

**GIVE JUSTICE GINSBURG WHAT SHE WANTS:  
USING SEX EQUALITY ARGUMENTS TO DEMAND  
EXAMINATION OF THE LEGITIMACY OF STATE  
INTERESTS IN ABORTION REGULATION**

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INTRODUCTION

Sex equality jurisprudence, both in theory and now in constitutional doctrine, has developed in two important ways that have the potential to provide new tools to advocates challenging abortion regulations. First, sex

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equality doctrine has evolved from its original construction under which courts recognized sex inequality in laws that treated men and women differently in ways that are not explained by differences between the sexes. This original construction was referred to as the “sameness-difference” model of sex equality and is still the model that is most widely understood.<sup>1</sup> Supreme Court jurisprudence now also recognizes sex inequality in laws that reinforce a hierarchy of the sexes under what has been referred to as a “dominance and subordination” model of sex equality.<sup>2</sup> In this latter model, equality principles protect against laws that reinforce a gender caste system, recognizing that laws that reinforce traditional sex roles—that are based on the notion that these traditional roles are naturally ordained for men and women—promote sex inequality in violation of the constitution and statutory demands for sex equality.<sup>3</sup>

The second important development in sex equality doctrine has been its evolving relationship with laws restricting women’s control over reproduction. Doctrine has followed theory again, has put the infamous case *Geduldig v. Aiello*<sup>4</sup> in its place, and now allows us to argue that restrictions on abortion violate constitutional sex equality guarantees, at least where their purpose is to reinforce outmoded forms of stereotyping.<sup>5</sup> These arguments are available to us *even if* *Geduldig* has not been completely overruled, that is *even if* the argument that abortion restrictions are *per se* discriminatory—because they treat a medical procedure that only women need differently from all other medical procedures—is not successful.

Unlike sex equality doctrine, the due process liberty jurisprudence that protects abortion has been in a downward spiral since the mid-1980s and is now in danger of losing its ability to protect women even from irrational and cruel regulations designed to foster the view that motherhood is their natural

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<sup>1</sup> See, e.g., CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination* (1984), in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 32–34 (1987) [hereinafter MACKINNON, *Difference and Dominance*] (discussing “sameness/difference” theory of sex equality and how it dominates sex discrimination law and policy).

<sup>2</sup> See, e.g., *id.* at 40 (proposing “dominance approach” as description of an alternative approach to the question of equality that views gender equality as “a question of power, specifically of male supremacy and female subordination”).

<sup>3</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1995) (holding that justification for classifications based on gender “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females”); see also *infra* text accompanying notes 31–37.

<sup>4</sup> 417 U.S. 484, 496–97 (1974) (holding that discrimination against pregnancy was not *inherently* sex discriminatory and declining to apply heightened scrutiny to the exclusion of benefits for disability due to pregnancy in California’s state disability program).

<sup>5</sup> See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (recognizing that pregnancy-based distinctions in state administration of leave benefits constituted unconstitutional sex discrimination because the distinctions were based on invalid gender stereotypes); *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004) (“*Hibbs* strongly supports plaintiffs’ argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.”).

destiny, the creation of life is their duty, and children are their golden tickets to redemption. The right to abortion grounded in due process liberty jurisprudence is based on a balancing of women's rights to decisional autonomy, bodily integrity, and informational privacy, as against the state's interest in regulating abortion to protect potential life and pregnant women's health.<sup>6</sup> As a result of a concerted anti-abortion legal strategy, and the Court's resulting decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>7</sup> however, the ability of a state to regulate abortion in furtherance of its interest in protecting potential life has expanded, first in *Casey* and perhaps now in *Gonzales v. Carhart*.<sup>8</sup>

I have argued, as have others, that *Gonzales v. Carhart* did not ultimately alter the underlying standard of review for abortion regulations set out in *Casey*.<sup>9</sup> However, as I and others have also recognized, the danger of *Carhart* is not to be underestimated.<sup>10</sup> Its greatest danger lies in how courts

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<sup>6</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (noting that “*Roe* stands at an intersection of two lines of decisions,” and “may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) (overruling part of decision striking provisions requiring mandatory information) (“The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity.”), *overruled in part by Casey*, 505 U.S. at 870; *id.* at 767–68 (invalidating reporting requirements that “raise the specter of public exposure and harassment of women who choose” abortion); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that “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, [in other bases], is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); *id.* at 152–53 (citing precedent protecting right to bodily integrity and decisional autonomy); *id.* at 154 (holding that “[a]t some point in pregnancy,” the state’s interests “in safeguarding health, in maintaining medical standards, and in protecting potential life” become “sufficiently compelling to sustain regulation of the factors that govern the abortion decision”).

<sup>7</sup> 505 U.S. 833, 875 (1992) (reaffirming central principles of *Roe*, but contending that *Roe*’s framework “in practice . . . undervalues the State’s interest in the potential life within the woman”).

<sup>8</sup> 550 U.S. 124 (2007) (upholding federal law banning method of abortion as long as alternative safe methods of abortion were available).

<sup>9</sup> See generally David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 22, available at <http://www.davidgarrow.com/hb2hosting.net/File/DJG%202008%20SCtRevAbortion.pdf> (“[The holding in *Carhart*] reaffirmed the continuing validity and applicability of *Casey*’s decisive undue burden test, and, in conjunction with the majority’s earlier acknowledgment that a ban which covered standard D&E procedures would indeed violate that standard, thus created a serious if not fatal impediment to this opinion serving as a direct stepping stone toward further prohibitions of second-trimester abortions.”); Priscilla J. Smith, *Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL’Y REV. 1, 13 (2008) [http://hlpronline.com/wordpress/wp-content/uploads/2009/12/Smith\\_HLPR.pdf](http://hlpronline.com/wordpress/wp-content/uploads/2009/12/Smith_HLPR.pdf) [hereinafter Smith, *Half-Full*] (“[T]he opinion [in *Carhart*] does not impact the ‘substantial obstacle’ effect prong of the undue burden standard; pre-viability abortions still cannot be banned . . . . Nor does the opinion eliminate the rule that [a] woman’s health must always remain the ‘physician’s paramount consideration’ . . .”).

<sup>10</sup> See, e.g., *Carhart*, 550 U.S. at 183 n.7 (Ginsburg, J., dissenting) (discussing the majority’s reliance on discredited claims that abortion harms women); *id.* at 171 (discussing “blur[red]” distinction between pre- and post-viability abortions); *id.* at 161–69 (ma-

will respond to the inevitable use anti-abortion activists will make of the Court's discussion of the state's ability to restrict abortion in furtherance of interests in protecting potential life and in protecting women's health. The danger is that those interests will become so broad that someday you will be able to drive an abortion ban truck right through them. The first arrows shot from the anti-abortion bow post-*Carhart* are statutes banning some pre-viability abortions based on the state's interest in protecting the fetus from pain—statutes that are part of a concerted campaign to stress “fetal pain.”<sup>11</sup> This campaign picks up where the partial-birth abortion campaign left off, talking about the fetus as if the fetus were already a baby, with all the emotional power that the word “pain” conveys. Ironically, the only way in which liberty jurisprudence has evolved in a *potentially* helpful direction is that it has come to incorporate a sex equality analysis, as I will discuss below.

Despite the positive evolution of sex equality analyses in both equal protection and liberty jurisprudence, and despite urging from the academy to press sex equality arguments, litigators have not wholeheartedly pursued these arguments in federal court challenges to restrictions on abortion. Instead, lawyers challenging abortion restrictions in federal court today rely mainly<sup>12</sup> on claims that a given restriction violates the woman's liberty and privacy interest under standards set out in *Roe* and *Casey* by imposing an “undue burden” on the woman's right to abortion under *Casey* and/or failing to adequately protect the woman's life or health as required by both *Roe* and *Casey*.<sup>13</sup> Reproductive rights litigators have certainly pled sex equality

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jority opinion) (discussing impact of shifting burden of proof on proving health claims); Talcott Camp, *The “Partial-Birth Abortion” Ban: Health Care in the Shadow of Criminal Liability*, 17 J.L. & POL'Y 1, 9–11, 14 (2008) (arguing that decision undermines health requirement and is “very scary”); Smith, *Half-Full*, *supra* note 9, at 2–3 & n.12 (discussing dangers); *id.* at 10 (discussing shifting burden of proof on health).

<sup>11</sup> See *infra* notes 119–123 and accompanying text.

<sup>12</sup> Litigators also use vagueness claims and other constitutional claims where appropriate. See, e.g., *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1047–48 (D. Neb. 2010) (claiming that, in addition to imposing an undue burden on the woman's decision to obtain an abortion, mandatory information law was unconstitutionally vague and violated the First Amendment).

<sup>13</sup> For example, in 2005, abortion providers challenged H.B. 1166 (S.D. 2005) which prohibited abortion unless the woman was provided with a written statement “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being”; “[t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota”; “[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated”; and describing “all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . [d]epression and related psychological distress; [and] . . . [i]ncreased risk of suicide ideation and suicide.” *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 375 F. Supp. 2d 881, 884 (D.S.D. 2005), *vacated*, 530 F.3d 724 (8th Cir. 2008). In addition to bringing First Amendment claims on behalf of abortion providers and an overall vagueness claim, the plaintiffs alleged that the statute imposed an undue burden on women's right to abortion protected by the Fourteenth Amendment substantive due process liberty right, violated

claims in targeted state and federal courts in the past<sup>14</sup> and continue to do so where possible in state courts under state constitutions.<sup>15</sup> However, after the Ninth Circuit's decision in *Tucson Woman's Clinic v. Eden*,<sup>16</sup> such claims are rarely briefed in the trial courts, much less preserved on appeal in federal courts.<sup>17</sup>

In Part I of this essay, I briefly outline sex equality arguments and argue that, even if they do not earn heightened scrutiny in litigation, these arguments offer specific advantages that can assist embattled litigators and supplement the use of liberty claims. In Part II, I review the greatest weakness of the liberty claim, describing how a well-developed anti-abortion strategy has resulted in tepid inquiry into legitimate state interests or legisla-

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women's right not to receive false and misleading information under the liberty right, violated their right not to be forced to listen to the state's ideological message under the First and Fourteenth Amendments, and contained an inadequate health exception in violation of the liberty right. *Id.* at 885. Similarly, in *Heineman*, 724 F. Supp. 2d 1025, a challenge to Nebraska's mandatory information law, L.B. 594 (Neb. 2010), the plaintiffs pled, *inter alia*, that the law was unconstitutionally vague and violated due process liberty rights and First Amendment rights by (1) requiring disclosure of false and misleading information; (2) banning abortion as a result of vague disclosure requirements and thus imposing an undue burden on abortion; and (3) requiring disclosure of patient information in violation of the right to informational privacy. 724 F. Supp. 2d at 1031. They also alleged that the law violated medical providers' and patients' rights of Equal Protection under the Fourteenth Amendment because the bill treated informed consent for abortion differently from informed consent for any other medical service or procedure. *Id.* The plaintiffs did not include a sex equality claim. *Id.*

<sup>14</sup> See Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1886–94 (2010) [hereinafter Siegel, *Roe's Roots*] (outlining the use of equality arguments in pre-*Roe* litigation and in *Roe* itself). Most recently, litigators pressed equality claims in federal courts by challenging physical plant and other regulations of physicians' offices where abortions were performed. See, e.g., *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 547–49 (9th Cir. 2004) (collapsing sex equality arguments into undue burden inquiry).

<sup>15</sup> See, e.g., *Doe v. Maher*, 515 A.2d 134, 162 (Conn. 1986) (holding Medicaid funding ban violated state Equal Rights Amendment); *id.* at 157 (holding funding ban also violates right to privacy under state constitution); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 397 (Mass. 1981) (holding that Medicaid funding ban violated state constitutional right to privacy and declining to reach sex equality argument under state constitution's Equal Rights Amendment); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 857 (N.M. 1998) (holding that the state's ban on Medicaid funding of abortions violated state Equal Rights Amendment); *Petition, Nova Health Sys. v. Edmondson*, No. CV-2010-533 (Okla. Cnty. Dist. Ct. Apr. 27, 2010), *aff'd*, 233 P.3d 380 (Okla. 2010) (challenging Oklahoma's H.B. 2780, which prohibited abortion unless women were shown and had described to them in detail an ultrasound of the fetus, alleging *inter alia* that statute discriminated on the basis of sex in violation of Oklahoma Constitution), available at <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Petition.pdf>.

<sup>16</sup> *Tucson Woman's Clinic*, 379 F.3d at 549 (in challenge to physical plant regulation of doctors' offices that performed abortion in which plaintiffs alleged *inter alia* unconstitutional sex discrimination, court collapsed sex equality claim into undue burden liberty claim, holding that "elements of intermediate scrutiny review particular to sex-based classifications, such as the rules against paternalism and sex-stereotyping, . . . are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard").

