the received wisdom of ‘the experts,’ cannot be overestimated.”²⁰ Abortion rights supporters understood that most women sought abortions for reasons other than the therapeutic model indicated and believed that women should be allowed to make that decision for themselves without having to plead with a doctor for permission.

MODEL PENAL CODE § 230.3(2) (Proposed Official Draft 1962).

¹⁷ BURNS, *supra* note 15, at 168.

¹⁸ *Id.* at 211, 221. Historian Linda Gordon has argued that one of the major reasons that reproductive rights became such a politically charged issue in the early 1970s was that the right to reproductive control “seemed to express the core aims of the women’s liberation movement and thus became the major focus of the backlash against feminism.” LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 295 (2002). On the sexual revolution of the 1960s, see DAVID ALLYN, *MAKE LOVE, NOT WAR: THE SEXUAL REVOLUTION: AN UNFETTERED HISTORY* (2000); JANE GERHARD, *DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT, 1920 TO 1982* (2001).

¹⁹ SUSAN BROWNMILLER, *IN OUR TIME: MEMOIR OF A REVOLUTION* 108 (1999).

²⁰ *Id.* at 109; *see also* Susan Brownmiller, “Everywoman’s Abortions: The Oppressor Is Man,” *VILLAGE VOICE*, Mar. 27, 1969, at 1, *reprinted in* GREENHOUSE & SIEGEL, *supra* note *, at 127-30.

“There is only one voice that needs to be heard on the question of the final decision as to whether a woman will or will not bear a child, and that is the voice of the woman herself.”²¹ Betty Friedan’s 1969 speech *Abortion: A Woman’s Civil Right*, which she delivered at a conference founding the National Association for the Repeal of Abortion Laws (“NARAL”), offered a new feminist perspective on traditional morals regulation. Abortion laws symbolically expressed and practically enforced women’s secondary social status. Friedan rejected incremental reform of laws criminalizing abortion and sought instead their repeal, a claim that Friedan asserted on the grounds of liberty, equality, and dignity.

[T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process.

. . . .

Then and only then will women move out of their enforced passivity, . . . their definition as sex objects as *things* to human personhood, to self-determination, to human dignity²²

Abortion was no longer simply a question of public health. On Friedan’s reframing, abortion laws expressed women’s social standing, their authority to govern their own lives:

Women are denigrated in this country, because women are not deciding the conditions of their own society and their own lives. Women are not taken seriously as people. Women are not seen seriously as people. So this is the new name of the game on the question of abortion: that women’s voices are heard.²³

Repealing laws criminalizing abortion would confer on women, at one and the same time, liberty *and* equality – control over the direction of their own lives to which men were generally presumed entitled:

[T]here are certain rights that have never been defined as rights, that are essential to equality for women, and they were not defined in the Constitution of this, or any country, when that Constitution was written only by men. The right of woman to control her reproductive process must be established as a basic and valuable human civil right not to be denied or abridged by the state.²⁴

²¹ Betty Friedan, President, NOW, *Abortion: A Woman’s Civil Right*, Speech Given at the First National Conference on Abortion Laws (Feb. 1969), in GREENHOUSE & SIEGEL, *supra* note *, at 39 (reprinting Friedan’s 1969 speech at the conference giving rise to National Association for the Repeal of Abortion Laws (“NARAL”).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Decriminalizing abortion would not only change women's experience of sex and parenting, Friedan argued; it would recognize women's competence and moral authority as decision-makers, and so transform their social standing. Friedan invokes this fusion of roles and standing, of liberty and equality, as dignity:

Am I saying that women must be liberated from motherhood? No, I am not. I am saying that motherhood will only be liberated to be a joyous and responsible human act when women are free to make with full conscious choice and full human responsibility the decision to be mothers. . . .

. . . .

So this is the real sexual revolution. Not what they so cheaply make headlines in the papers, at what age boys and girls go to bed with each other and whether they do it with or without the benefit of marriage. That's the least of it. The real sexual revolution is the emergence of women from passivity, from *thing-ness* . . . to full self-determination, to full dignity. . . .²⁵

Where the ALI model rationalized liberalization as needed to protect women's *health*, the women's movement sought repeal of abortion laws to promote women's *equal standing* as citizens. The women's rights challenge to abortion laws was part of a larger challenge to gender roles that shaped women's public and private lives. As Linda Gordon observes, movement support for the abortion right in the early 1970s

rested on a more grassroots and comprehensive feminist program than had the previous wave. It invented a new word – 'sexism' – which condemned practices once not even reprehensible, and invented an analysis that challenged not only sexual inequality but gender itself, including the view that motherhood had to be women's primary identity.²⁶

The women's movement of this era identified transformation in gender roles concerning sex and parenting as central to women's freedom and equality, and expressed this vision in constitutional terms. At its second national conference in 1967, the National Organization of Women ("NOW") identified passage of the Equal Rights Amendment ("ERA"), repeal of all abortion laws, and public funding of childcare among its goals in a "Bill of Rights for Women."²⁷ In 1970, the movement commemorated the fiftieth anniversary of the woman suffrage amendment with an inaugural strike for equality. It staged protest actions in forty cities around the nation that tied abortion to questions of political participation, work and education, and the social organization of

²⁵ *Id.* at 40.

²⁶ GORDON, *supra* note 18, at 297.

²⁷ National Organization for Women Bill of Rights in 1968, *reprinted in* FEMINIST CHRONICLES 1953-1993, at 214 (Toni Carabillo et al. eds., 1993).

childrearing. The strike sought ratification of the ERA and three demands: equality of opportunity in education and employment, access to abortion, and access to publicly supported childcare.²⁸

As the strike demands illustrate, abortion rights meant something very different on the medical and women's rights models. In challenging criminal abortion statutes, the women's rights movement was challenging institutional norms and structures that define women as mothers and define motherhood as inconsistent with core activities of citizenship, making the work of motherhood a source of exclusion and dependence for women. With this critical understanding of motherhood, feminists understood the criminalization of abortion to inflict harms, *in addition to* the threats it might pose for women's health.

As Friedan and others argued, laws requiring women to become mothers against their will inflicted *dignitary* harm, because such laws defined women's sexual and social lives solely in terms of their role as child bearers. Once feminists questioned this root assumption, the use of the criminal law to enforce role compliance looked deeply suspect. The harm was not only dignitary. Criminal abortion statutes allowed the society to decide the life plans of any sexually active woman, treating consent to sex – or lack thereof – as consent to motherhood.²⁹ Laws that deprived women of control over the timing of motherhood in turn exacerbated the relations of economic exclusion and interpersonal dependence that the social organization of motherhood imposed on women. Framed as part of a challenge to the social organization of

²⁸ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1373-75 (2006); Shirley Bernard, *The Women's Strike: August 26, 1970* (1975) (unpublished Ph.D. dissertation, Antioch College) (on file with author); *see also* Betty Friedan, President, NOW, *Call to Women's Strike for Equality*, Speech Given at the 1970 NOW Convention in Chicago (Mar. 20, 1970), in GREENHOUSE & SIEGEL, *supra* note *, at 41-43 (reprinting the text of Friedan's speech calling for the Women's Strike for Equality, "a 24-hour general strike . . . of all women in America against the concrete conditions of their oppression"); GREENHOUSE & SIEGEL, *supra* note *, at 44 (demonstrating the strike's three key demands through the reprinting of a 1970 flyer summoning women to a post-strike mass meeting to further press these demands).

²⁹ As historian Leslie Reagan has observed:

[N]o 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 backup. 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 1867-1973*, at 229 (1997).

sex and motherhood, the abortion rights claim was an incendiary cocktail of gender justice claims.

