

# EMBODIED EQUALITY: DEBUNKING EQUAL PROTECTION ARGUMENTS FOR ABORTION RIGHTS

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

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

2. For an exception, see Mary Catherine Wilcox, Note, *Why the Equal Protection Clause Cannot "Fix" Abortion Law*, 7 AVE MARIA L. REV. 307 (2008). Prolife legal argument has concerned itself primarily with criticizing the constitutional rationales for the Supreme Court's abortion jurisprudence and proposing constitutional justifications for the legal protection of the unborn. For representative articles criticizing the rationale of *Roe v. Wade*, see Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973) (comparing *Roe v. Wade* to *Dred Scott v. Sandford* and *Buck v. Bell*); Joseph W. Dellapenna, *Nor Piety Nor Wit: The Supreme Court on Abortion*, 6 COLUM. HUM. RTS. L. REV. 379, 380-412 (1975) (summarizing the Court's approach to abortion and urging Congress to enact a statute that defines personhood); Clark D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 306 (2006) (analyzing the constitutional legitimacy of the substantive due process rationale in *Roe* and urging a constitutional amendment to restore the abortion issue to the states); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007 (2003) (arguing from constitutional text, structure, and history that *Roe* was unwarranted); Philip A. Rafferty, *Roe v. Wade: A Scandal upon the Court*, 7 RUTGERS J.L. & RELIGION 1, 5 (2005) (dis-

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

That the abortion right should be included within the Supreme Court's equal protection jurisprudence is not a new idea. Prochoice feminists have filed amicus briefs arguing as much

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puting *Roe's* assumption that abortion was recognized as a common law right). For representative articles arguing that the unborn are persons under the Fourteenth Amendment, see Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 342 (1993) (arguing for the personhood of the unborn from an originalist perspective); Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1336 (1975) (arguing that *Roe* made a dubious legal distinction); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119 (2007) (arguing that the definition of person under the Fourteenth Amendment should include the unborn); Charles B. Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059 (1973) (comparing *Roe* to *Dred Scott* on the grounds that in both cases a certain class of human beings were defined as nonpersons); Mark Trapp, *Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 PEPP. L. REV. 819, 823 (2001) (arguing that the Declaration of Independence uses the word "created," which includes the unborn); Tracy Leigh Dodds, Note, *Defending America's Children: How the Current System Gets It Wrong*, 29 HARV. J.L. & PUB. POL'Y 719 (2006) (arguing that the Supreme Court's treatment of the unborn has negatively affected the rights of children).

3. For arguments in favor of abortion rights based on equality, see, for example, Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in WHAT ROE V. WADE SHOULD HAVE SAID 3, 18–19 (Jack M. Balkin ed., 2005) [hereinafter WHAT ROE]; Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235 (2007); Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77 (1995); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907 (2007); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Kenneth L. Karst, Foreword, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Eileen McDonagh, *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173 (2007); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865 (2007); Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) [hereinafter Siegel, *Reasoning*]; Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) [hereinafter Siegel, *Sex Equality*].

both before and since the Supreme Court's pronouncement of the constitutional right to abortion in 1973.<sup>4</sup> The Supreme Court in *Roe v. Wade* steered clear of such reasoning, relying instead on the "right to privacy" found in the Court's newly-minted substantive due process jurisprudence.<sup>5</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of the Court intimated that legal abortion was necessary to women's equality in society, going so far as to say that society had come to rely on abortion as key to socioeconomic development and the organization of intimate relationships.<sup>6</sup> The Court in *Casey* did not, however, rely on the Equal Protection Clause for its holding.<sup>7</sup>

As a lawyer and activist, now-Justice Ruth Bader Ginsburg argued forcefully that equal protection required abortion rights and that the Equal Protection Clause was the strongest rationale for the abortion right.<sup>8</sup> After her appointment to the Court, Justice Ginsburg was able to articulate her distaste for *Roe's* privacy rationale in her dissent in the partial-birth abortion case

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

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

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

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

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

*Gonzales v. Carhart*, where she and three other Justices officially embraced equal protection reasoning, asserting that “[l]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>9</sup> Although the Court has never adopted equal protection grounds for the abortion right, it is certainly possible that a future majority of the Court will find the Ginsburg rationale persuasive.