<sup>17</sup> See *supra* note 13. This conclusion is also drawn from my own experience litigating reproductive rights cases.

tive purpose. While such an analysis is required in the liberty framework under *Roe*<sup>18</sup> and *Casey*,<sup>19</sup> it has been remarkably anemic and illogical in recent cases.

In Part III, I then examine some of the stated reasons for litigators' reluctance to press sex equality arguments in their cases, including some of the practical impediments to bringing and preserving these claims, as well as ongoing skepticism about the benefits of equality arguments. I argue that there are important reasons to overcome the reluctance to press sex equality arguments and, though I recognize and sympathize with the difficulty of the task, that the practical impediments can be overcome.

I conclude in Part IV that using sex equality arguments to bolster the battered liberty argument—"sistering the joist"<sup>20</sup>—may not *necessarily* provide heightened scrutiny of abortion restrictions in the form of traditional "intermediate" or "strict" scrutiny and may not result in greater overall success in the courts. However, sex equality arguments, which have not been as widely criticized by commentators as the liberty right has been, not only provide additional support for a woman's right to abortion, but will also force courts to grapple with the regressive views of women that propel many abortion restrictions. Because they focus the inquiry on a potential discriminatory purpose, sex equality arguments have the capacity to reinvigorate the required analysis of the legitimacy of state interests in abortion regulations. This renewed analysis should include exacting inquiry into the broad category of interests advanced under the guise of the state's interest in "potential life," and some of the interests advanced under the guise of protecting maternal health. Reinvigorating this review is essential to prevent further erosion of the standards used to examine abortion restrictions.

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<sup>18</sup> See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (providing that the state can regulate abortion starting at the beginning of the second trimester "to promote its interest in the health of the mother" and can regulate and even ban abortion post-viability "in promoting its interest in the potentiality of human life," except where necessary for the preservation of the life or health of the mother).

<sup>19</sup> 505 U.S. 833, 877 (1992) (holding that "a statute which, *while furthering the interest in potential life or some other valid state interest*," also imposes "a substantial obstacle in the path of the woman's choice," is invalid) (emphasis added).

<sup>20</sup> In construction terms, adding the equality argument to bolster the weakened liberty argument would be what is referred to as "sistering a joist." Rather than removing a weakened beam entirely, a new structurally sound beam is bolted onto a weakened one. The two together provide stronger structural support to the building. *How to Reinforce Floors with Sister Joists*, EHow, [http://www.ehow.com/how\\_4802264\\_reinforce-floors-sister-joists.html](http://www.ehow.com/how_4802264_reinforce-floors-sister-joists.html) (last visited Feb. 25, 2011).

I. A BRIEF HISTORY OF SEX EQUALITY ARGUMENTS IN  
ABORTION REFORM

The movement for reform of the criminal abortion laws was a central part of the movement for women's liberation in the 1960s and 1970s.<sup>21</sup> Sex equality arguments central to that movement were in turn used during the political and legal movements for abortion reform of the 1960s and early 1970s, in early litigation as well as in other forms of advocacy.<sup>22</sup> However, for both doctrinal and social reasons—including the fact that constitutional sex equality arguments were still in their infancy in the early 1970s—the Court neglected the equality arguments presented in *Roe*,<sup>23</sup> deciding the case using a substantive due process liberty frame instead of an equality one.<sup>24</sup> Just a year and a half later, in *Geduldig v. Aiello*, the Court refused to apply heightened scrutiny to the exclusion of benefits for disability due to pregnancy in California's state disability program, holding that discrimination against pregnancy was not *inherently* sex discriminatory, and the exclusion did not constitute unlawful sex discrimination under the Equal Protection Clause.<sup>25</sup> The case was read as a broad rejection of the claim that pregnancy discrimination is sex discrimination,<sup>26</sup> further discouraging advocates from relying on sex equality arguments in challenges to restrictions on women's

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<sup>21</sup> Siegel, *Roe's Roots*, *supra* note 14, at 1886–94 (discussing equality arguments used in pre-*Roe* litigation, other movement advocacy, and in the *Roe* litigation itself); *see also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1419 (2006); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 826 (2007) [hereinafter Siegel, *Sex Equality Arguments*].

<sup>22</sup> Siegel, *Sex Equality Arguments*, *supra* note 21, at 824–26.

<sup>23</sup> *Id.* at 826–28 (discussing doctrinal and political reasons for Court's failure to adopt equality frame in *Roe* or its progeny).

<sup>24</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973) (noting that “we feel” that the right to privacy which protects abortion is “founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action”).

<sup>25</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

<sup>26</sup> Although *Geduldig* is often said to stand for the proposition that pregnancy discrimination is not sex discrimination, its holding was more limited. It merely held that pregnancy discrimination is not *always* sex discrimination. *Id.* at 496 n.20 (“While it is true that only women can become pregnant, it does not follow that *every* legislative classification concerning pregnancy is a sex-based classification . . .”) (emphasis added). The Court declined to apply heightened scrutiny, finding that the state had a legitimate interest in the self-supporting nature of the program that required keeping benefit payments and contributions at appropriate levels, supplying “an objective and wholly noninvidious basis” for the pregnancy exclusion. *Id.* at 496. However, the Court left open the possibility that heightened scrutiny would apply where the plaintiff established that the pregnancy discrimination was a “mere pretext[ ] designed to effect an invidious discrimination against” women. *Id.* at 496 n.20. *See* Jennifer Keighley, *Health Care Reform and Reproductive Rights: Sex Equality Arguments for Abortion Coverage in a National Plan*, 33 HARV. J.L. & GENDER 357, 389–91 (2010); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1873 (2006) [hereinafter Siegel, *You've Come a Long Way*].

control over their reproduction, particularly in the form of abortion restrictions.

While advocates generally moved away from equality doctrine, preferring to rely on the heightened scrutiny applied to abortion restrictions in the liberty/privacy frame in *Roe*, legal scholars became more engaged with equality. They first began to promote equality arguments in the mid-1970s, when Kenneth Karst articulated *Roe* as a “woman’s role” case that “involve[s] some of the most important aspects of a woman’s independence, her control over her own destiny.”<sup>27</sup> Karst argued that the equality principle<sup>28</sup> advanced by the Fourteenth Amendment was implicated by the aspect of abortion that furthers the “woman’s claim of the right to control her own social roles,” and saw a benefit to moving the jurisprudence away from a balancing of woman versus fetus towards an examination of abortion as “a feminist issue, an issue going to women’s position in society in relation to men.”<sup>29</sup>

The scholarship on the application of sex equality arguments to reproductive decision-making exploded in the 1980s and early 1990s with works by Sylvia Law, Ruth Bader Ginsburg, Catharine MacKinnon, and Reva Siegel.<sup>30</sup> These scholars built on an important advance in equal protection doctrine occurring in the 1970s that recognized sex inequality in laws relying on sex stereotypes to support gender distinctions.<sup>31</sup> With this view of

<sup>27</sup> See Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–58 (1977) [hereinafter Karst, *Equal Citizenship*]; see also Kenneth L. Karst, *Book Review*, 89 HARV. L. REV. 1028, 1036–37 (1976); Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 531 n.113 (2003) (“I have been harping on this theme since 1976.”).

<sup>28</sup> This equality principle “is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.” Karst, *Equal Citizenship*, *supra* note 27, at 4.

<sup>29</sup> *Id.* at 58.

<sup>30</sup> See generally CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade* (1983), in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 93–102 (1987); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) [hereinafter MacKinnon, *Reflections on Sex Equality*]; Reva B. Siegel, *Abortion As a Sex Equality Right: Its Basis in Feminist Theory*, in MOTHERS IN LAW: FEMINIST HISTORY AND THE LEGAL REGULATION OF MOTHERHOOD 43 (Martha Albertson Fineman & Isabel Karpin eds., 1995) [hereinafter Siegel, *Sex Equality Right*]; Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) [hereinafter Siegel, *Reasoning from the Body*].

<sup>31</sup> “[T]he Court’s 1970s cases prohibited sex-based state action premised on the assumption—descriptive or prescriptive—that husbands are breadwinners and wives are dependent caregivers.” Siegel, *You’ve Come a Long Way*, *supra* note 26, at 1887 (discussing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (striking down the military’s sex-based dependent benefits statute noting that the view that women’s “paramount destiny” is to be wife and mother supported “gross, stereotyped distinctions between the sexes”); see also *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (disapproving of the

equality protections as background, the scholars argued that physiological differences, and specifically reproductive differences, between the sexes had been used as a central justification for the subjugation of women, achieved through the promotion of stereotyped notions of women's role, and that so-called "women-protective" regulations were a core mechanism for oppression of women.<sup>32</sup> They argued that sex equality principles had to be able to distinguish between differential treatment based on biological differences that promoted equality and differential treatment based on differences that reinforced inequality.<sup>33</sup> They "repudiate[d] equality theory focused on similarity and difference and . . . argue[d] for an inquiry focused on issues of hierarchy and subordination."<sup>34</sup> Articulating the promise of equal protection as a promise of protection against legislation that enforces subordination of certain groups rather than solely as protection against irrational differential treatment revealed regulation of reproduction as an equal protection concern. Rather than having to demonstrate sex discrimination by comparing women to a group of similarly situated men, an impossible feat with regard to pregnancy<sup>35</sup>—at least so far and at least outside the transgendered context<sup>36</sup>—instead, it was enough to show, as Reva Siegel put it, that "the policy or practice in question integrally contributes to the maintenance of an under-

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"'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of home and family life'"); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (striking down law premised on "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (law premised on "archaic and overbroad generalization . . . namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support" is not allowed under the Constitution). For an important discussion of the development of sex equality jurisprudence using anti-stereotyping arguments, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

<sup>32</sup> See, e.g., Law, *supra* note 30, at 957, 960–61.

<sup>33</sup> See *id.*, *supra* note 30, at 962–63.

<sup>34</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 62 (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979)); see also MACKINNON, *Difference and Dominance*, *supra* note 1, at 40–41; Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 57–62 (1990).

<sup>35</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 60 (arguing that physiologically, "no man is similarly situated to the pregnant woman facing abortion restrictions; hence, state action restricting a woman's abortion choices does not seem to present a problem of sex discrimination"); see also *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (claiming disability insurance program's exclusion of coverage for disability due to pregnancy not *per se* sex discrimination because it "divides potential recipients into two groups—pregnant women and nonpregnant persons [and w]hile the first group is exclusively female, the second includes members of both sexes").

<sup>36</sup> See Alan B. Goldberg & Katie N. Thomson, *Barbara Walters Exclusive: Pregnant Man Expecting Second Child*, ABC NEWS (Nov. 13, 2008), <http://abcnews.go.com/Health/story?id=6244878>; see generally PREGNANT MAN, <http://www.pregnantman.net> (last visited Mar. 21, 2011) (discussing cases of men who were born as women becoming pregnant).

class or a deprived position because of gender status.”<sup>37</sup> Despite the scholarship, however, *Geduldig* remained as an impediment to further doctrinal developments.

The second major development in equality jurisprudence came with the Court’s 2003 decision in *Nevada Department of Human Resources v. Hibbs*,<sup>38</sup> which reflected a significant transformation in the Court’s understanding of pregnancy discrimination from that revealed in the Court’s 1974 *Geduldig* decision.<sup>39</sup> Reva Siegel traces the change to a shift in Justice Rehnquist’s view of pregnancy, arguing that “[w]here Rehnquist once saw questions of women’s bodies, he now saw questions of women’s roles.”<sup>40</sup> In *Geduldig*, the Court was unable to see the pregnancy classification as *per se* sex discrimination because it divided recipients into two groups—pregnant women and “nonpregnant persons” which included women and men—and, seeing sex equality through a sameness-difference model, viewed the pregnancy “difference” as justification for the discrimination at issue.<sup>41</sup> While *Geduldig* left open the possibility that some pregnancy classifications would constitute sex discrimination, the Court gave little insight into how to determine when pregnancy classifications would violate sex equality guarantees.<sup>42</sup>

In *Hibbs*, the Court finally was able to answer this question. At least before Chief Justice Rehnquist was replaced by Chief Justice Roberts, the Court was able to understand sex equality protections differently—arguably viewing the question through a “dominance-subordination” equality lens—and was not blinded by the pregnancy “difference.” The *Hibbs* Court recognized that pregnancy classifications that rest on “the pervasive sex-role stereotype that caring for family members is women’s work” are “gender-discriminatory” in violation of constitutional equal protection guarantees.<sup>43</sup>

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<sup>37</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 62 (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 117 (1979)); *see also* Karst, *Equal Citizenship*, *supra* note 27, at 55 (“[T]o the extent that the stereotype is embodied in law or otherwise brought to bear in the public life of the society—in other words, to the extent that the phenomenon of women’s dependency on men is socially imposed—the principle of equal citizenship presumptively requires intervention by the courts.”); Siegel, *Reasoning from the Body*, *supra* note 30, at 263; Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 32–33 (1992) [hereinafter Sunstein, *Neutrality*] (arguing that despite the continued validity of *Geduldig*, “restrictions on abortion should be seen as a form of sex discrimination . . . . A statute that is explicitly addressed to women is of course a form of sex discrimination. A statute that involves a defining characteristic or a biological correlate of being female should be treated in precisely the same way.”).