How did the movement seek constitutional vindication of women's right to be free of coerced motherhood? By 1970, there was already constitutional litigation afoot, but these first challenges to the constitutionality of abortion restrictions were an outgrowth of the medical model of liberalization.³⁰ The lawsuits challenged abortion laws as infringing the constitutional rights of *doctors* – often contesting prosecutions on grounds of vagueness. In the 1969 case of *People v. Belous*,³¹ a physician made history by persuading the California Supreme Court to strike down the state's criminal abortion statute in an opinion that protected the doctor as vindicating constitutionally protected interests of his patients. In *United States v. Vuitch*,³² a plaintiff physician and nurse's aide challenged the District of Columbia's abortion statute, which the district court found void for vagueness;³³ the Supreme Court reversed in April of 1971, construing the health exception in the federal statute expansively to protect physician autonomy, but refusing to reach the patient rights claims to which the district court had adverted.³⁴

The first abortion rights cases advanced vagueness claims focused on the constitutional rights of doctors, even as it remained unclear whether the medical profession had any special immunity from public regulation, except insofar as doctors were indirectly raising what might be understood as constitutional claims of their patients, as the courts in *Belous* and *Vuitch* suggested.³⁵ But as of 1970, what rights did their patients have? In 1970, the Court had never found a single law to violate the Equal Protection Clause because it discriminated on the grounds of sex. The claims of their patients in this period were limited to the rights *Griswold v. Connecticut*³⁶ protected – a right of privacy extending at least to the use of contraception in marriage.

³⁰ For an in-depth account of these early cases with a particular focus on the New York litigation, see Linda J. Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES MAG., Jan. 25, 1970, at 200, reprinted in GREENHOUSE & SIEGEL, *supra* note *, at 130-39.

³¹ 458 P.2d 194 (Cal. 1969). This case successfully challenged California's abortion statute on behalf of a plaintiff physician.

³² 402 U.S. 62 (1971).

³³ 305 F. Supp. 1032, 1034-35 (D.D.C. 1969).

³⁴ 402 U.S. at 71-72. This is not to say that women's rights claims were not made in *Vuitch*. A feminist brief was filed on behalf of Human Rights for Women that alleged that the statute violated women's right to privacy and liberty, Equal Protection, and the Thirteenth Amendment. Brief for Human Rights for Women, Inc. as Amicus Curiae at 8-13, *Vuitch*, 402 U.S. 62 (No. 84).

³⁵ On vagueness doctrine of the era, see Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361 (2010).

³⁶ 381 U.S. 479 (1965).

The women's movement set out to make *women's* claims about abortion audible, as the NOW Bill of Rights emphasized, first through repeal of criminal abortion statutes – and then through litigation. A pioneer state, New York, illustrated both. The lawsuit challenging New York's abortion law was initially filed on behalf of plaintiff physicians, but it was soon joined with companion suits on behalf of clergy referral activists and legal services organizations who represented poor women,³⁷ – and *Abramowicz v. Lefkowitz*,³⁸ a suit brought by a large group of female plaintiffs.³⁹

Nancy Stearns of the Center for Constitutional Rights (“CCR”) brought the women's suit against New York's law; her aim was to represent women directly, instead of through doctors, employing the affirmative litigation strategy of CCR founder Arthur Kinoy.⁴⁰ Rather than litigate civil rights cases defensively, Kinoy “went on the offensive by initiating federal lawsuits with massive numbers of plaintiffs.”⁴¹

Unlike earlier lawsuits that had framed the issue on the medical model, as the right of counselors and doctors to perform abortions, the *Abramowicz* complaint framed the issue as a woman's right to an abortion.⁴² The suit was filed as a class action and the named plaintiffs consisted of 109 women; some were married, some had abortions in the past, and some had to bear unwanted children.⁴³ Not only was the identity of the plaintiffs different; the suit employed new feminist modes of argument as well. The brief in *Abramowicz* opened by recounting stories contained in the depositions of fourteen witnesses who had testified “concerning the harshness of the abortion laws upon women and the interferences of the laws with women's constitutionally protected rights.”⁴⁴ The brief asserted that the abortion laws “are both a result and symbol of the unequal treatment of women that exists in this society.”⁴⁵ It reasoned that so long as “such a broad range of disabilities are permitted to attach to the status of pregnancy and motherhood, that status must be one of choice.”⁴⁶

³⁷ GARROW, *supra* note 14, at 380.

³⁸ Hall v. Lefkowitz (*Abramowicz v. Lefkowitz*), 305 F. Supp. 1030 (S.D.N.Y. 1969).

³⁹ For more on *Abramowicz* and many of the litigation papers from the suit, including the plaintiffs' depositions, see generally DIANE SCHULDER & FLORYNCE KENNEDY, ABORTION RAP (1971).

⁴⁰ BROWNMILLER, *supra* note 19, at 111.

⁴¹ *Id.* at 110.

⁴² Janice Goodman, Rhonda Copelon Schoenbrod & Nancy Stearns, *Doe and Roe: Where Do We Go from Here?*, WOMEN'S RTS. L. REP., Spring 1973, at 20, 22.

⁴³ Complaint for Declaratory and Injunctive Relief, *Hall*, 305 F. Supp. 1030, *reprinted in* SCHULDER & KENNEDY, *supra* note 39, at 190.

⁴⁴ Plaintiffs' Brief at 1, *Hall*, 305 F. Supp. 1030 (No. 69 Civ. 4469). Excerpts from this brief are republished in GREENHOUSE & SIEGEL, *supra* note *, at 140-47.

⁴⁵ Plaintiffs' Brief, *supra* note 44, at 87.

⁴⁶ *Id.* at 40.

Activism surrounding the suit was so successful it prompted the legislature to take action. In the wake of a mass demonstration,⁴⁷ the legislature voted to legalize abortion until the twenty-fourth week of pregnancy,⁴⁸ – effectively satisfying the movement’s repeal aims – and the *Abramowicz* suit was dismissed as moot.⁴⁹ Although a final decision was never issued in the case,⁵⁰ Stearns’ New York suit prompted other movement litigation.

II. WOMEN VS. CONNECTICUT

With the *Abramowicz* suit moot, Connecticut became an arena developing women’s claim to abortion rights in the case of *Abele v. Markle*, commonly known as *Women vs. Connecticut*. The organizers of the Connecticut suit, which included several Yale Law School students, recruited Katie Roraback, Planned Parenthood’s counsel in Connecticut who had worked with Professor Thomas Emerson on litigating *Griswold*, to serve as lead counsel in the challenge to Connecticut’s nineteenth-century abortion law.⁵¹ Roraback

⁴⁷ SCHULDER & KENNEDY, *supra* note 39, at 178. This mass demonstration occurred just one year after the Redstockings speak-out at the Washington Square Methodist Church. *Id.*; BROWNMILLER, *supra* note 19, at 108.

⁴⁸ SCHULDER & KENNEDY, *supra* note 39, at 178-79.

⁴⁹ The opinion dismissing *Abramowicz* and its companion suits as moot was issued on July 1, 1970, but it was not published in any official court reporter. *Hall*, 305 F. Supp. 1030 (No. 69 Civ. 4469); *see also* SCHULDER & KENNEDY, *supra* note 39, at 178.

Legalization of abortion in New York energized opponents of abortion who mobilized with such energy “that they almost succeeded in legislatively repealing the New York legalization statute; only a 1972 gubernatorial veto by Nelson Rockefeller prevented such an anti-abortion triumph and kept legal abortion available in New York in the months immediately preceding the decision in *Roe*.” David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 841 (1999). Response to the New York statute has been largely ignored by scholars who argue that *Roe* unnecessarily provoked a disastrous backlash in a climate of state-by-state legalization of the abortion right. *See* Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991) (“By 1973 . . . state legislatures were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe*.” (footnote omitted)); Michael Kinsley, *The Right’s Kind of Activism*, WASH. POST, Nov. 14, 2004, at B7 (“*Roe* is what first politicized religious conservatives while cutting off a political process that was legalizing abortion state by state anyway.”).

⁵⁰ The draft opinion composed by Judge Friendly, however, suggests that if the court had issued its opinion, the plaintiffs would *not* have succeeded at overturning the law. Judge Friendly’s draft opinion is reproduced in A. Raymond Randolph, Circuit Judge, United States Court of Appeals for the D.C. Circuit, Before *Roe v. Wade*: Judge Friendly’s Draft Abortion Opinion, Barbara K. Olson Memorial Lecture at the Federalist Society’s National Lawyers Convention (Nov. 11, 2005), in 29 HARV. J.L. & PUB. POL’Y 1035, 1058 (2006).