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

This Article proceeds in four parts. Part I discusses why prochoice legal scholars are so interested in locating the right to abortion in the Equal Protection Clause and why the Supreme

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

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

Court has thus far declined to adopt this view. A review of the history of equal protection jurisprudence with regard to sex discrimination is necessary to trace the Court's understanding of how women's equality comports with the physical differences between the sexes.

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

Part II discusses the "burden of motherhood" arguments. Prochoice feminists employ several different types of burden of motherhood arguments in their attempt to base the right to abortion in the Equal Protection Clause. The first, "equal citizenship," refers to the phrase used by Justice Ginsburg in her *Gonzales* dissent. This phrase has enjoyed heightened scholarly usage of late, though it lacks the kind of currency other prochoice arguments have in general political discourse on abortion. Women's right to equal citizenship is less of an argument for abortion rights per se than it is an expression used to symbolize burden of motherhood arguments in general. In *United States v. Virginia*, Justice Ginsburg defined equal citizenship as "equal opportunity to aspire, achieve, participate in and contribute to society based on . . . individual talents and capacities."<sup>13</sup> Use of the term in an abortion case such as *Gonzales* serves to weave equality arguments for abortion rights into the landscape of sex discrimination jurisprudence, which has generally relied upon the Equal Protection Clause. Subsumed in the demand for equal citizenship, then, are three other, more widely-recognized burden of motherhood arguments for why

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

12. *Id.* at 331, 338.

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

abortion restrictions violate equal protection (or, in Justice Ginsburg's view, equal citizenship): first, because such laws deny women both decisional and reproductive autonomy; second, because restrictive abortion laws perpetuate women's subordinate status by compelling motherhood; third, because such laws preserve traditional notions of what prominent legal scholar Reva Siegel has called "separate spheres," that is, discriminatory understandings of women as primarily wives and mothers.<sup>14</sup>

After discussing the use of equal citizenship as an overarching theme in feminist jurisprudence, I critique each of these three arguments. In doing so, I discuss the feminist philosophy underlying them, a philosophy that reduces sexual equality to sameness, unwittingly setting up the male experience, and especially the male body, as the norm. I argue that, in a legitimate attempt to get beyond the essentialist idea that women's reproductive capacities should be determinative of women's lives, prochoice feminist legal scholars have jettisoned the significance of the body. In rightfully arguing that pregnancy is more than just a biological reality, they discount that pregnancy is a fundamental biological reality. I will show that acknowledging this fundamental biological reality—that the human species gestates in the wombs of women—need not necessitate the current social reality that women are the primary (and, too often, sole) caretakers of their children or the social arrangements in which professional and public occupations are so hostile to parenting duties. Biological realities need not determine social arrangements, but in ignoring or denying biological realities, we make it more likely that social arrangements will end up denigrating biological difference.<sup>15</sup>

The second type of equality argument in the literature—the burden of pregnancy argument—is addressed in Part III. Unlike the multifaceted approach of burden of motherhood arguments, burden of pregnancy arguments share a common starting point: Professor Judith Jarvis Thomson's famous 1971 essay, *A Defense of Abortion*.<sup>16</sup> Professor Thomson granted the personhood of the fetus and then analogized this nascent and

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

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

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

dependent human being to a famous unconscious violinist who is kept alive only by being attached, for nine months, to an innocent, unwilling bystander's circulatory system.<sup>17</sup> Professor Thomson employs the analogy in an attempt to demonstrate the injustice of laws that would mandate continuation of a pregnancy without the consent of the pregnant woman.

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

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

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

### A. *Why the Equal Protection Clause?*

Ever since the Supreme Court decided *Roe v. Wade* in 1973, legal scholars supportive of abortion rights have sought to find a more appealing constitutional justification than the roundly criticized right to privacy offered in *Roe*.<sup>18</sup> Not only is the right to privacy

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17. *Id.* at 48–49.

18. See, e.g., RICHARD POSNER, *OVERCOMING LAW* 180–81 (1995) (describing the wide variety of constitutional rights to which scholars have attempted to attach the right to abortion); Daly, *supra* note 3, at 85–86 (arguing for an equal protection ra-



difficult to discern from the text of the Bill of Rights, privacy rights, by their nature, provide only a negative sphere of protection for the rights-bearer and so offer little more than the right to be free from state interference.<sup>19</sup> *Casey's* liberty justification makes a more direct appeal to such a guarantee of governmental nonintervention but, for abortion proponents, still suffers from its inability to offer rights-bearers positive rights against the state.