<sup>38</sup> 538 U.S. 721 (2003) (upholding Family Medical Leave Act as a proper exercise of Congressional power under Section 5 of the Fourteenth Amendment).

<sup>39</sup> Reva Siegel and Jennifer Keighley have detailed the transformative power of *Hibbs*. *See* Keighley, *supra* note 26, at 389–91; Siegel, *You’ve Come a Long Way*, *supra* note 26, at 1873.

<sup>40</sup> Siegel, *You’ve Come a Long Way*, *supra* note 26, at 1897.

<sup>41</sup> *Geduldig*, 417 U.S. at 496 n.20.

<sup>42</sup> *See id.*

<sup>43</sup> *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (holding that parental leave policies that provided pregnancy disability leave to women in excess of the

The Court provided specific examples of many such legislative classifications, such as those that grant “maternity” but not “paternity” leave, or provide overlong “disability” leave for pregnant women beyond their actual disability.<sup>44</sup> Holding that “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation,”<sup>45</sup> *Hibbs* properly limits *Geduldig* to its terms and makes clear that abortion restrictions violate constitutional sex equality principles where they are based on or reinforce sex stereotypes. If the classifications rest on or reinforce stereotypes, plaintiffs will not need to establish discriminatory “purpose” separately.<sup>46</sup>

With the *Geduldig* hurdle passed, the next step for scholars was to demonstrate how abortion regulations have *in fact* functioned as tools of subordination and reinforced sex role stereotypes.<sup>47</sup> As Reva Siegel summarized, these equality arguments would “emphasize that abortion restrictions are (1) a form of class legislation that (2) reflects status-based judgments about women and (3) inflicts status-based injuries on women.”<sup>48</sup> Siegel demonstrated exhaustively in her 1992 article *Reasoning from the Body* that abortion restrictions coerce women into motherhood in social settings in which motherhood has been, and remains, subordinating, and that such restrictions continue to reflect traditional views of women’s roles.<sup>49</sup>

Importantly for our purposes here, scholars examining abortion restrictions with this view of equal protection in mind also recognized that the rationales used to justify these regulations—i.e., the state interests in regulation articulated in support of abortion restrictions in the liberty cases—are themselves gender-biased, reflecting, as Siegel puts it, “a distinctive set of

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amount medically indicated but did not provide any similar time for men violated constitutional sex equality principles because these “differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work”); see also *id.* at 732 n.5 (“Evidence pertaining to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women’s family duties trump those of the workplace.”).

<sup>44</sup> *Id.* at 733–35.

<sup>45</sup> *Id.* at 735.

<sup>46</sup> Siegel, *You’ve Come a Long Way*, *supra* note 26, at 1892–93; see also *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004) (“*Hibbs* strongly supports plaintiffs’ argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.”).

<sup>47</sup> See, e.g., MacKinnon, *Reflections on Sex Equality*, *supra* note 30, at 1320–21; Siegel, *Reasoning from the Body*, *supra* note 30, at 361–68; Siegel, *Sex Equality Right*, *supra* note 30, at 64–65; Sunstein, *Neutrality*, *supra* note 37, at 36–37.

<sup>48</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 64.

<sup>49</sup> Siegel, *Reasoning from the Body*, *supra* note 30, at 361 (noting that the highest support for abortion came when pregnancy was the result of rape or incest—in other words, situations in which the woman did not want sex—and that the greatest opposition to abortion was for situations where the woman reported having an abortion because of her career—in other words, when her desire for a career conflicted with acceptance of the maternal role).

judgments about the unborn, not consistently expressed in other social settings and often controverted by other social practices.”<sup>50</sup> For example, although pregnant women are expected to sustain and save the lives of the “unborn,” no one else has the duty to save the life even of people who have already been born, much less to the detriment of their own life circumstances and physical or mental health.<sup>51</sup> This “selectivity,” as Siegel suggests,<sup>52</sup> has been invisible to many of us because we have internalized this unique expectation of pregnant women to preserve the life of a fetus in a way that no one else is expected to preserve the life of another person.<sup>53</sup> The expectation of women to create people and then parent them carries over into our differential expectations of the parenting abilities of mothers versus fathers. For example, although mothers are more likely than fathers to cause the death of their children,<sup>54</sup> Americans have higher expectations of maternal behavior and are much more fascinated and outraged by mothers killing children, either intentionally (Susan Smith and Andrea Yates)<sup>55</sup> or through neglect,<sup>56</sup> than fathers killing children.

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<sup>50</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 65.

<sup>51</sup> Law, *Rethinking Sex*, *supra* note 30, at 1021 & n.239 (referencing Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) and discussing “general common law principle that people are not required to aid others, particularly when aid can only be provided at significant cost and risk to the rescuer” and that equal protection “demands respect for the woman’s right to refuse to aid the fetus”).

<sup>52</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 65; *see also* Sunstein, *Neutrality*, *supra* note 37, at 33–35 (discussing selectivity of compulsion to save the life of another).

<sup>53</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 65 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1354 (2d ed. 1988) and Siegel, *Reasoning from the Body*, *supra* note 30, at 318 n.236, 365–66).

<sup>54</sup> A significantly higher percentage of the 1,247 children killed in 2009 were killed by their mother acting alone or with the help of a non-parent (37.1%), than were killed by their father acting alone or with the help of a non-parent (16.2%). ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., *CHILD MALTREATMENT 2009*, at 64 tbl.4–6 (2010), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf> (27.3% were killed by the mother alone; 9.8% were killed by the mother along with a non-parent; 14.8% were killed by the father acting alone; 1.4% were killed by the father acting with a non-parent). An additional 22.5% of the children killed in 2009 were killed by mothers and fathers acting together. *Id.*

<sup>55</sup> *See* Elena Arteaga, *Florida Mom Shoots, Kills Teenage Children For Talking Back*, KTSN NEWS CHANNEL 9 (Jan. 31, 2011), <http://www.ktsn.com/news/florida-mom-shoots-kills-teenage-children-for-talking-back>; Katherine Ramsland, *Andrea Yates: Ill or Evil*, TRU TV, [http://www.trutv.com/library/crime/notorious\\_murders/women/andrea\\_yates/index.html](http://www.trutv.com/library/crime/notorious_murders/women/andrea_yates/index.html) (last visited Mar. 22, 2011); Tom Turnipseed, *Continuing Saga of Sex, Murder & Racism: Susan Smith is Still Scheming in Prison*, COMMON DREAMS.ORG, <http://www.commondreams.org/views/091400-101.htm> (last visited Mar. 22, 2011).

<sup>56</sup> *See* Michele Oberman, *Mothers Who Kill: Cross-Cultural Patterns in and Perspectives on Contemporary Maternal Filicide*, 26 INT’L J.L. & PSYCHIATRY 493, 497 (2003) (arguing that “[i]n the past, [cases of fatal child neglect] might have been regarded as tragic accidents. In the contemporary United States, however, we treat them as homicides. This is a reflection of the social construction of motherhood, which is more than simply a full-time job. The unwritten rules that govern the role of mother require constant vigilance and altruism. To the extent that these child neglect cases occur when a mother is entertaining a male lover, or visiting a beauty parlor, society is merciless in its scorn and fury.”).

## II. WHY LIBERTY NEEDS A SISTER JOIST: A RIGHT UNDER ATTACK

Given that the right to abortion grounded in the due process liberty clause has taken a significant beating over the almost forty years since the right was first announced, it may seem ludicrous to suggest that the liberty right might *not* need help. On the other hand, from a litigator's perspective, one could view the right as weakened but amazingly resilient, especially given the disparity in the number of Supreme Court Justices appointed by Republicans<sup>57</sup> versus those appointed by Democrats that existed until the recent appointments of Justices Sotomayor and Kagan.<sup>58</sup> I have previously pointed out, as have others, that much of the *Casey* standard remains intact.<sup>59</sup> However, a significant crack has developed.

### A. *The Weakened Evaluation of State Regulatory Interests*

The most significant area of weakness in liberty doctrine rests in the courts' unwillingness to carefully evaluate the legitimacy of state interests in regulating abortion. In *Roe v. Wade*, the Supreme Court identified just two legitimate state interests that could justify state regulation of abortion: the state's "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman . . . and in protecting the potentiality of human life."<sup>60</sup> After the first trimester, the State could, "*in promoting its interest in the health of the mother . . . regulate the abortion procedure in ways that are reasonably related to maternal health.*"<sup>61</sup> After the point of fetal viability, the State could "*in promoting its interest in the potentiality of human life . . . regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*"<sup>62</sup>

#### 1. *Anti-Abortion Strategy*

Since the 1970s, anti-abortion strategists have pursued a remarkably consistent and successful strategy to attack *Roe v. Wade*, much of which is set forth in a 1987 book entitled *Abortion and the Constitution: Reversing*

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<sup>57</sup> The Republican Party platform still calls for an Amendment to the Constitution that would ban abortion throughout the nation. Katharine Q. Seelye, *G.O.P. Holds to Firm Stance on Abortion*, N.Y. TIMES, Aug. 31, 2008, at A27.

<sup>58</sup> Until the recent appointments of Justices Sotomayor and Kagan, Republican appointees outnumbered Democratic appointees 7–2. The imbalance is now reduced, and Republicans outnumber Democratic appointees 5–4. See *Members of the Supreme Court of the United States*, SUPREME CT. OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> (last visited Mar. 22, 2011).

<sup>59</sup> See generally Garrow, *supra* note 9; Smith, *Half-Full*, *supra* note 9.

<sup>60</sup> *Roe v. Wade*, 410 U.S. 113, 162 (1973).

<sup>61</sup> *Id.* at 164 (emphasis added).

<sup>62</sup> *Id.* at 164–65 (emphasis added).

Roe v. Wade *Through the Courts*,<sup>63</sup> and in books and articles written by James Bopp, Jr.<sup>64</sup> of the National Right to Life Committee.<sup>65</sup> Most public attention has been focused on the efforts of anti-abortion advocates to overturn *Roe* by changing the membership of the Court or through adoption of a Human Life Amendment to the Constitution insuring the right to life from conception.<sup>66</sup> Anti-abortion advocates, however, also designed an incremental strategy to proceed in tandem with efforts to alter the composition of the Supreme Court. This strategy was to weaken the right to abortion bit by bit by devaluing women's interests in abortion on the one hand while expanding the breadth of the legitimate state interests in regulating abortion on the other.<sup>67</sup>

In their 1987 article, *Strategies for Reversing Roe v. Wade*,<sup>68</sup> Victor Rosenblum and Thomas Marzen described this alternative "incrementalist"<sup>69</sup> approach to *Roe* reversal. They contended that expanding the state's interest in the fetus and "widen[ing] the state's interest in maternal health" to allow greater regulation of abortion throughout pregnancy, along with efforts to change the judiciary, would create the conditions necessary for reversal.<sup>70</sup> To expand the state's interest in the fetus, the authors argued, advocates must attack the viability line and the requirement that a woman's health must be protected even in a ban on abortions after viability,<sup>71</sup> which the authors saw

<sup>63</sup> See generally ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS (Denis J. Horan, Edward R. Grant & Paige C. Cunningham eds., 1987) [hereinafter, ABORTION AND THE CONSTITUTION].

<sup>64</sup> Bopp describes himself as "an attorney and Supreme Court advocate whose clientele spans the conservative spectrum from Focus on the Family, the National Right to Life Committee, and the Christian Broadcasting Network to the Club for Growth, Citizens United, and the National Federation of Independent Businesses. He [was] special adviser on life issues for the Mitt Romney presidential campaign." James Bopp, Jr., *The Eve of Destruction?*, NAT'L REV. ONLINE (Jan. 2, 2008), <http://www.nationalreview.com/articles/223241/eve-destruction/james-bopp-jr>.

<sup>65</sup> See, e.g., James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181 (1989) (asserting a critique of *Roe* based on judicial inconsistencies within the opinion); James Bopp, Jr., *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. CONTEMP. L. 131 (1989) (arguing that *Roe* should be overruled).