⁵¹ Amy Kesselman, *Women Versus Connecticut: Conducting a Statewide Hearing on Abortion*, in ABORTION WARS: A HALF CENTURY OF STRUGGLE 42, 47 (Rickie Solinger ed., 1998). Other Connecticut lawyers involved in *Abele* included Kathryn Emmett, Marjory

worked with Nancy Stearns of the CCR, the lawyer for *Abramowicz* who had also helped file suits with large named plaintiff classes in New Jersey⁵² and Rhode Island,⁵³ and who assisted similar cases in Massachusetts⁵⁴ and Pennsylvania.⁵⁵ These suits helped establish the understanding that criminal abortion laws inflicted constitutionally significant harm on women, as well as doctors.

Like *Abramowicz*, *Women vs. Connecticut* was conceived of as an opportunity to mobilize and educate.⁵⁶ The group organizing *Women vs. Connecticut* wrote a pamphlet for recruiting women to volunteer as plaintiffs in a suit challenging Connecticut's abortion law. In what follows, I reconstruct the plaintiffs' claims from the organizing pamphlet, a state hearing, and several published decisions. The recruitment pamphlet, in particular, documents the master narratives that organizers used the suit to disseminate.⁵⁷

Connecticut's abortion law, which had been on the books since the nineteenth century, was quite stringent. It allowed abortions only to preserve the life of the mother; women who had abortions, anyone who performed an abortion, or anyone who assisted in arranging the abortion could be imprisoned or fined.⁵⁸ But the recruitment pamphlet located its challenge to the state's abortion law in a more wide-ranging critique of the social relations in which women conceived and bore children. The claim to constitutional protection of women's decisions challenged the social understandings and arrangements that pressured women to bear children *and* that pressured women to end pregnancies:

For years women have been under constant pressure to have children. Our culture teaches us that we are not complete women unless we have children.

. . . .

Other pressures compel some of us not to have children. If we are unmarried, we become social outcasts by bearing children. Those of us who are poor and live on welfare know that opponents of welfare want to

Gelb, Barbara Milstein, and Marilyn Seichter. *Id.* at 52. Yale Law School students involved in organizing the case included Gail Falk, Ann C. Hill, and Ann Freedman.

⁵² *YWCA v. Kugler*, 342 F. Supp. 1048, 1052 (D.N.J. 1972).

⁵³ *Women of R.I. v. Israel*, No. 4605 (D.R.I. May 14, 1971).

⁵⁴ *Women of Mass. v. Quinn*, Civ. No. 71-2420-W (Nov. 1, 1971).

⁵⁵ *Ryan v. Specter*, 321 F. Supp. 1109 (D. Pa. 1971).

⁵⁶ For the organizers' reflections on strategy, see *Women vs. Connecticut, Some Thoughts on Strategy*, in GREENHOUSE & SIEGEL, *supra* note *, at 163-77.

⁵⁷ Excerpts from the pamphlet, as well as a strategy memo from the organizers of the suit, are republished in GREENHOUSE & SIEGEL, *supra* note *, at 163-77. To this point, I have not located a copy of the plaintiffs' brief.

⁵⁸ 1860 Conn. Pub. Acts 65-66. The provisions of the statute are discussed in *Abele v. Markle*, 342 F. Supp. 800, 801 (1972).

limit the size of our families. We are pressured to use contraceptives or be sterilized. . . .

. . . .

We want control over our own bodies. We are tired of being pressured to have children or not to have children. *It's our decision.*⁵⁹

Movement lawyers were emphatic: "We are arguing that all women should have the freedom to choose, and that they not be penalized whatever the choice is – to bear the child or to abort."⁶⁰

Thus, the movement sought relief from government control of women's decisions, and *more*: it sought transformation of the social understandings and arrangements that pressured women to bear children, *and* to forbear from bearing children. It challenged these social understandings and arrangements in a demand for reproductive justice that linked demands for abortion rights and childcare. Motherhood itself was not a harm; instead, the problem was the way the society treated mothers:

Women must not be forced into personal and economic dependence on men or on degrading jobs in order to assure adequate care for the children they bear. Our decisions to bear children cannot be freely made if we know that aid in child care is not forthcoming and that we will be solely responsible for the daily care of our children.⁶¹

The recruitment pamphlet presented these everyday understandings about the social conditions of motherhood as injuries of constitutional magnitude. Under the heading "right to life, liberty, and property," the organizers pointed out that imposition of forced motherhood was so great it shaped the lives of women even when they were not pregnant, teaching women and their society to see all women as potentially pregnant.⁶² The pamphlet's account of how unwanted motherhood affected women repeatedly emphasized society's responsibility for motherhood's adverse effects on women:

Unmarried women who become pregnant and are forced to bear children against their will suffer an extreme deprivation of liberty and human dignity by the social stigma placed on them as unwed mothers.

⁵⁹ WOMEN VS. CONNECTICUT RECRUITMENT PAMPHLET 2 (1970), *reprinted in* GREENHOUSE & SIEGEL, *supra* note *, at 168-69.

⁶⁰ See Goodman, Schoenbrod & Stearns, *supra* note 42, at 35 (conversing about forms of pressure or coercion of concern to the feminist movement in the immediate aftermath of *Roe*).

⁶¹ WOMEN VS. CONNECTICUT RECRUITMENT PAMPHLET, *supra* note 59, at 169.

⁶² *Id.* at 173 ("In Connecticut, the actuality of an unwanted pregnancy, or the possibility of such a pregnancy, severely limits a woman's liberty and freedom to engage in the political process, to choose her own profession, and to fulfill herself in any way which does not relate to the bearing and raising of children."); *see also id.* at 174 ("Women also suffer loss of property in that they are denied jobs solely on the basis of possible pregnancy, or motherhood.").

. . . Pregnant women are forced to leave their jobs without compensation and without any guarantee of returning to work after they give birth.

Women who are forced to bear children they cannot support suffer extreme economic hardship. Because there are few facilities for child care outside the home, these women are effectively excluded from seeking employment and are forced to rely on welfare or charities to help in raising their children, at a loss to their liberty and independence in economic matters.⁶³

These arguments, emphasizing gender inequalities in the conditions in which children are conceived and raised, were offered as illustrations of how abortion law deprived women of liberty and property. The *equal protection* argument, advanced at a time when there was no heightened scrutiny for sex discrimination, addressed the ways in which criminal abortion laws discriminated between *rich* women, who “can afford to travel to London or Puerto Rico for abortions” and *poor* women, who could not.⁶⁴ The litigation in Connecticut, as in other states, emphasized the ways in which the social organization of motherhood varied across lines of socioeconomic class and race,⁶⁵ and argued that the criminalization of abortion specially harmed poor and minority women.⁶⁶

⁶³ *Id.* at 173-74.

⁶⁴ *Id.* at 174. Other arguments in the pamphlet included claims in Cruel and Unusual Punishment, Unconstitutionally Vague, Right to Freedom of Religion, Right to Free Speech, and Lack of State Interest. The pamphlet speaks of continuing to work on a Thirteenth and Nineteenth Amendment argument. *Id.* at 174-76.

⁶⁵ See, e.g., *supra* text accompanying note 49.

⁶⁶ See *supra* text accompanying note 63. The suit’s recruitment pamphlet emphasized that wealthy women “have greater opportunity to learn of private New York hospitals that perform abortions for out-of-state women at fees of \$500-600. Thus, Connecticut’s abortion law places a much heavier burden on poor women, who cannot afford the prices charged by hospitals in New York for therapeutic abortions” WOMEN VS. CONNECTICUT RECRUITMENT PAMPHLET, *supra* note 59, at 174.