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

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tionale for abortion); Gans, *supra* note 7 (arguing for a rebirth of the Privileges and Immunities Clause as the overarching equal citizenship framework within which substantive rights, such as abortion, should be located); Law, *supra* note 3, at 1020 (arguing that equality arguments are better than privacy arguments); Siegel, *Sex Equality*, *supra* note 3 (making sex equality arguments for abortion rights).

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

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

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

B. *Early History of Sex Discrimination Law*

For the first 100 years after adoption of the Fourteenth Amendment, laws making distinctions on the basis of sex generally were construed as benign and in the best interests of women. Legislation governing working hours and conditions, barring women from certain professions, and preventing women from entering into contracts or serving in the military, was understood as necessary for protecting women from corrupting cultural forces that might compromise their valued roles as wives and mothers.<sup>22</sup> The cultural shift brought on by the civil rights movement in the 1950s and 1960s and the second-wave feminist movement in the 1960s and 1970s inspired the Court to begin to question the merit of such paternalist laws. Women's roles in society were expanding well beyond the home, and the women's movement began to garner support and success in its comparison of sexual discrimination with racial discrimination. In 1971, the Supreme Court in *Reed v. Reed* first used the Equal Protection Clause to strike down a law that preferred men to equally qualified women in the administration of estates, holding that "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the Equal Protection Clause."<sup>23</sup>

The Burger Court formulated its sex discrimination jurisprudence throughout the 1970s and into the 1980s, settling on a standard of intermediate scrutiny to ascertain whether statutes violated equal protection. In *Frontiero v. Richardson*, Justice Brennan's opinion echoed the feminist sentiment of the time—that sexual discrimination was comparable to racial discrimination, because both sex and race were "immutable characteristics."<sup>24</sup> Justice Brennan thus urged that classifications based on

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

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

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

sex be reviewed under the same strict scrutiny standard used for racial classifications.<sup>25</sup> Though a plurality of the Court agreed in *Frontiero*, the majority of the Court opted instead for the intermediate level of scrutiny three years later in *Craig v. Boren*.<sup>26</sup> The Court further articulated its rationale in *Michael M. v. Superior Court*, finding that, unlike men of different races, “the sexes are not similarly situated in certain circumstances.”<sup>27</sup> This formulation, also utilized in *Reed*, reiterated a long-held view within equal protection jurisprudence in general, which Justice Frankfurter had articulated in 1940: “The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”<sup>28</sup> Thus, though sex, like race, is an immutable characteristic determined solely by the accident of birth, classifications based upon the physical differences between the sexes may indeed be constitutional, assuming such classifications are “substantially related to the achievement” of “important governmental objectives.”<sup>29</sup>

It is no coincidence that during the uptick in sex discrimination cases in the 1970s, future Justice Ruth Bader Ginsburg was a talented young attorney working for the ACLU. Indeed, Justice Ginsburg helped to craft the plaintiff’s brief in *Reed*, and argued before the Court in *Frontiero* on behalf of the Women’s Rights Project at the ACLU.<sup>30</sup> According to legal historian Cary Franklin, Justice Ginsburg’s legal strategy, developed through each of the briefs she wrote for the Court during that decade, was to reveal the discriminatory nature of sex-role stereotyping—that is, the discriminatory nature of laws that defined women as homemakers and men as breadwinners.<sup>31</sup> Indeed, her pro bono sex discrimination advocacy began not on behalf of women, but rather of men, whom the state had, in various ways, pigeon-holed as providers rather than caretakers, a move that

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25. *Id.* at 688.

26. 429 U.S. 190 (1976).

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

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

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

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

31. Franklin, *supra* note 30.

adversely affected their ability to care for their dependents.<sup>32</sup> Most notably, Justice Ginsburg successfully argued the 1975 case *Weinberger v. Wiesenfeld*, in which the Court held that a husband's right to equal protection of the laws required the government to disperse to him, as a dependent husband, his wife's benefits upon her death, just as a wife is entitled to collect the Social Security survivor benefits of her husband upon his death.<sup>33</sup> To Justice Ginsburg, *Weinberger* was the "most critical" of the sex discrimination cases decided that decade, because it perfectly illustrated her proposed theory of sex discrimination: Sex-role stereotyping violated equal protection.<sup>34</sup> The Burger Court, however, chose not to extend this antistereotyping principle of sex discrimination into the arenas of state regulation to which Justice Ginsburg and other feminists most wanted the principle to extend: classifications based upon physical differences between men and women—most especially, pregnancy.<sup>35</sup>