<sup>66</sup> See, e.g., Memorandum from James Bopp, Jr. & Richard E. Coleson on Pro-life Strategy Issues 1-3 (Aug. 7, 2007), available at <http://personhood.net/docs/BoppMemorandum1.pdf> [hereinafter Bopp Memo].

<sup>67</sup> See generally ABORTION AND THE CONSTITUTION, *supra* note 63; see also Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade*, in ABORTION AND THE CONSTITUTION, *supra* note 63, at 195-96 ("A constructive reversal process can begin when one of the five justices in the pro-Roe majority [existing in 1986] is replaced with a judge who opposes *Roe*.").

<sup>68</sup> Rosenblum & Marzen, *supra* note 67.

<sup>69</sup> See, e.g., Michael J. New, *The I's Have It: Three cheers for pro-life incrementalism*, NAT'L REV. ONLINE (Apr. 19, 2007), <http://www.nationalreview.com/articles/220661/have-it/michael-j-new>.

<sup>70</sup> Rosenblum & Marzen, *supra* note 67, at 197 ("Once these goals are achieved, the abortion privacy right would be drained of content, lose its significance and could be directly attacked.")

<sup>71</sup> *Id.* at 197-201.

as the only two “conceptual hurdles” to a state’s ability to ban abortions throughout pregnancy.<sup>72</sup> To attack the viability line, they recommended using statutes that “rais[ed] critical biological issues,” and “emphasiz[ed] the biologically human character of the fetus,” all with the goal of laying the “groundwork for recognizing the constitutional personhood of the unborn.”<sup>73</sup> The main goal, they wrote, is “the passage of legislation offering an opportunity for a willing Supreme Court to begin the reversal process by discarding ‘viability’ as a valid criterion for the onset of a compelling state interest in protecting life.”<sup>74</sup>

Anti-abortion advocates in the 1970s and 1980s had already been pursuing this strategy, enacting statutes testing their ability to regulate in the interests of women’s health and to protect potential life<sup>75</sup> by regulating abortion clinics and mandating that certain information designed to dissuade women from obtaining abortions be given to the woman.<sup>76</sup> Other statutes were enacted to test the viability line, such as Pennsylvania’s 1974 statute requiring a physician who had “sufficient reason to believe that the fetus may be viable” to use the procedure that would provide “the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother,”<sup>77</sup> and Missouri’s 1986 statute declaring that life begins at conception and requiring physicians

<sup>72</sup> *Id.* at 198.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 199. Rosenblum and Marzen also recommended strategies to weaken the status of women’s right to abortion. *Id.* at 203 (“If abortion were not protected as a *fundamental* right,” then the “sometimes compelling interests in the protection of unborn human life and in maternal health . . . even if not ‘compelling’ at all stages of pregnancy and even if the fetus were not a ‘person,’ would be sufficient to warrant governmental regulation and eventually prohibition.”) (emphasis added).

<sup>75</sup> Interestingly, Rosenblum and Marzen viewed strategies that made it more difficult for certain populations to obtain abortions—such as the enactment of parental or spousal notice or consent statutes for minors and married women, respectively, and funding ban statutes—as much less helpful to the ultimate goal of overturning *Roe*. *Id.* at 201–03. As they put it, “state interests in the minor’s or married woman’s abortion, or in demographic or eugenic considerations, provide scant help in assaulting any principle critical to the survival of *Roe*” because the issues raised by these “special, circumstantial interests are too remote from the core of the *Roe* doctrine to be of any use in a reversal strategy.” *Id.* at 203. Attempts to regulate on behalf of such interests often failed. *See, e.g.*, *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979) (striking parental consent statute); *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52 (1976) (striking statute banning abortions using saline method and requiring spousal and parental consent). *But see, e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980) (upholding ban on federal funding for abortion in federal Medicaid program).

<sup>76</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986) (striking requirement that physician give patient information designed “to influence the woman’s informed choice between abortion or childbirth,” and holding that state interests in health or potential life could not justify efforts to “intimidate women into continuing pregnancies”); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (striking mandatory delay and biased counseling provision).

<sup>77</sup> *Colautti v. Franklin*, 439 U.S. 379 (1979) (striking the Pennsylvania Abortion Control Act, 35 PA. STAT. ANN. § 6605 (Purdon 1977), as impermissibly vague).

to test for fetal viability starting at twenty weeks of pregnancy.<sup>78</sup> While the Supreme Court consistently rejected these attempts to restrict abortion through the 1970s and mid-1980s, the strategy began to pay off with the Court's 1989 decision in *Webster v. Reproductive Health Services*, which reviewed the 1986 Missouri statute.<sup>79</sup> The pay-off came not so much from the ruling in *Webster*—which upheld the statute's requirement that physicians test for viability on any twenty-week-old fetus—but because of its strong criticism of *Roe* and its indication that the Court would be ready to, at the very least, abandon the trimester framework and perhaps do more if a case properly presenting the question of *Roe*'s legitimacy came before it.<sup>80</sup>

## 2. *The Result of the Strategy*

After almost two decades of statutory thrusts and litigation parries, and with a significant change in membership on the Supreme Court, the Court in *Planned Parenthood v. Casey* considered Pennsylvania's comprehensive abortion regulations, putting the incremental strategy to the test. In the end, the Court reaffirmed *Roe* and its basic requirement that regulations must advance legitimate state interests.<sup>81</sup> However, it discarded *Roe*'s trimester approach as promised in *Webster* and held that as long as abortion regulations do not otherwise impose an undue burden<sup>82</sup> on the woman's decision to have an abortion, a state may (1) regulate abortions to serve the state's interest in maternal health throughout pregnancy,<sup>83</sup> and (2) "[e]ven in the earliest stages of pregnancy, . . . enact rules and regulations designed to encourage [the pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term"<sup>84</sup> in furtherance of the state's interest in potential life.

It is important to remember that the Court placed significant limitations on the state's ability to regulate in furtherance of its interest in potential life that must be enforced. This power was limited to circumstances (1) where

<sup>78</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (reviewing MO. ANN. STAT. §§ 1.205.1(1), 188.029 (1986)).

<sup>79</sup> 492 U.S. 490 (1989).

<sup>80</sup> *Id.* at 518–22.

<sup>81</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (“[Even] while furthering the interest in potential life or some other valid state interest,” a regulation “cannot be considered a permissible means of serving its legitimate ends” if it places an undue burden on the right.) (emphasis added).

<sup>82</sup> The Court described an undue burden as “shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 877. There has been some confusion regarding the use of the term “purpose” in this description of undue burden. The “purpose” of imposing an undue burden, itself invalid, should not be confused with the requirement that the state have a legitimate interest in the regulation. *Id.*

<sup>83</sup> *Id.* at 846, 887.

<sup>84</sup> *Id.* at 872–73 (finding that allowing such regulations was “the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn”).

the means chosen by the state to further that interest was “calculated to inform the woman’s free choice, not hinder it,”<sup>85</sup> (2) where the information is truthful and not misleading,<sup>86</sup> and (3) where a physician can decline to comply if “he or she can demonstrate . . . that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient,” an exception included in the statute at issue in *Casey*, and specifically noted by the Court.<sup>87</sup>

From the viewpoint of those who sought total elimination of the right to abortion, *Casey* could be seen as dealing a significant blow to the incremental strategy. But those who advocated transforming legal standards piece by piece, reducing the right to abortion incrementally, recognized the significance of the gains they had won in *Casey* and looked for ways to build on those gains.<sup>88</sup> They developed new strategies to expand the state’s ability to regulate in the interests of the fetus, such as the campaign to ban “partial-birth abortions” described below.

### 3. *New Strategies—Abortion Harms Women*

As Reva Siegel has documented exhaustively,<sup>89</sup> some anti-abortion strategists came to believe that in a straight-up battle between fetal interests and women’s interests, the woman would win.<sup>90</sup> They decided that the two interests must be linked and so developed strategies to argue that abortions (harming fetuses) harmed women. The state, they claimed, had an interest in limiting abortions in order to protect women’s physical and mental health.<sup>91</sup>

<sup>85</sup> *Id.* at 877.

<sup>86</sup> *Id.* at 882.

<sup>87</sup> *Id.* at 883–84; see also *Summit Med. Ctr. of Ala. v. Riley*, 318 F. Supp. 2d 1109, 1113 (M.D. Ala. 2003) (issuing limited injunction under this provision of *Casey* that allowed doctors to waive a statutory requirement that they give information about normal fetal development to women who were seeking abortions because of serious fetal anomaly).

<sup>88</sup> Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER’S MAG., Nov. 1, 2004, at 35–37 [hereinafter Gorney, *Gambling*].

<sup>89</sup> Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (discussing growth of strategy to undermine abortion by arguing that abortion harms women, causing “post-abortion syndrome” and its symptoms of suicide and madness, breast cancer, failed lives, broken homes, divorce, and general ruination) [hereinafter Siegel, *New Politics*].

<sup>90</sup> See Bopp Memo, *supra* note 66, at 4 n.2.

<sup>91</sup> *Id.* Numerous studies have refuted claims that abortion harms women physically or mentally. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 184 n.7 (2007) (Ginsburg, J., dissenting) (discussing numerous studies refuting claims that abortion causes mental health problems); BRENDA MAJOR ET AL., REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 4 (2008), available at <http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf> (reporting that the task force “reviewed no evidence sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion per se, as opposed to other factors”). Similarly, data from another recent study showed that “the risk of a psychiatric contact did not differ significantly after first-trimester abortion as compared with before abortion (P=0.19) but did

Siegel documented the spread of the claim that abortion harms women in the anti-abortion movement from its initial articulation by Vincent Rue and Anne Speckhard in the early 1980s through its use in the movement today.<sup>92</sup> Rue and Speckhard called the harm they claimed abortion caused “post-abortion syndrome” (“PAS”), borrowing from the new concept of post-traumatic stress disorder, and spread the idea through testimony in Congress and speeches at National Right to Life Committee conferences.<sup>93</sup> The idea of focusing on the woman and not the fetus was opposed by some anti-abortion advocates in the 1980s, and, as Siegel has documented, that conflict still exists within the anti-abortion movement today.<sup>94</sup> However, PAS discourse became a form of expression for women unhappy after abortions, and it is used in appeals to women in so-called “crisis pregnancy centers.”<sup>95</sup> The PAS discourse, which began as an expressive and therapeutic one, was then transformed into a political strategy designed for the 1990s.<sup>96</sup>

Although claims about abortion causing depression were first refuted during the Reagan Administration by anti-abortion Surgeon General C. Everett Koop<sup>97</sup> and have been repeatedly rebutted by the scientific community,<sup>98</sup> anti-abortion advocates did not give up. They have, however, altered the tenor of the arguments. They couched claims about the existence of PAS in a “pro-woman” frame promoted by Feminists for Life.<sup>99</sup> However, as Siegel notes, the real harm that promoters of PAS claimed was caused by abortion was a harm they believed came from rejection of traditional sexual and family roles—roles PAS promoters believe are “natural” and God-

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increase after first childbirth as compared with before childbirth ( $P < 0.001$ ).” Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 *NEW ENG. J. MED.* 332, 335, 338 (2011) (concluding that the data “does not support the hypothesis that there is an overall increased risk of mental disorders after first-trimester induced abortion”).

<sup>92</sup> Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 *DUKE L.J.* 1641, 1656–69 (2008) [hereinafter Siegel, *Right's Reasons*].

<sup>93</sup> *Id.* at 1656–57.

<sup>94</sup> *Id.* at 1661–64, 1680.

<sup>95</sup> See Siegel, *New Politics*, *supra* note 89, at 1022 n.131. Crisis pregnancy centers (“CPCs”) are volunteer organizations—often set up close to medical clinics providing abortions—that seek to discourage women from having abortions. *Id.*

<sup>96</sup> Siegel describes how anti-abortion advocate David Reardon opened an institute dedicated to the study of PAS and was instrumental in transforming PAS into a political strategy. Siegel, *Right's Reasons*, *supra* note 92, at 1667–69.

<sup>97</sup> See Nada L. Stotland, Commentary, *The Myth of the Abortion Trauma Syndrome*, 268 *J. AM. MED. ASS'N* 2078, 2078 (1992) (referencing letter from Surgeon General C. Everett Koop to President Ronald Reagan (Jan. 1989) (as described in C. EVERETT KOOP, *KOOP: THE MEMOIRS OF AMERICA'S FAMILY DOCTOR* (1991)), noting the anti-abortion Surgeon General's finding that “the available scientific evidence did not demonstrate significant negative (or positive) mental health effects of abortion”).