Litigation in other states emphasized the racial and economic disparities of abortion restrictions. See, e.g., Complaint at 6, *Women of Mass. v. Quinn*, Civ. No. 71-2420-W (D. Mass. Nov. 1, 1971) [hereinafter *Quinn Complaint*] (“[Poor women] without economic means are unable to procure psychiatric and medical evaluations that are necessary to obtain ‘legal’ abortions in Massachusetts, thus violating the constitutional guarantee of equal protection of the laws.”); Brief of Plaintiff at 12, *Ryan v. Specter*, 321 F. Supp. 1109 (D. Pa. 1971) (No. 70-2527) (“[B]y far the most disastrous [sic] effect of this comfortable and closely guarded monopoly [on therapeutic abortions] is the fact that it makes safe medical abortions unavailable to most women of low income, and consequently condemns them to choose between bearing an unwanted child and risking a self-induced abortion or an abortion at the hands of an unqualified practitioner.”); *id.* (discussing data in New York City that showed that half of the women who died from bungled abortions in 1960-1962 were non-white women, but 92.7% of women granted therapeutic abortions were white); *id.* at 13

In fact, the organizing pamphlet for *Women vs. Connecticut* invoked a variety of clauses of the Constitution as authority for its claim that criminal abortion statutes violated women's constitutional rights. The pamphlet asserted that the Connecticut abortion statute violated women's rights under the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments, and announced that a Nineteenth Amendment argument was under development.⁶⁷ Appeal to these many forms of constitutional authority was a regular part of the movement's multi-plaintiff cases challenging criminal abortion statutes. The suits expressed wide-ranging challenge to the conditions in which women conceived and raised children as they argued that abortion restrictions (1) violated women's right to life,⁶⁸ and liberty,⁶⁹ under the Fourteenth Amendment; (2) violated women's right to equal protection under the Fourteenth Amendment;⁷⁰ (3) violated poor women's right to equal

("[T]he inevitable effect of the statute has been systematically to deny safe medical abortions to the poor, Negroes, and Puerto Ricans. . . . The law operates in a socio-economic environment which could lead to no other results."); First Amended Complaint at 6, *Women of R.I. v. Israel*, No. 4605 (D.R.I. May 14, 1971) ("[I]n their application, [the laws] affect least those with the money and contacts to afford and obtain a legal abortion . . . ; a legal abortion out of the State; or at least a safe and discreet illegal abortion. Most women who die or become seriously ill or sterile from unsafe self abortions, or illegal abortions, are poor women."); *see also* Complaint at 15, *Abramowitz v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972) (No. 431-70) [hereinafter *Abramowitz Complaint*] (employing the same language used in the Rhode Island complaint to challenge the socioeconomic effect of New Jersey's laws). In the wake of *Roe*, movement lawyers focused on the kinds of suits that would be necessary to ensure that Medicaid covered abortions and to ensure that poor women and women of color were protected against involuntary sterilization. *See* Goodman, Schoenbrod & Stearns, *supra* note 42, at 31, 35.

⁶⁷ *WOMEN VS. CONNECTICUT RECRUITMENT PAMPHLET*, *supra* note 59, at 173-76; *see also* *Abele v. Markle*, 452 F.2d 1121, 1123 (2d Cir. 1971).

⁶⁸ Plaintiffs' Brief, *supra* note 44, at 13, 15. The New York suit argued that women's right to life was violated on the grounds that childbirth involved a risk of death, that many women seeking to avoid pregnancy were forced to "expose themselves to the known and as yet unknown dangers of the pill even though they would prefer not to," and that the statute criminalizing abortion drove women seeking abortions "into the hands of often unskilled and unscrupulous persons directly in the face of the guarantees of the Fourteenth Amendment." *Id.*

⁶⁹ *Id.* at 16-25. The New York brief detailed numerous ways in which childbearing infringed upon the liberty of women: The law permitted, and in some cases encouraged, employment discrimination on the basis of pregnancy and motherhood, inhibiting women's liberty to work. Schools frequently required pregnant students to withdraw. Unmarried women could be forced to marry by the social stigma of unwed motherhood and the economic requirements of a society where mothers were often refused employment. The brief argued that the decision whether to bear children and to bear the constraints the status of motherhood imposed was an aspect of liberty protected by the Fourteenth Amendment.

⁷⁰ The New York brief challenges the sexual "double standard," arguing that while women and men are equally responsible for the act of sexual intercourse, "[s]hould the

protection under the Fourteenth Amendment;⁷¹ (4) violated women's right to privacy as protected by the Ninth Amendment;⁷² (5) violated the Eighth Amendment, by imposing motherhood on women for engaging in sex, a form of cruel and unusual punishment;⁷³ (6) violated the Thirteenth Amendment as a form of involuntary servitude;⁷⁴ and (7) violated the Nineteenth Amendment

woman accidentally become pregnant . . . she endures in many instances the entire burden or 'punishment.'" Plaintiffs' Brief, *supra* note 44, at 35-36. The brief argues that this violates equal protection of the laws by putting women, and only women, "into a position in which they will be subjected to a whole range of de facto types of discrimination based on the status of motherhood" that will last for much longer than the mere nine months of pregnancy. *Id.* at 37.

⁷¹ In New Jersey, the plaintiffs argued that the statutes particularly deprived poor women of equal protection of the law: "The abortion laws affect all women adversely, but in their application, affect least those with the money and contacts to afford and obtain a legal abortion in New Jersey Thus, they deprive poor women of the equal protection of the laws" Abramowitz Complaint, *supra* note 66, at 15. The Pennsylvania case also made an equal protection argument on behalf of poor women: "Wealthy women enter the front door [of the hospital] armed with the results of expensive psychiatric consultation. . . . The poor woman enters the hospital through the back door, often on the verge of death." Brief of Plaintiff, *supra* note 66, at 14. The Pennsylvania brief argues that the state has "consciously adopted and retained an abortion statute which inexorably leads to systematic socio-economic discrimination." *Id.* at 48.

⁷² In New York, the plaintiffs' brief stated that a woman's "control of her own body – the decision concerning whether she will or she will not bear a child – must be her own private decision. This private decision is inextricably linked to a woman's right of liberty to control her life and with her privacy of association." Plaintiffs' Brief, *supra* note 44, at 45. The Rhode Island Complaint argued that women seeking abortions, who are fighting for "their constitutional right to self-determination," were forced by the state's statute to expose their most intimate concerns to anyone whom they think might aid them. They must become involved in the furtive and sordid underground which the laws against abortion create. Thus, the abortion laws operate to degrade women in their own eyes and in the eyes of others. All this violates the right of privacy which is guaranteed by the Ninth Amendment and which is a penumbra of the first ten amendments.

First Amended Complaint, *supra* note 66, at 5.

⁷³ In her *New Women Lawyers* amicus brief in *Roe*, Nancy Stearns argued:

Forcing a woman to bear a child against her will is indeed a form of punishment, a result of society's ambivalent attitude towards female sexuality. The existence of the sexual "double standard" has created the social response that when a woman becomes pregnant accidentally, she must be "punished" for her transgression, particularly if she is single. This punishment falls solely on the woman. . . . The man equally responsible for the pregnancy faces no such punishment. . . . The Eighth Amendment to the United States Constitution protects all persons against the infliction of "cruel and unusual punishment."

Brief Amicus Curiae on Behalf of New Women Lawyers et al. at 34-35, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). On the sexual double standard, see generally Keith Thomas, *The Double Standard*, 20 J. HIST. IDEAS 195 (1959).

⁷⁴ The Massachusetts case argued that the state's statute constituted involuntary servitude in violation of the Thirteenth Amendment by forcing women to "spent a major portion of

by forcing women to become mothers while organizing the core activities of citizenship to exclude caregivers.⁷⁵

The organizers of the Connecticut case recruited 858 individual female plaintiffs to challenge the constitutionality of the state's abortion statute. To make clear that "it was women whose cause they were defending – not members of the medical profession,"⁷⁶ and to illustrate concretely the harms that the abortion statute inflicted on individual women, the organizers made large charts detailing each plaintiff's experiences with abortion. The organizers indicated, as to each plaintiff, whether she reported complications from illegal abortion, sexual inhibition, compelled pregnancy, pressure to early marriage, as well as physical, emotional, and financial problems from unwanted pregnancy.⁷⁷

The action proved remarkably successful in communicating with the judiciary the social meaning and consequences of forced motherhood for women. A three-judge panel invalidated Connecticut's criminal abortion statute over strenuous dissent, with Judge Edmund Lumbard writing an opinion recognizing the "extraordinary ramifications" of motherhood for women,⁷⁸ and

their lifetime bearing and rearing unwanted children to the necessary exclusion of other endeavors." Quinn Complaint, *supra* note 66, at 7; *see also* Brief for Human Rights for Women, Inc. as Amicus Curiae, *supra* note 34.

⁷⁵ The Rhode Island Complaint stated:

[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, *supra* note 66, at 6-7.