For those who hoped that an equality basis for abortion rights would emerge out of the legal doctrine governing sex discrimination, the 1974 Supreme Court case *Geduldig v. Aiello* was a major setback.<sup>36</sup> In *Geduldig*, the Court upheld a California disability insurance program that excluded normal pregnancy from coverage, reasoning that because women, as a class, were not excluded from the program, the state had not discriminated on the basis of sex.<sup>37</sup> Though the Court acknowledged that the program adversely affected women because only women could become pregnant, the Equal Protection Clause was not triggered because "[not] every legislative classification concerning pregnancy is a sex-based classification."<sup>38</sup> Feminist scholars attacked *Geduldig* because it seemed obvious to them that classification on the basis of pregnancy—that most basic physical difference between men and women—constituted

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32. *Id.* at 84, 122.

33. 420 U.S. 636 (1975).

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

35. *Id.* at 138.

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

37. *Geduldig*, 417 U.S. at 496–97.

38. *Id.* at 496 n.20.

sex-based classification.<sup>39</sup> But the Court in *Geduldig* understood itself to be embracing the guiding principle of all equal protection reasoning: the Equal Protection Clause governs only those regulations that discriminate between persons who are similarly situated. Men and women are not similarly situated with regard to pregnancy, and, therefore, pregnancy discrimination need not constitute discrimination on the basis of sex.

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

### C. Casey, Virginia, Hibbs—and Nyugen

After nearly twenty years of faded hope, *Planned Parenthood v. Casey* put new wind in the sails of those making equality arguments for abortion rights. Though the plurality in *Casey* did not expressly ground its holding in the Equal Protection

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

40. 429 U.S. 125, 145–46 (1976).

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

42. *Id.* at 386.

43. See *id.* at 386–87.

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

Clause, much of its reasoning indicated a willingness to smuggle equality arguments into the Court's due process framework.<sup>45</sup> From the perspective of prochoice legal scholars, however, two sex discrimination cases decided by the Supreme Court after *Casey* were equally important to *Casey*'s flirtations with equality reasoning: *United States v. Virginia* and *Nevada Department of Human Resources v. Hibbs*.<sup>46</sup> For prochoice scholars, these cases marked an encroachment upon the reasoning in *Geduldig*, indicating that even laws that were erected based upon physical differences between men and women were no longer safe from equal protection scrutiny.<sup>47</sup> Indeed, these cases, together with *Casey*, form what one scholar suggests amounts to a "critical capacity to discern gender bias in reproductive regulation," and so bring abortion rights into the equal protection fold.<sup>48</sup>

Though prochoice legal scholars are correct to note that sex discrimination jurisprudence over the last fifteen years has moved steadily toward Justice Ginsburg's view that sex-role stereotyping provides the lens through which to discern sex discrimination, their confidence that these cases have erected an opening through which abortion law might pass lacks merit.<sup>49</sup> The holdings in *Virginia* and *Hibbs*, read together with a contemporaneous case, *Nguyen v. INS*,<sup>50</sup> exclude abortion

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

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

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

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

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

50. 533 U.S. 53 (2001).

regulations from their purview—unless one entirely ignores the biological basis of pregnancy.

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

In 2003, the Court in *Hibbs* upheld the Family and Medical Leave Act (FMLA) as a proper use of congressional power under Section 5 of the Fourteenth Amendment.<sup>55</sup> To the surprise of many, Chief Justice Rehnquist wrote the Court’s opinion, holding that leave policies that differentiated on the basis of sex (by, for example, offering elongated maternity leave but no paternity leave) reinforced “the pervasive sex-role stereotype that caring for family members is women’s work,” and so were properly redressed by the FMLA.<sup>56</sup> Chief Justice Rehnquist

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

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

53. *Id.*

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

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

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

wrote at some length about the “self-fulfilling cycle” such stereotypes create in reinforcing women’s role as primary caregivers while discouraging men from such caregiving.<sup>57</sup> Critical for our purposes is the Court’s finding that Congress was within its authority to “remedy and deter” sex discrimination violations because “[t]his and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”<sup>58</sup>