<sup>98</sup> See, e.g., MAJOR ET AL., *supra* note 91; see also *Gonzales v. Carhart*, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting) (listing numerous studies refuting claim that abortion causes depression).

<sup>99</sup> Siegel, *New Politics*, *supra* note 89, at 1020–21 & n.124.

given.<sup>100</sup> In other words, their supposedly “pro-woman” claims that abortion restrictions promoted women’s health and well-being were actually infused with anti-feminist stereotypes about women’s roles and women’s inability to function happily outside of those traditional mores.<sup>101</sup>

#### 4. *Gonzales v. Carhart—Two Strategies Come Together in the New Century*

In the mid-2000s, the “abortion harms women” strategy was gaining traction, most notably through its use to support South Dakota’s 2006 law banning abortion.<sup>102</sup> At the same time, a ban on so-called “partial-birth abortion” headed to the Supreme Court for a second time.<sup>103</sup> The campaign to ban “partial-birth” abortions harkened back to the Rosenblum strategy of the 1980s that took aim at the viability line and the health requirement<sup>104</sup> and sought to undermine the strength of women’s interest in abortion.<sup>105</sup> The campaign reflected Rosenblum’s call to expand the state’s ability to regulate abortions in the interests of the fetus before viability by “emphasi[zing] the biologically human character of the fetus.”<sup>106</sup> For example, the federal statute at issue in *Carhart* used “anatomical markers” to delineate the procedures being banned and required detailed discussion of abortion procedures in litigation.<sup>107</sup> Although none of the physicians testifying before the trial court in *Carhart* performed procedures post-viability that would be banned under the Act, and although the ban applied to pre-viability procedures,<sup>108</sup> the campaign sold the restrictions as measures to outlaw abortions occurring post-viability, if not at full term—abortions, we were told, that took place inches from life.<sup>109</sup> As anti-abortion strategist James Bopp, Jr. describes it,

<sup>100</sup> *Id.* at 1018–20.

<sup>101</sup> Siegel, *Right’s Reasons*, *supra* note 92, at 1686–88.

<sup>102</sup> Siegel, *New Politics*, *supra* note 89, at 1009–14 (describing the use of “woman-protective arguments” to justify the 2006 South Dakota ban on abortion, H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006), and the broader anti-abortion movement’s use of such arguments). South Dakota voters rejected the ban in a November 2006 referendum. *Id.* at 992 n.2.

<sup>103</sup> For a discussion of the campaign to ban abortions by calling them “partial-birth” abortions, see Smith, *Half-Full*, *supra* note 9, at 4–5.

<sup>104</sup> *Id.*; see also Bopp Memo, *supra* note 66, at 4 n.2.

<sup>105</sup> The argument is suggested by, among others, Justice White in his dissent in *Thornburgh*. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 790–94 (1986) (White, J., dissenting) (“I can certainly agree with the proposition—which I deem indisputable—that a woman’s ability to choose an abortion is a species of ‘liberty’ that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so ‘fundamental’ that restrictions upon it call into play anything more than the most minimal judicial scrutiny.”).

<sup>106</sup> Rosenblum & Marzen, *supra* note 67, at 198.

<sup>107</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 135–40 (2007); Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

<sup>108</sup> *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1042–47 (D. Neb. 2004), *aff’d* *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev’d on other grounds*, 550 U.S. 124 (2007).

<sup>109</sup> See, e.g., Gorney, *Gambling*, *supra* note 88, at 36.

the campaign was designed as much to “change the hearts and minds of the public on abortion[,] . . . to set before the public . . . a developed baby, capable of life outside the womb, within inches of birth, being slaughtered by a stab in the skull and the suctioning of its brains,” as it was to be victorious in the courts.<sup>110</sup> The public relations campaign imagery was powerful and it worked in state legislatures, where bans were enacted in thirty states.<sup>111</sup>

In the Court’s decision in *Carhart*, many of the goals of the incrementalist strategy were achieved. While the decision was not a complete doctrinal victory for the anti-abortion movement,<sup>112</sup> in upholding the federal Partial-Birth Abortion Ban Act of 2003,<sup>113</sup> the decision has the potential to allow increased regulation based on a broadened interest in potential life.<sup>114</sup> Moreover, in an unexpected twist, it has brought together the efforts to increase the state’s interest in protecting fetal interests with the new PAS strategy, thus opening a crack in the door to expanding the ability to limit abortions based on a state interest in women’s health. After a long exegesis on the necessity of saving women from their decisions,<sup>115</sup> the Court in *Carhart* does not actually examine whether the statute’s ban on abortion procedures actually protected women from their own decisions to have abortions, much less whether women needed that protection in the first place. Instead, the Court claims that a “necessary effect” of the existence of the ban on a particular method of abortion “and the knowledge [such a ban] conveys”—presumably by existing in the statute books and describing how the procedure is performed—will be to “reduc[e] the absolute number of late-term abortions.”<sup>116</sup> Of course, the statute at issue in *Carhart* was not an “in-

<sup>110</sup> Bopp Memo, *supra* note 66, at 5.

<sup>111</sup> *Stenberg v. Carhart*, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting).

<sup>112</sup> See generally Garrow, *supra* note 9; Smith, *Half-Full*, *supra* note 9.

<sup>113</sup> The statute claimed to ban something it called “partial-birth abortions.” The Court limited the reach of the ban to certain defined intact dilation and evacuation abortion procedures (“intact D & Es”), where the physician intended to remove the fetus intact when he or she began the procedure. See *Gonzales v. Carhart*, 550 U.S. 124, 150–56 (2007). Dilation and evacuation (“D & E”) is the most frequently used abortion procedure during the second trimester of pregnancy, and intact D & E is a variant of the D & E procedure. See *id.* at 173 n.3 (Ginsburg, J., dissenting). For further discussion of the Court’s interpretation of the scope of the ban, see Camp, *supra* note 10, at 9–10 and Smith, *Half-Full*, *supra* note 9, at 6–8.

<sup>114</sup> The Court relied on the state’s interest in protecting potential life, approving a ban on certain pre-viability abortion procedures as an appropriate expression of respect for the “dignity of human life.” *Carhart*, 550 U.S. at 157. As I have argued before, I believe that *Carhart* was a unique case both because of the subject matter, see *id.* at 158 (“Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.”), and because Justice Kennedy was determined to elevate what he saw as the neglected principle of *Casey*: the state’s ability to regulate to protect potential life within the limitations prescribed by the Court in *Casey*. See Smith, *Half-Full*, *supra* note 9, at 12.

<sup>115</sup> See *Carhart*, 550 U.S. at 159–60.

<sup>116</sup> *Id.* at 160.

formed consent” statute and conveyed no information. Rather, it was a ban on a method of abortion that the American College of Obstetricians and Gynecologists thought was the safest for some women in some circumstances; a ban with no exception for circumstances in which the woman’s choice was fully informed or for her health; a ban that applied whether or not she would suffer serious medical complications, uterine perforation, scarring, hysterectomy, hemorrhage, and whether or not she had a bleeding placenta previa, chorioamnionitis, uterine or placental cancer, etc.<sup>117</sup>

The Court’s language<sup>118</sup> is already being exploited to promote restrictive statutes, such as the Nebraska ban on pre-viability abortions based on fetal pain,<sup>119</sup> and others like it currently being proposed.<sup>120</sup> As the legislative findings in Nebraska’s Pain-Capable Unborn Child Protection Act provide: “It is the purpose of the State of Nebraska to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.”<sup>121</sup>

<sup>117</sup> *Id.* at 177–80 (Ginsburg, J., dissenting).

<sup>118</sup> For a discussion of the “scariness” of the *Carhart* decision and the Court’s reference to broad potential interests such as “an interest in protecting the integrity and ethics of the medical profession,” and in protecting women from making decisions they will regret, see Camp, *supra* note 10, at 12–14 (internal quotation mark omitted).

<sup>119</sup> Pain-Capable Unborn Child Protection Act, NEB. REV. STAT. §§ 28-3,102–28-3,111 (Supp. 2010) (banning all abortions starting at twenty weeks after fertilization with an extremely narrow exception only in cases where the mother “has a condition which so complicates her medical condition as to necessitate the abortion . . . to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function”). Note that twenty weeks after fertilization is twenty-two weeks of pregnancy in normal medical and lay parlance, which date pregnancies from the first day of the woman’s last menstrual period (“LMP”), rather than from fertilization. For a discussion of gestational age dating and its use in abortion politics, see Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women’s Interests in Motherhood*, 17 J.L. & POL’Y 97, 104 n.14 (2009).

<sup>120</sup> See H.B. 2218, 2011 Leg., Reg. Sess. (Kan. 2011), available at [http://www.kslegislature.org/li/b2011\\_12/year1/measures/hb2218/](http://www.kslegislature.org/li/b2011_12/year1/measures/hb2218/) (Pain-Capable Unborn Child Protection Act would ban abortions starting at twenty-two weeks of pregnancy LMP; signed into law by Governor on April 8, 2011); see also H.B. 18, 2011 Leg., Reg. Sess. (Ala. 2011), available at <http://alisondb.legislature.state.al.us/acas/ViewBillsStatusACASLog.in.asp?BillNumber=HB18> (same; bill under consideration in House); S.B. 1165, 61st Leg., 1st Reg. Sess. (Idaho 2011), available at <http://legislature.idaho.gov/legislation/2011/S1165.pdf> (Pain-Capable Unborn Child Protection Act would ban abortions starting at twenty-two weeks of pregnancy LMP; signed into law by Governor with immediate effective date Apr. 13, 2011); H.B. 1888, 53d Leg., 1st Sess. (Okla. 2011), available at <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1888> (same; passed House 94–2, Senate 38–8); see also *Pro-Life Laws Move Ahead in Kansas, Oklahoma, and Idaho*, NAT’L RIGHT TO LIFE NEWS TODAY (Mar. 30, 2011), <http://www.nation-alrighttolifenews.org/news/2011/03/pro-life-laws-move-ahead-in-kansas-oklahoma-and-idaho> (reporting that thirteen bills patterned on Nebraska’s fetal pain ban have been introduced in states since 2010).

<sup>121</sup> NEB. REV. STAT. § 28-3,104(5) (Supp. 2010). The Nebraska legislature found that “[a]t least by twenty weeks after fertilization there is substantial evidence that an unborn child has the physical structures necessary to experience pain.” NEB. REV. STAT. § 28-3,104(1) (Supp. 2010). *But cf.*, e.g., ROYAL COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS, FETAL AWARENESS: REVIEW OF RESEARCH AND RECOMMENDATIONS

These statutes should fall under *Casey*'s undue burden standard, which provides that the government may not rely on its interest in the potential life of the fetus to interpose a significant obstacle to abortion before viability.<sup>122</sup> Whether these statutes will fall, though, will depend on a number of factors: the ability of anti-abortion advocates to enact a statute in a jurisdiction where doctors are performing procedures at twenty-two weeks of pregnancy, the willingness of physicians to challenge such laws, a political calculus made by abortion rights advocates about the advisability of walking into another debate that is all about the fetus and not about the woman, and the possibility that doctors affected by these laws will simply relocate their medical practices to other states, thereby avoiding the necessity of going to court.<sup>123</sup> The main point, though, is that under the liberty doctrine rubric, the focus will be completely on the fetus.

The question facing us after *Carhart* is the scope of the state's ability to regulate abortion short of an outright ban under state interests in potential life and maternal health, and how closely courts will analyze whether regulations actually promote valid state interests. The trial court's decision in *Planned Parenthood of the Heartland v. Heineman*<sup>124</sup> is illustrative of the limitations of analysis of state interests in a substantive due process liberty

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FOR PRACTICE (2010), available at <http://www.rcog.org.uk/files/rcog-corp/RCOGFetalAwarenessWPR0610.pdf>. This report found the following:

It was apparent that connections from the periphery to the cortex are not intact before 24 weeks of gestation and, as most neuroscientists believe that the cortex is necessary for pain perception, it can be concluded that the fetus cannot experience pain in any sense prior to this gestation. After 24 weeks there is continuing development and elaboration of intracortical networks such that noxious stimuli in newborn preterm infants produce cortical responses. Such connections to the cortex are necessary for pain experience but not sufficient, as experience of external stimuli requires consciousness. Furthermore, there is increasing evidence that the fetus never experiences a state of true wakefulness *in utero* and is kept, by the presence of its chemical environment, in a continuous sleep-like unconsciousness or sedation. This state can suppress higher cortical activation in the presence of intrusive external stimuli.

*Id.*; see also Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 952 (2005) ("[T]he capacity for conscious perception of pain can arise only after thalamocortical pathways begin to function, which may occur in the third trimester around 29 to 30 weeks' gestational age, based on the limited data available. Small-scale histological studies of human fetuses have found that thalamocortical fibers begin to form between 23 and 30 weeks' gestational age, but these studies did not specifically examine thalamocortical pathways active in pain perception.").