⁷⁶ Kesselman, *supra* note 51, at 53.

⁷⁷ Women vs. Connecticut Organizing Charts (1970) (on file with author). The charts indicated whether the plaintiff had (1) previously received an abortion; (2) suffered physical, emotional, or financial complications from an illegal abortion; (3) used previous methods of birth control (including the type of birth control and any complications); (4) used the Pill despite adverse reaction or doctor's advice; (5) ever felt sexually inhibited; (6) married early because of unplanned pregnancy; (7) continued a pregnancy because of the illegality of abortion; (8) given up a child for adoption; (9) suffered physical, emotional or financial problems from an unwanted pregnancy; (10) been denied an abortion in Connecticut; and (11) been provided (or was currently being providing) abortion counseling. *Id.* Finally, the chart indicated whether the plaintiff was willing to testify in the case. *Id.*

⁷⁸ *Abele v. Markle*, 342 F. Supp. 800, 801-02 (D. Conn. 1972) ("The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The

reasoning that, in view of the “changed role of women in society and the changed attitudes toward them,”⁷⁹ retaining control over child-bearing decisions was of fundamental importance to women. Judge Jon Newman focused on the ways the statute violated women’s “right to privacy in family and sexual matters.”⁸⁰ Newman’s concurring opinion weighed evidence suggesting that the century-old statute might have been enacted for the purpose of “deterring fornication” and “inhibiting non-procreative sexual relations,”⁸¹ as well as for protecting women from what was then an unsafe medical procedure. Unable to find evidence that protecting unborn life was a reason for the ban’s enactment, Judge Newman concluded that protecting a woman’s health and morals was not sufficient reason to sustain a law burdening a woman’s constitutional liberties, when medical advances had eliminated risks abortion once posed.⁸²

Upon learning that the state’s criminal abortion statute had been struck down with one judge questioning whether the statute had a fetal-protective purpose, Governor Thomas Meskill called a special session of the Connecticut legislature to enact a new law with a preamble stating that the purpose of the law was to protect the fetus.

The plaintiffs’ lawyer, Roraback, and other participants in the case attended the legislative hearing to voice their opposition to the newly proposed abortion law.⁸³ Roraback’s statement to the legislature on behalf of the plaintiffs in *Women vs. Connecticut* indicated that the number of named plaintiffs in the case continued to grow. Responding to the Governor’s proposal to reinstate the statute in order to protect the unborn, Roraback emphasized the ways women were treated when pregnant – conditions for which the society as a whole was responsible. She stated, in part:

We are here to speak as women on behalf of the 1,700 women in Connecticut who join together to strike down the ban on abortion in this State. . . . Probably nothing but death itself can affect a woman [sic] life more seriously than enforce [sic] bearing of children and enforced responsibility for them perhaps for the remainder of her and their lives. . .

mother with an unwanted child may find that it overtaxes her and her family’s financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman.”).

⁷⁹ *Id.* at 802.

⁸⁰ *Id.* at 805 (Newman, J., concurring).

⁸¹ *Id.* at 808-09.

⁸² *Id.* at 810 (“Because I believe the only interests which the 1860 legislature was seeking to advance are not today sufficient to justify invasion of the plaintiff’s constitutionally protected rights, I join with Judge Lumbard in holding these statutes unconstitutional.”).

⁸³ Excerpts from the legislative hearing on the new law are reprinted in GREENHOUSE & SIEGEL, *supra* note *, at 184-91.

. Even before childbirth, she will probably lose her employment, at least temporarily, and during that lay-off she is not entitled to receive unemployment compensation benefits. . . . Afterwards, the woman that has given birth to a child will find her employment opportunities severely limited.

. . . .

. . . The interruption of her education and training, for whatever reason and whatever level, places her and her family at a permanent disadvantage

. . . .

The real question . . . is not whether abortions will be performed. . . . [It] is who will perform them and how they will be done – by a trained doctor in a clean medical facility or by a dirty old man in a back room.⁸⁴

Despite a wide-ranging speak-out at the hearing, the legislature reenacted the abortion statute. Roraback and her fellow attorneys sued – now with over 2000 named plaintiffs⁸⁵ – to enjoin enforcement of the new law, and the new law was struck down in an opinion authored by Judge Jon Newman that squarely addressed the relation of claims about women and the unborn, and proposed a viability framework as a basis for reconciling the two.⁸⁶ The state of Connecticut appealed the decision invalidating its statute, but the case was intercepted by the *Roe* decision itself.

III. HOW WOMEN VS. CONNECTICUT IS VISIBLE, AND EFFACED, IN *ROE*

Both *Abele* opinions are notable for their influence on *Roe*. Justice Blackmun's opinion in *Roe* employs the viability framework set forth in Judge Jon Newman's opinion as a way of coordinating the abortion right and the state's interest in protecting potential life.⁸⁷

But the influence of *Abele* on *Roe* is deeper, helping to establish that women's interest in retaining control over the decision whether to become a mother is of constitutional magnitude. *Roe* was argued twice; in its earliest drafts the opinion seems to have been conceived of as an opinion invalidating

⁸⁴ *Hearing on Abortion Before the J. Comm. Pub. Health and Safety*, 1972 Leg., Spec. Sess., 18-23 (Conn. 1972) (statement of Catherine Roraback), reprinted in GREENHOUSE & SIEGEL, *supra* note *, at 186-87.

⁸⁵ Kesselman, *supra* note 51, at 59.

⁸⁶ See *Abele v. Markle*, 351 F. Supp. 224, 227, 232 (D. Conn. 1972).

⁸⁷ See generally Andrew D. Hurwitz, *Jon O. Newman and the Abortion Decisions: A Remarkable First Year*, 46 N.Y.L. SCH. L. REV. 231 (2002). Interestingly enough, it seems to have been a Justice Powell clerk who was sufficiently attached to the reasoning of Judge Newman's opinion that he continued to press for revisions expanding the scope of the right in accordance with it. *Id.* at 244.

the Texas abortion statute on vagueness grounds.⁸⁸ Between the first and second argument of the case, challenges to abortion statutes on the women's rights model, ongoing in multiple jurisdictions, seem to have communicated that criminal abortion statutes inflicted harms on women of constitutional magnitude, gravity, and fundamentality.⁸⁹ In the wake of *Roe*, Nancy Stearns reflected:

I don't think we can possibly underestimate how much women have taught judges, lawyers and the public generally on the women's rights issues I mean they really did not understand women's rights claims and they certainly did not understand how serious it was to a woman to have an unwanted child. . . . I must stress that I think this progression was largely due to the strategy of bringing women's rights cases. I don't think we could have educated the judges the same way in pure doctors' lawsuits.⁹⁰

More specifically, *Abele* itself seems to have shaped *Roe*'s account of the harms of criminal abortion statutes.⁹¹ Years later, Nancy Stearns, the lawyer

⁸⁸ LINDA J. GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 87-88* (2005); Hurwitz, *supra* note 87, at 240.

⁸⁹ For Stearns' amicus brief in *Roe*, see Brief Amicus Curiae on Behalf of New Women Lawyers et al., *supra* note 73. Other multi-plaintiff challenges to abortion statutes filed at this time with which she was associated include: Quinn Complaint, *supra* note 66; Complaint, *YWCA v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972) (No. 264-70); Complaint, *Ryan v. Specter*, 321 F. Supp. 1109 (D. Pa. 1971) (No. 70-2527); First Amended Complaint, *supra* note 66.

⁹⁰ Goodman, Schoenbrod & Stearns, *supra* note 42, at 24.

⁹¹ *Abele* offered this account of harm:

The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman.