Five years after *Virginia*, and two years before *Hibbs*, the Court decided another sex discrimination case that also concerned differences between men and women, but that was not found to constitute an equal protection violation. In *Nguyen*, the Court held that the government did not contravene the Equal Protection Clause when a statute required a father to provide proof of biological parenthood, but did not require the same of a mother because of the different circumstances mothers and fathers find themselves in at the time of birth.<sup>59</sup> Mothers are always present at birth, whereas fathers need not be. Thus, fathers and mothers are not “similarly situated” with regard to proving their parentage.<sup>60</sup> Importantly, the Court noted that the burden legitimately placed on the father by the statute

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

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

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

60. *Id.* at 63.



at issue did not result from stereotyping, but rather from an “undeniable difference” in the circumstances at birth.<sup>61</sup>

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

*Virginia*, *Hibbs*, and *Nguyen* speak to differences between the sexes, but only the last, *Nguyen*, turns on the treatment of “real” physical differences. *Virginia* and *Hibbs* indicate, rather, that the government cannot justify social inferences or expectations on the basis of physical differences between the sexes, if such inferences or expectations engage in sex-role stereotyping by perpetuating traditional sex roles or understandings (here, that women tend toward cooperative learning and caretaking, respectively). *Nguyen*, in contrast, is the only one of the three cases that does not turn on illicit legislation on social expectations of the sexes, but on the physical circumstances of pregnancy and birth itself. This triad of cases teaches that a legislature does not engage in sex-role stereotyping when it passes a law that is based upon the biological facts of childbearing (for example, that women, and not men, gestate and bear children), but that it is sex-role stereotyping when a law seeks to define traditionally the social roles of men and women in reliance upon those biological facts (for example, because women bear children, they care less about their professional work). Chief Justice

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61. *Id.* at 68.

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

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

Rehnquist tells us as much when he writes that the differential leave policies at issue were discriminatory because they “were not attributable to any differential *physical needs* of men and women, but rather to . . . pervasive sex-role stereotype[s].”<sup>64</sup> That is, *Hibbs* is not making a statement about the potentially discriminatory nature of “laws regulating pregnant women,” as Professor Siegel has suggested;<sup>65</sup> the leave policies Chief Justice Rehnquist took to task were those that extended leave beyond the “typical . . . period of physical disability [required by] pregnancy and childbirth,” without offering men a similar caretaking benefit.<sup>66</sup> The illicit policies were not regulating pregnancy at all, or even the days and weeks required for maternal recovery; rather, they suggested that women, not men, were the assumed caregivers for infants beyond such a period. To the Court, such an assumption was sex-role stereotyping.<sup>67</sup>

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

Abortion restrictions impose legal burdens not on the basis of gender but on the basis of the asserted presence and value of a human life *in utero*. To be sure, only women become pregnant. But [abortion restrictions do] not regulate *women*

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

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

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

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

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

as a class; [they] regulate[] the conduct of *men and women* relevant to the commission of or assistance in abortion . . . .”<sup>69</sup>

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

Parts II and III explore the numerous arguments prochoice feminist legal scholars make in their effort to understand pregnancy, and restrictions on abortion, as a social rather than biological phenomenon. Where their arguments decry societal structures that are inhospitable to women who are mothers, I agree. However, many of their arguments refuse to take seriously the biological reality that women, rather than men, get pregnant. And, as we have seen, classifications based on such fundamental biological differences do not trigger the Equal Protection Clause. By highlighting prochoice legal scholars’ neglect of the body, I show that the abortion right, unsatisfactory as a privacy or a liberty right, also fails to conform to current Supreme Court views of equality rights.

## II. BURDEN OF MOTHERHOOD ARGUMENTS

Burden of motherhood equality arguments for abortion rights focus on the unjust social conditions in which mothers are situated. “Equal citizenship” has become the catchphrase for these arguments, a concept that Justice Ginsburg expressly defined in the aforementioned sex discrimination case, *United States v. Virginia*: “Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature . . . .”<sup>70</sup> Justice Ginsburg thus explains that the equal protection principle, discernible through the Court’s sex discrimination cases since their advent, is encapsulated in the notion of full or equal citizenship, defined as the “equal opportunity to aspire, achieve,

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

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

participate in and contribute to society based on their individual talents and capacities.”<sup>71</sup> The term equal citizenship is meant to contain the entire body of sex discrimination jurisprudence in its definition. Its use in abortion rights argument, therefore, as in Justice Ginsburg’s dissent in *Gonzales*, is a not-so-veiled attempt to bring abortion law into the fold of sex discrimination law.<sup>72</sup> As Professor Siegel has written, “Justice Ginsburg and a growing community of scholars have long argued that this body of equality law governs abortion restrictions.”<sup>73</sup> This Part looks first to what equal citizenship might mean as a constitutional principle underlying abortion rights and then discusses the three other burden of motherhood arguments subsumed in the notion of equal citizenship: women’s rights to autonomy, to equal status, and to be free from sex-role stereotyping.