<sup>122</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992); see also *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (upholding ban on intact D&E because, *inter alia*, "[a]lternatives are available to the prohibited procedure"); *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 466-67 (1998).

<sup>123</sup> Rob Stein & Lena H. Sun, *Doctor planning new late-term abortion clinics in D.C. area*, WASH. POST, NOV. 10, 2010, at B1 (reporting that Nebraska doctor had decided to open clinics in other jurisdictions "because Nebraska had implemented a new law [making] it illegal to perform abortions beyond the 20th week of a pregnancy").

<sup>124</sup> 724 F. Supp. 2d 1025 (D. Neb. 2010).

frame. While the decision may represent the absolute best the liberty clause currently has to offer in terms of a court's willingness to question the legitimacy of statutory purpose, it demonstrates the difficulties we face.

In *Heineman*, the plaintiffs challenged an extensive set of information requirements imposed only on abortion providers and their patients.<sup>125</sup> Rather than taking the state's claim that the regulations served the state's interest in protecting women's health on face value, the court looked behind the claim.<sup>126</sup> The court relied on a plain reading of the statute and "the absence of any similar statutory 'protections' for the health of [male or female] patients in other contexts" to reject the state's claim that the statute was designed to further the state's interest in protecting women's health.<sup>127</sup>

With the health justification out of the way, the court "infer[red] that the objective underlying [the statute] is the protection of unborn human life," and noted that protection of potential life is a legitimate state interest under *Casey* and *Carhart*.<sup>128</sup> However, the court did not evaluate whether the statute actually served the state's interest in protecting potential life by providing information that would inform the woman's choice and might lead her to change her mind and carry a pregnancy to term. Nor did the court question whether the state's interest in protecting potential life as expressed in the statute was based on or reinforced a desire to preserve a separate-spheres tradition for men and women.<sup>129</sup> Instead, the court was only willing to evaluate the state's interest in fetal protection under *Casey*'s "purpose or effect" rule.<sup>130</sup> Under that standard, the court asked whether the state sought "to effect this [fetal protective] goal by placing a substantial obstacle in the path of women seeking an abortion," i.e., by imposing an undue burden on the right.<sup>131</sup> The court held that the vagueness of, or impossibility of compli-

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1044.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1043–44 (citing *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992)).

<sup>129</sup> Reva Siegel has made this argument in the most detail. See Siegel, *Reasoning from the Body*, *supra* note 30, at 266 (noting that those leading campaigns to criminalize abortion in the United States in the 1800s argued that restricting abortion "was necessary, not only to protect the unborn, but also to ensure that women performed their obligations as wives and mothers"); *id.* at 296–97, 302–04 (discussing claims that women had a duty to procreate within marriage). Siegel has also pointed out that those leading the nineteenth century criminalization campaign sought to reduce access to abortions "to preserve the ethnic character of the nation." *Id.* at 266, 297–300 (discussing claim that abortion and contraception threaten the political power of the middle class). Criminalization campaign leaders also sought to "appropriate management of the birthing process from midwives." *Id.* at 300.

<sup>130</sup> *Heineman*, 724 F. Supp. 2d at 1043–46 ("It also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'") (quoting *Carhart*, 550 U.S. at 126 (quoting *Casey*, 505 U.S. at 878) (internal quotation marks omitted)). For a discussion of the *Casey* standard, see generally Smith, *supra* note 9.

<sup>131</sup> *Heineman*, 724 F. Supp. 2d at 1044.

ance with, the statute would essentially result in a ban on abortions in the state and therefore the statute had the purpose of imposing an undue burden.<sup>132</sup> In other words, the proof of the illegitimate purpose was synonymous with proof of illegitimate effect.

Although the result was positive for the plaintiffs in this case, it is unclear whether plaintiffs will ever be able to establish under liberty jurisprudence that an abortion regulation does not promote a valid state interest without proof of illegitimate effect, i.e., proof that a substantial obstacle to abortion exists. If the purpose inquiry is the only method to review legitimacy of state interest and if “substantial obstacle” is the only impediment to validity, then the scrutiny of state interests may indeed remain tepid and even illogical.

This is certainly not a foregone conclusion, and the Court’s decisions do not support the idea. For example, it is possible that the district court in *Heineman* would have inquired more closely into the validity of the state’s interests if the effect of the law had not so clearly been to ban abortion, or perhaps if that aspect of the ruling had been overturned on appeal to the Eighth Circuit. After all, the court noted that Eighth Circuit precedent directed courts to “‘look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose,’ which may include evidence in the form of ‘statements by lawmakers.’”<sup>133</sup> We will never know because the case settled before appeal.<sup>134</sup>

To prevent expansion of state interests from swallowing the right to abortion, as Rosenblum and Marzen envisioned, abortion rights advocates must be as vigilant as our opponents in developing strategies to change the Constitutional abortion equation. The best strategy now is to reinvigorate the Court’s examination of the validity and efficacy of claimed state interests by adding considerations of equality both under the Equal Protection Clause and our liberty claims.<sup>135</sup>

### *B. Scholarly Criticism of Liberty Right and Embracing of Equality Right*

The second reason to sister the liberty joist is that protection of the right to abortion as a matter of liberty and privacy has taken a beating in academic circles as well as in the courts. Beginning almost immediately, *Roe* was disparaged for recognizing a right that critics argued the Founders never meant to protect. These critics contended that *Roe* was incorrectly decided because neither the right of abortion nor the right to privacy is written in the

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1044 n.8 (quoting *Jones v. Gale*, 470 F.3d 1261, 1269 (8th Cir. 2006)).

<sup>134</sup> *Neb. Agrees to Permanent Injunction Blocking Abortion Screening Law*, WOMEN’S HEALTH POL’Y REP., (Aug. 19, 2010), [http://www.nationalpartnership.org/site/News2?news\\_iv\\_ctrl=-1&abbr=daily2\\_&page=newsArticle&id=25651](http://www.nationalpartnership.org/site/News2?news_iv_ctrl=-1&abbr=daily2_&page=newsArticle&id=25651).

<sup>135</sup> See *infra* Part IV.

text of the Constitution, and neither is supported by the original understanding of its principles or values.<sup>136</sup>

Coming from anti-abortion conservatives or from those who call themselves “originalists,” such claims would not necessarily counsel in favor of a change in strategy. We would expect nothing less. Indeed, it has long been a goal of the anti-abortion movement to undermine scholarly support for the right to abortion.<sup>137</sup> But when progressives began responding to the attacks on *Roe* by originalists and engaging in a sort of *Roe* exceptionalism, there was more cause for alarm.

*Roe* became the progressive punching bag at the center of the seemingly interminable discussion about how to resolve the so-called “dilemma” of Madisonian Democracy.<sup>138</sup> While perfectly comfortable with the use of substantive due process in cases like *Griswold v. Connecticut*<sup>139</sup> and later *Lawrence v. Texas*,<sup>140</sup> some progressive scholars have thrown *Roe* to the wolves. These scholars attacked the grounding of the right to abortion in a substantive due process liberty right,<sup>141</sup> notably without explaining why they did not take issue with *Griswold* or *Lawrence* on the same grounds.

Other scholars blamed *Roe* for engendering an enormous backlash against the judiciary, claiming that this backlash ended a legislative abortion reform movement that was successfully creating abortion reform in a more “natural” and democratic way through state legislatures.<sup>142</sup> These and other scholars went so far as to claim that *Roe* was bad for women, bad for the

<sup>136</sup> See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–36 (1973) [hereinafter Ely, *Crying Wolf*] (arguing that the right to abortion “is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure”) (internal footnote omitted).

<sup>137</sup> See, e.g., Rosenblum & Marzen, *supra* note 67, at 196 (“*Roe* must be subject to legitimate historical, legal, and social criticism.”).

<sup>138</sup> See, e.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1096–1105 (1981) (discussing fact that because a Madisonian democracy is not completely democratic but also provides protections against majority rule, there will always be tension between majority rule and minority rights and arguing that there may not be a resolution to this controversy).

<sup>139</sup> 381 U.S. 479 (1965).

<sup>140</sup> 539 U.S. 558 (2003).

<sup>141</sup> See, e.g., Sunstein, *Neutrality*, *supra* note 37, at 31 (“There are serious difficulties . . . in treating the abortion right as one of privacy, not least because the Constitution does not refer to privacy and because the abortion decision does not involve conventional privacy at all.”). Sunstein does argue, however, that abortion should be protected under a constitutional equality analysis. *Id.* at 31–33.

<sup>142</sup> See, e.g., William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991) [hereafter Sunstein, *Three Fallacies*] (“Perhaps more fundamentally, the decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women’s movement by spurring opposition and demobilizing potential adherents. At the same time, *Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus.”).

women's movement, bad for the entire progressive movement, and unjustly "politicized" the judicial nomination process.<sup>143</sup> The claims that the liberty right is not the proper source of a right to abortion, that *Roe* put an end to a burgeoning legislative movement of abortion reform sweeping the states, that judicial decision-making in the service of political reform is "anti-democratic," and that *Roe* was bad for women and the women's movement, have been directly and extensively rebutted in the works of Jack Balkin, Reva Siegel, and others; these rebuttals will not be repeated here.<sup>144</sup>

Some of the same progressive scholars who have criticized the grounding of the right to abortion in a constitutional liberty right have recognized the legitimacy of the judicial role in protecting a right to abortion in service of constitutional equality principles, at least as asserted under the Equal Protection Clause.<sup>145</sup> As Cass Sunstein recognized:

[T]he equality principle . . . will on occasion call for a judicial role under the Equal Protection Clause. At a minimum, it requires a powerful sex-neutral justification for laws that are aimed, on their face or in their motivation, at women. For this reason laws restricting abortion, which contain a sex-based classification, raise a serious equal protection problem.<sup>146</sup>

I am not arguing that advocates should adopt equality arguments because of the scholarly criticisms of the liberty right, criticisms I believe are misplaced and often actually a result of a failure to understand the importance of abortion to women's lives. Rather, pressing equality arguments in conjunction with liberty arguments defuses one prong of the anti-abortion attack without giving up anything.

### C. Vulnerability to Reversal

A third reason to sister the liberty joist remains, after all these years, the possibility of reversal of the *Roe* rationale. Despite the election of a pro-

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<sup>143</sup> See, e.g., Sunstein, *Three Fallacies*, *supra* note 142, at 766. Reva Siegel and Robert Post, in perhaps their best punny title, dubbed this petulant attitude towards *Roe* "Roe rage." See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, *Roe Rage*].

<sup>144</sup> See generally Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in WHAT ROE V. WADE SHOULD HAVE SAID 3 (Jack M. Balkin ed., 2005) (rebutting criticisms of liberty claim); Post & Siegel, *Roe Rage*, *supra* note 143 (pointing out that the political movement in opposition to the right to abortion had developed first in response to legislative advocacy and was well-developed before the decision in *Roe* was issued and arguing that even if "backlash" to the *Roe* decision occurred, such dissatisfaction is an integral part of the democratic process that impacts future judicial decisions).

<sup>145</sup> Sunstein, *Neutrality*, *supra* note 37, at 16; see also Jack M. Balkin, *Opinion in Roe v. Wade*, in WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 144, at 31 (expressing opinion that abortion statutes at issue in *Roe* and *Doe* should have been held to violate right to liberty and equality and that these rights are intertwined).

<sup>146</sup> Sunstein, *Neutrality*, *supra* note 37, at 16.

choice President in 2008, years of Republican administrations and Supreme Court appointments have taken their toll. The right to abortion likely rests on a mere 5–4 majority in the U.S. Supreme Court, with Justice Kennedy the protector of a narrow right to abortion. Thus, the right remains vulnerable to defeat depending on when certain justices leave the Court and who is elected President (and thus who holds the nomination power) in the next two terms. The use of sex equality arguments will not protect the right from an anti-choice justice intent on eliminating the right to abortion from the Constitution at all costs. These arguments do, however, give us another ground for the right, which could appeal to a justice who is uncomfortable with the liberty analysis but is similarly uncomfortable with state control of reproduction and enforcement of motherhood that rests on stereotypes about women's roles and reinforces women's social and economic inequality.<sup>147</sup>

### III. RESISTANCE TO ADDING EQUALITY CLAIMS: PRACTICAL IMPEDIMENTS AND SUBSTANTIVE CONCERNS

The question for litigators is how to present equality arguments to busy judges who would rather rely on the well-developed liberty doctrine. In fact, litigators may find they do not get much action on sex equality arguments made in trial or even appellate courts. However, the recent return to “woman protective” arguments<sup>148</sup> gives litigators an opportunity. These arguments make the underlying regressive notions behind abortion regulations—even those labeled “fetal protective”—more transparent and thus more easily established now.<sup>149</sup> The limits of liberty jurisprudence may preclude or at least discourage this searching examination and rejection of restrictions whose purpose is to reinforce stereotyped notions of women's roles in society, to idealize motherhood, and impose it as a natural duty on those who reject it or a particular instance of it.