Abele v. Markle, 342 F. Supp. 800, 801-02 (D. Conn. 1972) (citations omitted). *Roe* famously observed:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and

who worked on the multi-plaintiff movement cases observed: “Justice Blackmun’s description of the physical and emotional harm to women of an unwanted pregnancy, the stigma of an out-of-wed-lock pregnancy, and the problems associated with bearing an unwanted child bears a striking resemblance to the language used by the Connecticut court.”⁹²

Whereas in 1971 in *United States v. Vuitch*⁹³ the Supreme Court rejected a doctor’s void for vagueness challenge to the District of Columbia’s abortion statute in a decision that refused to address the constitutional liberties of the doctors patients,⁹⁴ in 1973 it struck down Texas’s and Georgia’s abortion statutes as violating women’s right to privacy grounded in the “Fourteenth Amendment’s concept of personal liberty.”⁹⁵ The movement’s account of how criminal abortion statutes injured women seems to have changed the Court’s understanding of the law sufficiently to extend protection of the liberty right recognized in its contraception cases to the case of abortion.⁹⁶ In reviewing the history of criminal abortion statutes, Justice Blackmun queried whether the state had an interest in enforcing morals by law sufficient to justify the imposition on women’s liberty, citing to opinions arising out of cases that the feminist movement brought in Connecticut and New Jersey, including Judge Newman’s opinion in *Abele*.⁹⁷

But, as Linda Greenhouse has emphasized, even though amicus briefs in *Roe* “were filled with the new feminist discourse of women’s rights,” there was a “disconnect between what the Court heard in *Roe* and what it chose to say.”⁹⁸

otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

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

⁹² Nancy Stearns, *Commentary: Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN’S L.J. 1, 5 (1988-90). It is clear from Stearns’s article that she is referring to Lumbard’s opinion – she makes this claim directly after quoting Lumbard’s statement that “determining whether or not to bear a child is of fundamental importance to a woman.” *Abele*, 342 F. Supp. at 802.

⁹³ 402 U.S. 62 (1971).

⁹⁴ See *supra* notes 32-34 and accompanying text.

⁹⁵ *Roe*, 410 U.S. at 153.

⁹⁶ See Goodman, Schoenbrod & Stearns, *supra* note 42, at 27 (observing that at the time the Court handed down *Roe*, the Justices “knew that they had at least ten other cases logged in the Court . . . with probably ten different stages of pregnancy plus cases all over the United States on behalf of doctors, non-medical people, counselors, and on behalf of all sorts of folks”).

⁹⁷ See *Roe*, 410 U.S. at 148 & n.42.

⁹⁸ Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 45-46 (2008). Multiple briefs making feminist claims for the abortion right were filed, including the brief on the merits. See Brief Amicus Curiae on Behalf of New Women Lawyers et al., *supra* note 73, at 8, 25, 34; Brief of American Ass’n of University Women et al. as Amicus Curia Supporting Appellants at 23, *Roe*, 410 U.S. 113 (Nos. 70-18 & 70-14) (arguing that unwanted pregnancies sharply

Roe was at best a transitional decision that straddled the medical and women's rights models. Women's advocacy helped establish women as constitutional rights holders who are entitled to make decisions about sex and parenting without control by the state – but *Roe* gave only confused expression to this right. Consider the following passage, which illustrates how *Roe* teeters between the women's rights and medical model:

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.

. . . .

This means, on the other hand, that, for the period of pregnancy prior to this “compelling” point, *the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.* If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

. . . .

. . . *The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.* If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.⁹⁹

By contrast, compare a key passage from Judge Lumbard's initial opinion invalidating the Connecticut abortion statute, which reveals how far beyond the medical model this district court judge moved, and how many of the critical

decrease “the value of the present right to vote, to equal pay, to equal job opportunities, to choose one's marriage partner, to joint custody of children”); Brief of California Committee to Legalize Abortion et al. as Amici Curiae Supporting Appellants at 5, *Roe*, 410 U.S. 113 (Nos. 70-18 & 70-14) (arguing that abortion restrictions enslaved women's bodies and thereby violated the Thirteenth Amendment as a form of involuntary servitude); Brief on the Merits for Appellants at 106, *Roe*, 410 U.S. 113 (Nos. 70-18 & 70-14) (arguing that abortion restrictions force women to “endure economic and social hardships”).

⁹⁹ *Roe*, 410 U.S. at 162-66 (emphasis added); see also Kristin Booth Glen, *Abortion in the Courts: A Laywoman's Historical Guide to the New Disaster Area*, 4 FEMINIST STUD. 1, 9 (1978) (“[T]he Supreme Court was not upholding a woman's right to determine whether to bear a child, as abortion proponents and feminists had argued. Instead, it was upholding a doctor's right to make a medical decision!”); Greenhouse, *supra* note 98, at 42 (“To modern ears, regardless of one's opinion about the acceptability of abortion, *Roe*'s paternalistic assumption that doctors (always male, evidently) know what is best for their female patients sounds archaic. Those who expound upon *Roe* without ever having read it . . . might be surprised to find that the decision is much more a doctor's bill of rights than it is a feminist manifesto.”).

predicates of the feminist claim he internalized. After describing the harms that coerced motherhood inflicts on women,¹⁰⁰ Judge Lumbard explained that women's social status and social role had changed since the state's criminal abortion statute was first enacted, and suggested that the law's imposition on women – which was once reasonable – was no longer so:

The Connecticut anti-abortion laws take from women the power to determine whether or not to have a child once conception has occurred. In 1860, when these statutes were enacted in their present form, women had few rights. Since then, however, their status in our society has changed dramatically. From being wholly excluded from political matters, they have secured full access to the political arena. From the home, they have moved into industry; now some 30 million women comprise forty percent of the work force. And as women's roles have changed, so have societal attitudes. The recently passed equal rights statute and the pending equal rights amendment demonstrate that society now considers women the equal of men.¹⁰¹

In this brief paragraph, penned *before* Justice Brennan made the case for extending heightened scrutiny to sex discrimination in *Frontiero v. Richardson*,¹⁰² Judge Lumbard reasoned that constitutional protection for women's decision whether to abort a pregnancy was warranted because of changing social views about women's "status" and "roles," citing the Nineteenth Amendment conferring on women the right to vote, the first equal protection sex discrimination decision, Title VII of the 1964 Civil Rights Act (as amended in 1972 when Congress insisted on equal enforcement of sex as well as race provisions of the federal employment discrimination law), and the ERA.¹⁰³ Given changing social understanding of women's "status" and "roles," Judge Lumbard decided that the state's interest in protecting the unborn was not sufficient reason to take away from women all control over the decision whether to become a mother:

The state has argued that the statutes may be justified as attempts to balance the rights of the fetus against the rights of the woman. While the Connecticut courts have not so construed the statutes, we accept this characterization as one fairly drawn from the face of the statutes. Nevertheless we hold that the state's interest in striking this balance as it

¹⁰⁰ See sources cited *supra* note 91.

¹⁰¹ *Abele v. Markle*, 342 F. Supp. 800, 802 (D. Conn. 1972) (citations omitted).

¹⁰² 411 U.S. 677 (1973).

¹⁰³ *Abele*, 342 F. Supp. at 802. Judge Lumbard does not expressly cite the Equal Protection Clause; instead he cites *Reed v. Reed*, 404 U.S. 71 (1971), the first equal protection decision to strike down a law on the ground that it discriminates on the basis of sex – a case litigated by Ruth Bader Ginsburg. See Reply Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

has is insufficient to warrant removing from the woman all decisionmaking power over whether to terminate a pregnancy.¹⁰⁴

Roe lacks language of this kind. There is no language in *Roe* acknowledging that statutes criminalizing abortion were enacted in the nineteenth century at the height of the separate spheres tradition when women were denied the right to vote and restricted in the forms of employment allowed outside the home. There is no language in *Roe* suggesting that society's changing attitudes toward women – of the kind manifest in the Nineteenth Amendment, Title VII, *Reed* (the first equal protection-sex discrimination case),¹⁰⁵ and the ERA – warranted a change in the constitutionality of criminal abortion statutes. And there is no language in *Roe* suggesting that, given these changes, the state's interest in protecting the unborn was not sufficient to take from women all control over the decision whether to become a mother. Only indirectly does *Roe* acknowledge that laws criminalizing abortion present questions of sexual freedom for women.¹⁰⁶

Instead *Roe* bases women's right to make the abortion decision free of state interference on the constitutional value of privacy, and recognizes a state interest in regulating the abortion decision that grows with the pregnancy itself,¹⁰⁷ in an opinion that reasons within the medical model as much as the women's rights model. In passage after passage, *Roe* explains the basis of the abortion right in physiology, medical science, the physician-patient

¹⁰⁴ *Abele*, 342 F. Supp. at 802-03.

¹⁰⁵ See sources cited *supra* note 103.