#### A. Equal Citizenship

With an understanding of the motives in making use of equal citizenship rationales in legal arguments for abortion rights, it is necessary to turn to the idea of equal citizenship itself and its relationship to abortion rights. The right to abortion, it is argued, is needed for women to participate as equal citizens. Professor Siegel writes that “[a]bortion laws . . . treat women as . . . citizens who are expected to perform the work of parent-

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71. *Id.*

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

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

ing as dependents and nonparticipants in the citizenship activities in which men are engaged.”<sup>74</sup> Neither Professor Siegel, in the article quoted, nor Justice Ginsburg, who references Professor Siegel’s work in her dissent in *Gonzales*, describe the citizenship activities in which men, but not pregnant or “dependent” women, may engage. Elsewhere, Professor Siegel fills out her vision of citizenship to include broadly “dignity” or decisional autonomy, as well as the ability to participate equally with men in the spheres of education, work, and politics.<sup>75</sup> Another constitutional scholar has argued similarly that “[a]s citizens, women have the right to shape their destiny and the course of their lives, what we might call a right of self-government. Antiabortion laws contravene this guarantee by forcing pregnant women to be mothers.”<sup>76</sup> As noted, the equal citizenship equality argument subsumes other more well-known equality arguments for abortion rights, including the rights to decisional and reproductive autonomy, equal status with men, and freedom from sex-role stereotyping, discussed below. But what does it mean to assert that abortion is necessary for women to be equal citizens?

Full citizenship, for Professor Siegel at least, appears to include activities in which dependent mothers cannot participate.<sup>77</sup> Professor Siegel thus intimates that dependent mothers

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

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

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

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

are not full citizens. Indeed, she writes that the “core pursuits of citizenship” have been designed for individuals “unburdened by the obligations of family care.”<sup>78</sup> But what are the “core pursuits of citizenship” in which mothers cannot participate? Professor Siegel does not say, but as traditionally understood, the core rights and duties associated with citizenship presumably include, among others, the right to vote, to appeal to and be heard by one’s public representatives, to assemble in favor of a political cause, and to serve as a juror. Ordinary family obligations do not conflict with any of these core citizenship activities; indeed, professional obligations are more likely to.

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

But perhaps Professor Siegel’s theory of citizenship is not meant to encompass the ordinary citizen. After all, Professor Siegel’s complaint is that women who are compelled to be mothers by restrictive abortion laws will “never be . . . totally

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<http://www.gallup.com/poll/1558/few-say-its-ideal-both-parents-work-full-time-outside-home.aspx>.

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

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

functioning part[s] of the government which determines [their] rights.”<sup>80</sup> If by this she means that women who have dedicated a portion of their lives to raising children are generally not legislators, judges, or presidents (that is, those in the business of determining rights), then perhaps the great majority of men are not equal citizens either. If, on the other hand, she means that dependent mothers are unable to fully participate in democratic activities and in those activities that promote citizenship, she is surely mistaken. Professor Camille Williams captures my response to this alleged nonparticipation of mothers in citizenship activities when she writes that “[m]any of us . . . see our work in our families as the first and most important contribution we make to a humane and caring community . . . . [T]he notion that a woman in her home is isolated from society is archaic and, to many, offensive.”<sup>81</sup> Indeed, from the founding of the American republic, society has entrusted parents to guide their children in the development of the core values and virtues associated with democratic citizenship: respect, responsibility, integrity, and justice. If mothers (and fathers) were not to dedicate themselves to inculcating these virtues, the democratic experiment in ordered liberty would surely fail.