I am not arguing that sex equality arguments should be used as replacements for liberty arguments. As Reva Siegel has pointed out, “developing equality arguments for the abortion right can in fact reinvigorate privacy discourse . . . [and] encourage us to identify the peculiar strengths of privacy discourse.”<sup>150</sup> In some cases, the best course will be to bring the sex equality argument as a complementary but equal claim to the liberty argu-

<sup>147</sup> See Siegel, *New Politics*, *supra* note 89, at 991–92.

<sup>148</sup> See Siegel, *Right's Reasons*, *supra* note 92, at 1648–51 (discussing gender-based anti-abortion arguments and appearance in Supreme Court's opinion in *Carhart*).

<sup>149</sup> For example, the legislative history of the South Dakota ban explicitly relied on many stereotyped notions of women's role, as Reva Siegel carefully documents, providing excellent evidence of the law's discriminatory purpose. *Id.* at 1651–56.

<sup>150</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 69; see also Ginsburg, *supra* note 30, at 382–83 (arguing that the *Roe* Court “presented an incomplete justification for its action” and that equality rights are “also in the balance”); *id.* at 386 (“Court's *Roe* position is weakened . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”) (emphasis added).

ment.<sup>151</sup> In some cases, it will make sense to combine them, to argue sex equality rights as a violation of the liberty doctrine.<sup>152</sup> It no longer makes sense to argue one without the other.

Before outlining in Part IV the potential benefits of adding equality arguments to our liberty claims, I first want to address what I believe are the two primary reasons for resistance to bringing sex equality claims in federal court today and those are: (1) the valid practical impediments to raising and preserving these claims, and (2) the substantive concerns about raising new claims, especially in front of today's very conservative federal courts.

### A. *Practical Concerns*

Abortion litigation differs from much other litigation brought to establish and preserve individual constitutional rights. First, litigators protecting abortion rights are in a defensive posture politically, protecting an established right, but in an aggressive posture in litigation as the plaintiffs challenging restrictions on that right and seeking to preserve its breadth. As they set out to challenge restrictions on the right currently held by their plaintiffs, litigators challenging abortion restrictions have more to lose than those seeking to enjoin the anti-miscegenation law in *Loving v. Virginia*<sup>153</sup> or the laws preventing same-sex marriage in recent years.<sup>154</sup> If pro-choice litigators lose, not only does the challenged restriction stay in place, but the courts could use the case to diminish the right in some way. Litigators who seek to establish new rights and lose, on the other hand, fight the good fight. While they may leave the law in a worse place because the possibility of the new right is rejected, their individual plaintiffs are no worse off than if they had never brought the case.

Moreover, because anti-abortion advocates have enacted thousands of restrictions since the decision in *Casey*, pro-choice litigators are on the run, seeking to protect clients in states throughout the nation. Because anti-abor-

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<sup>151</sup> See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding that prohibition on interracial marriage violated the Lovings' rights to equal protection *and* liberty).

<sup>152</sup> For example, Justice Ginsburg supports her statement that “legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature” by reference to liberty jurisprudence. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). See generally Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGEORGE L. REV. 473 (2002) (describing use of hybrid claims combining liberty and equality principles) [hereinafter Karlan, *Equal Protection*]; Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447 (2004) [hereinafter Karlan, *Loving Lawrence*] (arguing that Lawrence decision while based in liberty jurisprudence, incorporates equality principles); Siegel, *Sex Equality Right*, *supra* note 30, at 68.

<sup>153</sup> 388 U.S. 1 (1967).

<sup>154</sup> See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (state law precluding same-sex marriage violates state equal protection guarantees); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (same); *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003) (same).

tion statutes are most likely to pass in the most conservative states, litigation is likely to take place in the most conservative courts in front of the most conservative judges and appellate courts. Understandably, litigators are reticent to raise new claims, especially claims that have been lionized like the equality claims, in hostile federal courts.<sup>155</sup>

Finally, abortion litigation is consistently fast-paced. New restrictions are adopted at an alarming rate and almost always go into effect within a few months of enactment, sometimes immediately on signing.<sup>156</sup> Thus, cases are brought on Motions for a Temporary Restraining Order (“TRO”) and/or preliminary injunction. Oral arguments on a TRO are often scheduled quickly with a preliminary injunction set for two weeks later.<sup>157</sup> Sometimes the length of time between a TRO hearing and a hearing on preliminary injunction is extended with the consent of the parties, given the state’s equal interest in additional preparation time. However, there is often political pressure to move forward quickly so that the state does not seem to be presenting less than a vigorous defense of the constitutionality of a statute. In these cases, the state will sometimes agree to the additional preparation time between the TRO and the preliminary injunction, as long as the hearing on preliminary injunction is consolidated with the trial on the merits. In other cases, there is no need for a trial and the case can be decided on summary judgment after a short discovery period because there are no material issues of fact in dispute. Discovery periods and briefing schedules are often expedited in these cases as well.<sup>158</sup>

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<sup>155</sup> Of the eleven active judges on the Eighth Circuit Court of Appeals, which has jurisdiction over cases coming out of the federal courts in Nebraska and South Dakota, among others, nine were appointed by Republican Presidents (seven by President George W. Bush) and only two by a Democratic President. *Eighth Circuit Court of Appeals Judges*, U.S. CT. OF APP. FOR THE 8TH CIR., <http://www.ca8.uscourts.gov/newcoal/judge.htm> (last visited Mar. 23, 2011) (listing the appointment date of judges on court). Similarly, seven of the ten active judges on the Seventh Circuit Court of Appeals were appointed by Republicans and only three by Democrats, for a 70% Republican majority. *Seventh Circuit Report*, ALLIANCE FOR JUSTICE, <http://www.afj.org/assets/resources/nominees/seventh-circuit-report.pdf> (last visited Mar. 23, 2011). Interestingly, the Ninth Circuit and the Fourth Circuit Courts of Appeals, once considered the most liberal (Ninth) and most conservative (Fourth) circuits, have actually become more moderate. In the Ninth Circuit, eleven of the twenty-seven active judges were appointed by Republican presidents. *Ninth Circuit One Pager*, ALLIANCE FOR JUSTICE, [http://www.afj.org/advisory-committees/ninth\\_circuit\\_one\\_pager.pdf](http://www.afj.org/advisory-committees/ninth_circuit_one_pager.pdf) (last visited Mar. 23, 2011). The Fourth Circuit now has six judges appointed by Republicans, five by Democrats (counting one nominated by a Democrat and then re-nominated by a Republican), and four vacancies. *Fourth Circuit Report*, ALLIANCE FOR JUSTICE, <http://www.afj.org/assets/resources/fourth-circuit-report.pdf> (last visited Mar. 23, 2011).

<sup>156</sup> See, e.g., Petition, *Nova Health Sys. v. Edmondson*, No. CV-2010-533 (Okla. Cnty. Dist. Ct. Apr. 27, 2010), *aff’d*, 233 P.3d 380 (Okla. 2010) (suit challenging an Oklahoma law, which went into effect immediately upon signing and which prohibits an abortion unless the woman first has an ultrasound, is shown the ultrasound image, and listens to the doctor describe the image in detail).

<sup>157</sup> See FED. R. CIV. P. 65 (TRO issued without notice may not exceed fourteen days).

<sup>158</sup> The patterns described in this paragraph are drawn from my own experience litigating reproductive rights cases.

As anyone who has sought a TRO and/or preliminary injunction under a short timeframe knows, many judges will be angry and indisposed to grant the needed relief if the case appears complicated. For this reason, litigators are even more wary of an innovative argument in cases seeking immediate injunctive relief than in other cases. Losing the TRO can mean that a clinic shuts down, leaving hundreds of women at risk of not being able to obtain an abortion.<sup>159</sup> Unfortunately, this can lead a busy litigator to omit the claim that is framed in an innovative way rather than risk a grouchy judge. Delaying briefing on a claim at the TRO stage would be fine if the cases proceeded normally to trial where all the claims could be presented in an orderly fashion; however, it is not fine if the decision on TRO becomes the decision on preliminary injunction and the decision on preliminary injunction becomes the final decision. Poof, the claim, so nicely presented in the complaint, disappears, unpreserved for appeal.

### B. *Dreams of Strict Scrutiny*

I suspect that some of the reluctance to press equality claims at this juncture stems from disappointment at the result in the *Tucson Women's Clinic* case. Litigators have been looking for ways to increase the scrutiny applied by courts to abortion restrictions and attempted to use sex equality arguments in cases challenging medical facility licensing regulations to do just that. In *Tucson Woman's Clinic v. Eden*,<sup>160</sup> the Ninth Circuit agreed that abortion regulations should be seen as a form of gender discrimination and supported the idea that treating abortion differently from other medical procedures should be recognized as unconstitutional sex discrimination.<sup>161</sup>

Rather than adjudicating the sex equality claim under the Equal Protection Clause, however, and applying intermediate scrutiny as would normally be required under *United States v. Virginia*,<sup>162</sup> the Ninth Circuit held that the

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<sup>159</sup> Tamar Lewin, *Wisconsin Abortion Clinics Shut Down, Citing New Law*, N.Y. TIMES, May 15, 1998, at A16 (reporting that all Wisconsin abortion clinics stopped performing abortions after federal judge refused to block a new state law from going into effect).

<sup>160</sup> 379 F.3d 531 (9th Cir. 2004).

<sup>161</sup> *Id.* at 548 (noting that *Hibbs* “strongly supports plaintiffs’ argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender”); *id.* at 549 (noting that under *Casey* “abortion is tied to the right to be free from sex discrimination in a manner unlike any other medical service that only one gender seeks” and that “[a]bortion is unique”); *id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

<sup>162</sup> 518 U.S. 515, 533–34 (1996) (holding under “heightened review standard” that “Virginia has shown no ‘exceedingly persuasive justification’ for excluding all women from the citizen-soldier training afforded by VMI” and finding Virginia in violation of the Equal Protection Clause).

equality arguments were subsumed in the undue burden liberty claim.<sup>163</sup> This disappointed plaintiffs looking for intermediate scrutiny of their claim. However, the Ninth Circuit's decision should not be so quickly dismissed. The court recognized that

elements of intermediate scrutiny review particular to sex-based classifications, such as the rules against paternalism and sex-stereotyping, are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard.<sup>164</sup>

Recognition that the Court's liberty jurisprudence includes prohibitions against sex inequality in regulation of abortion, including constitutional bans on paternalism or sex-stereotyping rationales, holds significant promise for unmasking these sources of bias that fuel many abortion restrictions. Though a similar claim was rejected by the Fourth Circuit in *Greenville Women's Clinic v. Bryant*,<sup>165</sup> this exercise in bringing sex equality claims did no harm to the jurisprudence and could be a model for the future.

#### IV. FRAMING SEX EQUALITY ARGUMENTS

Reva Siegel has identified a number of important advantages to analyzing abortion restrictions using a sex equality analysis, so I will not repeat them all here. However, three advantages are particularly important and worth stressing for advocates. First, an equality analysis allows us to place abortion restrictions in their proper historical context, which involved the enforcement of family roles.<sup>166</sup> By placing discriminatory motive at issue in litigation, we can seek information through traditional discovery and trial techniques about the justifications most commonly offered in defense of abortion restrictions—the interests the state claims in protection of potential fetal life and women's health. This will allow us to reveal when these interests are in fact based on stereotypes of women's proper place in society, such as a woman's duty—hers alone—to save the life of the fetus at her own physical expense. This skeptical evaluation of state interests and legislative

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<sup>163</sup> *Tucson Woman's Clinic*, 379 F.3d at 539.

<sup>164</sup> *Id.* at 549 (internal citations omitted) (citing *Casey*, 505 U.S. at 882) (“approving only of information provided to a woman seeking an abortion that is ‘truthful and not misleading’”); *id.* (citing *Casey*, 505 U.S. at 898) (“A State may not give to a man the kind of dominion over his wife that parents exercise over their children. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.”).

<sup>165</sup> *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 159 (4th Cir. 2000).