¹⁰⁶ See *supra* note 97 and accompanying text.

¹⁰⁷ *Roe v. Wade*, 411 U.S. 113, 159 (1973) (“The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland’s Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.”). For an account of the “physiological naturalism” that shapes *Roe*’s reasoning, as well as the equal protection sex discrimination cases of this era, see Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 274 (1992) (“Because *Roe* and its progeny treat pregnancy as a physiological problem, they obscure the extent to which the community that would regulate a woman’s reproductive choices is in fact implicated in them, responsible for defining motherhood in ways that impose material deprivations and dignitary injuries on those who perform its work. . . . *Roe*’s account of the abortion decision invites criticism of the abortion right as an instrument of feminine expedience . . . because it presents the burdens of motherhood as woman’s destiny and dilemma – a condition for which no other social actor bears responsibility.”).

relationship, and doctors' prerogatives to make medical judgments free of state interference,¹⁰⁸ without relating constraints on government control of women's decisions about motherhood to a new understanding of women's status and role.

CONCLUSION: DANGEROUS REASONS – EQUALITY'S REPRESSION AND
EXPRESSION AS A BASIS FOR THE ABORTION RIGHT

What factors contributed to equality's repression and expression as a basis for the abortion right? In the era of *Roe*, there were both political and legal forces that combined to efface sex equality as a normative basis for the abortion right; over time, these constraints have begun to relax, and equality-based reasoning has come to increasing prominence in the case law.

Both cultural and political forces would seem to explain the predominance of medical talk over women's rights talk in *Roe*. At the time of *Roe*, Congress had sent the ERA to the states; the Justices had scarcely decided any sex discrimination cases, and, while responsive, were plainly only beginning to comprehend the nature of the movement's claims.¹⁰⁹ To the extent they did, the Justices nonetheless employed professional frames to justify the abortion right rather than the more politically provocative women's rights frame, which called into question norms governing sex and family life. That the women's rights frame was politically provocative was becoming clear. In the several years before *Roe*, the women's movement's sex equality claims for abortion rights had already begun to prompt backlash. 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,” in an attack that condemned abortion as an evil associated with “free sex” and “day-care centers”:

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

¹⁰⁸ See, e.g., *supra* text accompanying note 99. Despite the urgings of one of Justice Powell's law clerks to recognize the woman's interest in the medical decision, Blackmun's opinion ignores the fact that “women, not their doctors, are the central actors in the human drama of pregnancy and reproductive decision-making.” Greenhouse, *supra* note 98, at 41-42.

¹⁰⁹ For one account that traces the relation between the ERA and abortion debates, see Siegel, *supra* note 28, at 1389-403.

babies instead of homes. They are promoting abortions instead of families.¹¹⁰

Schlafly mobilized opposition to the ERA by talking about the women's movement as a threat to traditional family roles. As importantly, she mobilized opposition by framing abortion and homosexuality as potent symbols of the new family form that the ERA would promote – insisting that ratification of the ERA would constitutionalize both abortion and gay rights.¹¹¹ These claims proved so powerful in energizing opposition to the ERA that architects of the New Right borrowed them, emphasizing abortion and gay rights as threats to faith and the traditional family form in order to mobilize the pan-Christian movement that helped drive the Republican revival in the late 1970s.¹¹² As I have elsewhere shown, with conservative backlash burgeoning, feminists came to rely on privacy reasoning as a way to *separate* the ERA from their support for abortion and gay rights, until the women's movement abandoned hope of the ERA's ratification in the 1980s.¹¹³

But it was not only backlash against the women's movement that made equality arguments for abortion rights more difficult to assert. The growth of constitutional 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 v. Richardson*¹¹⁴ stated the case for equal protection scrutiny of sex-based state action without mentioning laws regulating reproduction. In 1974, *Geduldig v. Aiello*¹¹⁵ rejected arguments that laws discriminating against pregnant women reflect sex stereotyping 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.¹¹⁶ The Court followed in 1977 by holding in *Maher v. Roe*¹¹⁷ that Connecticut could prohibit Medicaid funding for elective abortions because the state law “involves no discrimination against a suspect class. An indigent woman desiring an

¹¹⁰ Phyllis Schlafly, *What's Wrong with "Equal Rights" for Women*, PHYLLIS SCHLAFLY REP., Feb. 1972, at 1, 4. A subsection of Schlafly's article, entitled “Women's Libbers DO NOT Speak for Us,” is reprinted in GREENHOUSE & SIEGEL, *supra* note *, at 218-20.

¹¹¹ Siegel, *supra* note 28, at 1392-93. As Rosemary Thomson, an organizer for Schlafly, warned in *The Price of Liberty*: “The national leaders of the women's movement, who were working so hard to ratify ERA, were the same clique promoting homosexual rights, abortion, and government child rearing.” ROSEMARY THOMSON, *THE PRICE OF LIBERTY* 15 (1978).

¹¹² See GREENHOUSE & SIEGEL, *supra* note *, at 257-59; Post & Siegel, *supra* note 2, at 415-23.

¹¹³ Siegel, *supra* note 28, at 1395.

¹¹⁴ 411 U.S. 677 (1973).

¹¹⁵ 417 U.S. 484 (1974).

¹¹⁶ *Id.* at 497 n.20.

¹¹⁷ 432 U.S. 464 (1977).

abortion does not come within the limited category of disadvantaged classes so recognized by our cases.”¹¹⁸ In *Harris v. McRae*¹¹⁹ the Court ruled that funding restrictions of this kind deserved no special scrutiny¹²⁰ and were presumptively benign, “rationally related to the legitimate governmental objective of protecting potential life.”¹²¹ In this framework, the sex equality argument for reproductive rights was not only politically provocative; it was legally unintelligible.

But times change. While *Roe*, *Frontiero*, *Geduldig*, *Maher*, and *McRae* remain good law, the constitutional framework they established continues to evolve, and in ways that make the sex equality claim increasingly visible and important as a normative basis for the abortion right.

Developments in Equal Protection Law. Since the mid-1970s we have grown to recognize the forms of sex discrimination directed at pregnant women. When the Court first interpreted federal employment discrimination law on the premise that pregnancy discrimination is not sex discrimination, Congress objected and enacted the Pregnancy Discrimination Amendment (“PDA”) to Title VII.¹²² Years of litigation under the PDA illustrated the many forms of sex discrimination pregnant women face. Recently the Court drew upon the understandings forged in nearly three decades of PDA litigation when Chief Justice Rehnquist held in *Nevada Department of Human Resources v. Hibbs*¹²³ that the Family and Medical Leave Act (“FMLA”) was a valid exercise of Congress’s power to enforce the Fourteenth Amendment because the FMLA deterred and remedied sex stereotyping in the treatment of new mothers and mothers-to-be in the workplace.¹²⁴

¹¹⁸ *Id.* at 470-71.

¹¹⁹ 448 U.S. 297 (1980).

¹²⁰ *Id.* at 323 (“[T]his court has held repeatedly that poverty, standing alone is not a suspect classification.”).

¹²¹ *Id.* at 325.

¹²² Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

¹²³ 538 U.S. 721 (2003).

¹²⁴ *Hibbs* presents Title VII, the Pregnancy Discrimination Amendment, and the FMLA as remedies for a pattern of unconstitutional conduct involving discrimination against “women when they are mothers and mothers-to-be” – a form of bias it understands to be at the root of sex discrimination. *See id.* at 736-37. *Hibbs* notes that Congress determined that “[h]istorically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to-be.” *Id.* at 736. The Court continued:

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.

Developments in Substantive Due Process Law. During these same several decades, sex equality arguments have been articulated – inside substantive due process law – as the Court has defended *Roe*, first in *American College of Obstetricians & Gynecologists v. Thornburgh*¹²⁵ and then in *Planned Parenthood v. Casey*.¹²⁶ The joint opinion in *Casey* does not invoke equal protection as clausal authority for the abortion right, but it repeatedly invokes the conceptual repertoire of sex equality arguments to justify the abortion right.¹²⁷ Consider the language in which the joint opinion in *Casey* reaffirms constitutional protection for the abortion right:

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.¹²⁸

Precisely as it reaffirms the abortion right the joint opinion summons the understanding that the state cannot impose “its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.”¹²⁹ The opinion ties constitutional protection for women's abortion decision to the understanding, forged in the Court's sex discrimination cases, that government cannot use law to enforce traditional sex roles on women.

Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id. See generally 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).

¹²⁵ 476 U.S. 747, 772 (1985) (“Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in *Roe* – whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.” (citations omitted)).

¹²⁶ 505 U.S. 833 (1992).

¹²⁷ The joint opinion states 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. *Id.* at 856 (O'Connor, Kennedy, Souter, JJ., Joint Opinion) (“[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

¹²⁸ *Id.* at 852.

¹²⁹ *Id.*

The Court's insistence that abortion regulation cannot enforce traditional sex roles also guides application of undue burden analysis in *Casey*. *Casey* holds that the spousal notice requirement is an undue burden on women's constitutionally protected right to decide whether to become a mother because the 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."¹³⁰ The joint opinion expresses "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 the liberty cases."¹³¹

Justice Ginsburg quotes *Casey*'s sex equality reasoning in her *Gonzales v. Carhart* dissent.¹³² But she goes even further. Where *Casey* draws upon the conceptual framework of the sex equality argument for abortion rights – that government cannot use the power of the state to enforce traditional sex roles on women – Justice Ginsburg's *Carhart* dissent adds a discussion of key equal protection sex discrimination precedents, including decisions she litigated and wrote.¹³³ In her *Carhart* dissent, Ginsburg fuses the normative power of equality arguments with the textual authority of the Equal Protection Clause.

¹³⁰ *Id.* at 898.

¹³¹ Siegel, *supra* note 5, at 831.

¹³² 550 U.S. 124 (2007); *see also, e.g., id.* at 170 (Ginsburg, J., dissenting) ("In reaffirming *Roe*, the *Casey* Court described the centrality of 'the decision whether to bear . . . a child,' to a woman's 'dignity and autonomy,' her 'personhood' and 'destiny,' her 'conception of . . . her place in society.'" (citations omitted)); *id.* at 171 ("As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.' . . . Women, it is now acknowledged, have the talent, capacity, and right 'to participate equally in the economic and social life of the Nation.' Their ability to realize their full potential, the Court recognized, is intimately connected to 'their ability to control their reproductive lives.'" (citations omitted)); *id.* at 171 n.2 ("*Planned Parenthood of Southeastern Pa. v. Casey* described more precisely than did *Roe v. Wade* the impact of abortion restrictions on women's liberty." (citations omitted)); *id.* at 172 ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); *id.* at 185 (citing *Casey* as evidence of the Court's repeated confirmation "that '[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society'" (alteration in original).

¹³³ In objecting to the forms of woman-protective antiabortion argument to which the *Carhart* majority refers, *see infra* note 135, Justice Ginsburg invokes both negative and positive equal protection precedents, that is, the cases invalidated by modern understandings of sex discrimination, as well as the equal protection decisions that reflect this new understanding of women's roles as citizens. For example, *Carhart* said:

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. Compare, *e.g., Muller v. Oregon*, 208 U.S. 412, 422-423 (1908) ("protective" legislation imposing

It is this shift in the justification of the abortion right that prompted James Bopp, general counsel for the National Right to Life Committee, to warn the antiabortion movement to exercise care in the kinds of abortion challenges it sends the Court – the concern raised in the strategy memo that I quoted at the beginning of this Article.¹³⁴ Beliefs about women's citizenship are sufficiently different from those in the 1860s – when Connecticut adopted its abortion statute – or the 1970s when the Court first conferred constitutional protections on women's abortion decisions – that even opponents of abortion rights have now begun to argue that restrictions on abortion are necessary to promote women's health and freedom. The perceived need to integrate expression of respect for women into antiabortion argument has fueled the spread of the abortion-hurts-women argument that Justice Kennedy drew upon in his opinion striking down the partial birth abortion ban act,¹³⁵ claims that provoked Justice Ginsburg to counter by appeal to the equal protection sex discrimination cases.¹³⁶ Bopp is worried that were Justice Kennedy faced with a ban wholly depriving women of control over the decision whether to become a mother – as the partial birth abortion ban act did not – that Kennedy might well side with Justice Ginsburg, sufficiently to give her an opportunity to express the more far

hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal functio[n]"); *Bradwell v. State*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with *United States v. Virginia*, 518 U.S. 515, 533, 542, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Carhart, 550 U.S. at 185 (alterations in original).

¹³⁴ See *supra* note 7 and accompanying text.

¹³⁵ *Carhart*, 550 U.S. at 159 (2007) ("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." (citations omitted)). For an account of the rise and spread of woman-protective antiabortion argument, see generally Siegel, *Right's Reasons*, *supra* note 4.

¹³⁶ Justice Ginsburg cites to these cases to discredit the abortion-harms-woman argument as emblematic of a "way of thinking [that] reflects ancient notions about women's place in the family and under the Constitution – ideas that have long since been discredited." *Carhart*, 550 U.S. at 185.

reaching complex of constitutional values at the root of the right *Roe* recognized.

What difference would it make if the Court added an equality rationale to the privacy justification for abortion rights? Perhaps most obviously at stake is a question of constitutional authority. It is relatively safe to challenge constitutional privacy rights as “unenumerated,” but, calling for the deprivation of rights that vindicate women’s equal citizenship is an altogether riskier business – not simply because equality rights have a clear textual basis in the Constitution, but also because equality rights have trumping political authority.

At issue, however, is more than the question whether the Court ties the abortion right to the Equal Protection Clause as Schlafly long predicted and Bopp has come to fear. Beyond the question of which constitutional clauses protect the abortion right is its social meaning – the nation’s understanding of *why* the Constitution prohibits government from controlling women’s decision whether to become a mother. Here we move beyond the constitutional and political authority of the sex equality claim for abortion rights to its critical basis. At its core, the sex equality argument understands criminal abortion laws as reflecting and reinforcing traditional gender roles in matters of sex and parenting. It understands criminal abortion statutes as reflecting views *about women* as well as the unborn – whether the law is enacted for fetal-protective or woman-protective purposes.¹³⁷ And it understands the harms criminal abortion statutes inflict on women as flowing, in significant part, from norms and arrangements premised on gender-differentiated roles in sex and parenting that this society uneasily and increasingly senses to be unjust. *The sex equality argument for abortion rights thus questions (1) whether the impetus for criminal abortion statutes is wholly benign and (2) whether the impact of criminal abortion statutes on women is wholly inevitable.*

The sex equality argument for abortion rights is practical and utopian at one and the same time. As a practical matter, it conceives of the abortion right as enabling women better to negotiate unjust social arrangements. As a normative matter, the sex equality argument for the abortion right imagines an alternative universe in which women would be able to make their own choices in sex and parenting, free of norms and arrangements that push sexually active women to bear children, and that push women into dependency on men or the state in order to raise children that men and women together conceive. On this normative understanding, abortion rights alone are insufficient to secure freedom or equality. This was the vision the women’s movement expressed when it memorialized the Nineteenth Amendment with demands for abortion

¹³⁷ For an account of how fetal protective abortion restrictions reflect judgments about women as well as the unborn, see Siegel, *supra* note 107, at 323-80. For an account of the kinds of gender-conventional views about women embodied in woman-protective abortion restrictions, see Siegel, *Dignity*, *supra* note 4, at 1767-95; Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 999-1028; Siegel, *Right’s Reasons*, *supra* note 4, at 1651-81.

rights *and* childcare – both negative and positive rights.¹³⁸ The sex equality argument for abortion rights grows out of a vision, and a structural understanding, of what genuine freedom of choice looks like, which locates responsibility for the conditions in which women conceive and rear children in the society that would criminalize abortion, and imagines equal citizenship for women as requiring fundamental change in the form of our intimate and family lives.

¹³⁸ See *supra* text accompanying note 28. Movement lawyers initially read *Roe* as recognizing a right to liberty under the Fourteenth Amendment rather than a right to privacy under the Ninth Amendment and thought that might “imply that the state has some kind of affirmative obligation to ensure that a woman can exercise that right to liberty [which] presumably will have very important implications for access questions like Medicaid, for example.” See Goodman, Schoenbrod & Stearns, *supra* note 42, at 27.