<sup>166</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 67–68.

purpose with an eye toward discriminatory motives has become mostly unavailable under liberty jurisprudence, as currently litigated.<sup>167</sup>

Second, evaluating abortion restrictions as a form of “caste-enforcing” regulation allows us to tell the difference between regulation of reproduction that reinforces women’s subordination and regulation of reproduction that supports equality for women.<sup>168</sup> For example, some forms of regulation of assisted reproductive technologies seek to equalize women’s power in situations where inequality may be the norm, such as limitations on dual legal representation in adoption,<sup>169</sup> or proposals for informed consent requirements for surrogacy and adoption.<sup>170</sup>

Third, sex equality arguments shift the focus away from the physical aspects of reproduction, which are currently set in stone—the burden women must bear, however nobly.<sup>171</sup> The focus turns instead to the social conditions in which we are pregnant, and in which we bear and raise children. These aspects of reproduction are socially determined and therefore alterable.<sup>172</sup> Using equality arguments, we can demand state action to create conditions of equality, especially through legislative advocacy.

<sup>167</sup> See generally Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235 (2007); Karlan, *Equal Protection*, *supra* note 152; Karlan, *Loving Lawrence*, *supra* note 152; cf. *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010) (examining state interest under purpose prong).

<sup>168</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 68.

<sup>169</sup> See generally Debra Lyn Bassett, *Three’s a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 427 (2001) (discussing proposals to limit joint representation of birth mothers and adoptive parents); Stephen Doherty, *Joint Representation Conflicts of Interests: Toward a More Balanced Approach*, 65 TEMP. L. REV. 561 (1992) (discussing various approaches to conflicts of interest that arise in the context of joint representation).

<sup>170</sup> See, e.g., Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 77–78 (1999) (proposing regulation to ensure knowledge about contractual options in adoption agreements); Ester Murdukhayeva, *A Right to Know: Mandatory Disclosures, Informed Consent and the Future of Surrogacy* 6 (May 2010) (unpublished manuscript) (on file with author) (arguing that recognition of a “cognizable interest in reasonable access to information by all parties involved in [surrogacy] contracts would promote [*inter alia*] more equal bargaining power,” and that “unregulated surrogacy market would likely exacerbate the valid concerns about exploitation of poor and minority women”); Rupali Sharma, *Regulating Commercial Surrogacy Agreements between Indian Women and Foreign Intended Parents to Protect the Interests of Surrogates* 1–2 (May 20, 2010) (unpublished manuscript) (on file with author) (proposing, *inter alia*, mandatory disclosure of basic information about the surrogacy process in all surrogacy advertisements to destabilize traditional gender norms that harm Indian women).

<sup>171</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (lauding the “sacrifices” made by the woman who carries a child to full term that “have from the beginning of the human race been endured by [her] with a pride that ennoble her in the eyes of others and gives to the infant a bond of love”).

<sup>172</sup> Siegel, *Sex Equality Right*, *supra* note 30, at 68–69.

### A. *Sex Equality Claims Under the Equal Protection Clause*

Sex equality analysis of abortion restrictions conducted under the Equal Protection Clause will allow a close analysis of legislative purpose that can unmask the sex discriminatory purpose underlying the legislation. This is because “the burden of justification [in a sex discrimination case] is demanding and it rests entirely on the State.”<sup>173</sup> The Court has held that justification for a law “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>174</sup> Differences that do exist between the sexes cannot be used to justify “denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>175</sup> “Sex classifications may be used to compensate women ‘for particular [harms they have] suffered, [and] to promot[e] equal[ity],’<sup>176</sup> but can no longer be used “to create or perpetuate the legal, social, and economic inferiority of women.”<sup>177</sup>

Reva Siegel conducted an exhaustive analysis of South Dakota’s proposed ban on abortion, demonstrating, through a close examination of legislative history, that the proposed ban was justified by many regressive notions of woman’s natural role as mother.<sup>178</sup> Under an equality analysis, laws like the South Dakota ban—whose enactment was partially motivated by the idea that abortion harms women and thereby reinforces gender stereotypes—violate constitutional equality principles.<sup>179</sup> An interest in protecting the potential life of the fetus cannot save a statute that is also justified by

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<sup>173</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996). As the Court explained, “The state must show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Moreover, “the proffered justification must be ‘exceedingly persuasive.’” *Id.*

<sup>174</sup> *Id.* (citing *Califano v. Goldfarb*, 430 U.S. 199, 223–224 (1977) (Stevens, J., concurring); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)).

<sup>175</sup> *Virginia*, 518 U.S. at 533.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 534.

<sup>178</sup> Siegel, *New Politics*, *supra* note 89, at 1006–07 (“In prohibiting abortion, the South Dakota Legislature expressed and enforced understandings of women’s family role much like those expressed in the nineteenth-century criminalization campaign, and more recently in the World Congress of Families’ *Natural Family Manifesto*. The South Dakota statute regulated women, not simply as an incident of the state’s interest in protecting unborn life, but as an end in itself. The abortion ban reflected and enforced beliefs about women and the family, as well as the unborn.”).

<sup>179</sup> *Id.* at 1041 (“[A]n assertedly benign interest in protecting unborn life cannot save an abortion ban from claims of sex discrimination if government recites woman-protective justifications to secure the statute’s enactment.”). *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (“When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.”) (emphasis added); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing framework for proving mixed motive in a Title VII sex discrimination case).

“woman-protective” rationales or promotion of the naturalness of motherhood.<sup>180</sup>

Nor should a state’s alleged interest in protecting fetal life go unexplored in a sex equality analysis. Under equal protection principles, even alleged “benign” justifications “for gender-based classifications will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.”<sup>181</sup>

Another commentator, Jennifer Keighley, analyzed restrictions on coverage for abortion in health care reform legislation under constitutional sex equality principles.<sup>182</sup> She argues that restrictions on abortion coverage in any publicly administered plan, whether Medicaid or a “public option,” are class-based restrictions that harm women as a group in violation of constitutional sex equality principles.<sup>183</sup> As she explains, “as public plans begin to cover more and more women, abortion restrictions within such plans should be viewed as affecting all women as a class.”<sup>184</sup> She also argues that a federal restriction on private insurers’ coverage of abortion deprives women of equal protection— “[w]omen who have earned or paid for their own health insurance coverage, or who have received coverage through their employment, [and who] deserve to receive the same comprehensive coverage offered to men.”<sup>185</sup> She points out that these restrictions will “affect all women as a class, limit the reach of private insurance expenditures, and impose new burdens on women who currently receive abortion coverage.”<sup>186</sup>

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<sup>180</sup> Siegel, *New Politics*, *supra* note 89, at 1040–48 (“[South Dakota] sought to intervene in women’s decision making for the stated reason that a pregnant woman does not have the independence of judgment to make decisions about motherhood in her own best interest. The state sought to intervene in women’s decision making in the stated belief that she would ‘suffer[ ] significant psychological trauma and distress’ for acting contrary to ‘the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.’ South Dakota prohibited abortion to enforce sex-role morality on resisting women.”) (internal citations omitted).

<sup>181</sup> *Virginia*, 518 U.S. at 535–36 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, 648 n.16 (1975)) (“‘[M]ere recitation of a benign [or] compensatory purpose’ does not block ‘inquiry into the actual purposes’ of government-maintained gender-based classifications.”); *Califano v. Goldfarb*, 430 U.S. 199, 212–13 (1977) (rejecting government-proffered purposes after “inquiry into the actual purposes” (internal quotation marks omitted)).

<sup>182</sup> Keighley, *supra* note 26 (employing a model of legislative constitutionalism to argue that Congress’s debate over abortion coverage in a national health insurance scheme should recognize the ways in which state regulation of women’s reproductive capacities violates equal protection principles).

<sup>183</sup> *Id.* at 396–98.

<sup>184</sup> *Id.* at 396 (“The argument advanced in *Harris* that Medicaid restrictions only affect indigent women, not women as a class, will be much harder to apply to an expanded version of Medicaid and a public plan. Restrictions in the national health insurance scheme will harm all women.”).

<sup>185</sup> *Id.* at 398.

<sup>186</sup> *Id.* at 400.

B. *Sex Equality Claims as Part of the Liberty Right*

As Justice Ginsburg recognized in her *Carhart* dissent, the Court's liberty jurisprudence has incorporated elements of constitutional guarantees against sex inequality.<sup>187</sup> In *Thornburgh*, Justice Blackmun wrote for the Court: "A woman's right to make that choice [to have an abortion] 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."<sup>188</sup> In *Casey*, the Court recognized that the liberty right to abortion implicated equality guarantees and noted that the ability to control their own reproductive lives facilitated the "ability of women to participate equally in the economic and social life of the Nation."<sup>189</sup> Justice Blackmun stressed this aspect of the decision in his *Casey* concurrence, forcefully declaring that abortion regulations implicate "constitutional guarantees of gender equality."<sup>190</sup> Abortion restrictions "compel women to continue pregnancies," "conscript[ ]" their bodies into the service of the state, "forc[e]" them to "suffer the pains of childbirth[,] and in most instances, provide years of maternal care."<sup>191</sup> Moreover, Blackmun saw the state's failure to compensate women for forced childbearing and caretaking as proof of the state's assumption that women "owe this duty as a matter of course."<sup>192</sup> He then connected the dots, tying these forms of state coercion and stereotyping to the equal protection cases, declaring "[t]his assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."<sup>193</sup> He also tied the plurality opinion's analysis to his own, highlighting the plurality's recognition that

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<sup>187</sup> *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897 (1992)) (noting that stereotyped views of women's status "are no longer consistent with our understanding of the family, the individual, or the Constitution").

<sup>188</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (emphasis added), *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882–83 (overruling part of *Thornburgh* striking mandatory information requirements); *see also Adkins v. Children's Hosp.*, 261 U.S. 525, 554 (1923) (noting that after adoption of the Nineteenth Amendment, adult women had an equal liberty right to contract and were "legally as capable of contracting for themselves as men"), *overruled in part by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The Court in *Adkins* held that "[i]n view of the great—not to say revolutionary—changes which have taken place since [*Muller v. Oregon*], in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these [sex] differences have now come almost, if not quite, to the vanishing point." *Id.* at 553.

<sup>189</sup> *Casey*, 505 U.S. at 856; *see also id.* at 898 (implicating gender equality by rejecting spousal notice requirement as embodying a "repugnant" and outmoded view of marriage).

<sup>190</sup> *Id.* at 928 (Blackmun, J., concurring in part and dissenting in part).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 928–29 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–26 (1982); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976)); *see also id.* at 928 n.4.

“these assumptions about women’s place in society ‘are no longer consistent with our understanding of the family, the individual, or the Constitution.’”<sup>194</sup>

Most recently, Justice Ginsburg—joined by three other Justices—wrote in dissent in *Gonzales v. Carhart* that what is “at stake in cases challenging abortion restrictions is a woman’s ‘control over her [own] destiny.’”<sup>195</sup> Notably, rather than citing to equal protection jurisprudence, Justice Ginsburg cited provisions in the due process liberty jurisprudence rejecting stereotyping<sup>196</sup> and reaffirming women’s right “to participate equally in the economic and social life of the Nation,”<sup>197</sup> a right that is “intimately connected to ‘their ability to control their reproductive lives.’”<sup>198</sup> As a result she wrote: “[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.”<sup>199</sup> A sex equality claim in a liberty framework should argue that a woman’s right to liberty is violated when a law reinforces gender stereotypes or otherwise subordinates women, reinforcing their unequal status as citizens. Sex equality claims should be presented in both frameworks, under the Equal Protection Clause and under the liberty doctrine. Pursuing sex equality arguments in a liberty framework may overcome some of the practical impediments to bringing these claims, especially concerns about overwhelming a trial court judge with a completely new framework. Advocates can argue that a restriction that promotes stereotyped views of women’s roles violates *Casey*, which prohibited such an unlawful purpose, and therefore places an undue burden on the woman’s liberty right.

#### CONCLUSION

Arguing that a restriction on abortion violates constitutional guarantees of sex equality in either equal protection or liberty frames allows advocates to investigate and requires the court to examine the purpose behind the restriction. Any restriction found to promote sex stereotyping will fail constitutional equality guarantees. This examination of state interests should also reinvigorate the requirement that states’ interests must be legitimate, placing a break on the erosion of the liberty right.

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<sup>194</sup> *Id.* at 928 (quoting *Casey* plurality opinion at 897).

<sup>195</sup> *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 869).

<sup>196</sup> *Id.* (citing *Casey*, 505 U.S. at 852, 896–97).

<sup>197</sup> *Casey*, 505 U.S. at 856.

<sup>198</sup> *Carhart*, 550 U.S. at 171 (quoting *Casey*, 505 U.S. at 856).

<sup>199</sup> *Id.* at 172 (citing Law, *supra* note 30, at 1002–28; Siegel, *Reasoning from the Body*, *supra* note 30).