Professor Robin West criticizes the Ginsburg-Siegel equal citizenship argument on the grounds that it might “legitimiz[e], and with a vengeance, the [supposed] inconsistency of motherhood and citizenship itself.”<sup>82</sup> If motherhood is incompatible with citizenship, she argues, then “it is entirely because of the way in which we have constructed motherhood or constructed citizenship, or both.”<sup>83</sup> We err, according to Professor West, by imagining adults without dependents in our idea of citizenship. Professor West is correct to find fault with the autonomous individual as the archetype of the Ginsburg-Siegel

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

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

82. Robin West, *Concurring in the Judgment*, in *WHAT ROE*, *supra* note 3, at 121, 141–42 (“We would perversely render the incompatibility of motherhood and citizenship, in effect fully constitutional—by providing a constitutional right to avoid it . . . . It can’t be that by choosing to mother a child, we have foregone rights, privileges, and responsibilities of citizenship.”). *But see* West, *supra* note 19, at 1402 (“If equal citizenship is the goal of the Constitution’s declarations of equality and liberty, then women seemingly must have a right to legal abortion to achieve it.”).

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

citizenship model. Yet, she seems to concede to Professor Siegel and Justice Ginsburg the notion that citizenship has more to do with remunerative activities than was traditionally understood. Professors Siegel and West's views of citizenship comports neither with most Americans' view of citizenship nor with historical manifestations of active citizenship. After all, so-called dependent mothers were community builders and leaders, active political players, and molders of future citizens—fundamental players in the “intermediary institutions” that Tocqueville and others have understood as central to the flourishing of our constitutional republic—well before women entered the full-time work force in droves over the last few decades.<sup>84</sup>

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

### B. *Decisional and Reproductive Autonomy*

As noted in Part I, one of the principal reasons popular legal arguments in favor of equality rationales have failed is because

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

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

86. *Id.* at 839.

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



current equal protection jurisprudence requires a threshold showing that men and women are similarly situated. Because men and women are not so situated with regard to pregnancy, some prochoice feminists have sought to describe pregnancy at a “higher level of generality” in an effort to trigger the Equal Protection Clause.<sup>88</sup> Thus, these scholars seek to show that men and women are similarly situated—with regard to their common aspirations and life goals, in how they “define their views of themselves and their places in society.”<sup>89</sup> Pointing to this and other language from *Casey*, Professor Erin Daly writes, “Restrictive abortion laws that unequally burden women’s, but not men’s, capacity to *define their own lives* should be invalidated as violating the equality principle.”<sup>90</sup> Men and women may not be similarly situated with regard to biological pregnancy, Professor Daly argues, but they are similarly situated in their common desire to define the content of their present and future lives; they are equal in their dignity as self-defining citizens.

The argument that men and women equally share a desire to define their lives is beyond dispute. The Court in modern times has properly renounced historical views of women as dependent creatures incapable of rational decisionmaking, recognizing instead that women, like men, are self-governing, competent individuals. Preventing women from determining their life course and from shaping their own destinies most certainly denies them the freedom and equality so prized by democratic peoples and inscribed in the Constitution.

Goals and aspirations, decisions and destinies, however, are never formed by disembodied minds. Rather, embodied individuals, actual men and women, are the relevant goal-making

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88. Daly, *supra* note 3, at 138. *But see* Hendricks, *supra* note 11, at 338 (“Equality arguments for abortion . . . seek comparisons with male experience by describing pregnancy at a higher level of generality . . . . When the comparisons run this far afield, liberty becomes the subject of discussion, not equality. Women’s liberty should not have to be derivative of men’s experiences.”).

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

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

and decisionmaking agents.<sup>91</sup> How much the embodiment of men and women affects the content of their goal-making and decisionmaking is an open question—one beyond the scope of this Article. There is no question, however, that embodiment denotes reproductive differences between men and women, differences that constrain our individual capacities for autonomy at different stages of our lives.<sup>92</sup>

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

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

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

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

ual and reproductive autonomy, restrictions on abortion deny that autonomy to women."<sup>94</sup>

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

One need not be a biologist to notice that sexual intercourse sometimes leads to the creation of a new human life and that human life originates and develops in the body of a woman. Unbeknownst to many members of the American public, which periodically is still polled about its opinions on when human life begins, most prochoice feminists have conceded the humanity of the unborn for some time.<sup>97</sup> Although philosophers of various stripes debate which human attributes make a nascent human being a legally protected human person,<sup>98</sup> most prochoice femi-

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

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

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

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

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

nist legal academics seem willing to concede the value of fetal life.<sup>99</sup> In their view, whatever the status of unborn human life, women's sexual equality depends upon the right to abortion.

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

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99. See, e.g., Hendricks, *supra* note 11, at 350 (arguing that a particular prochoice argument "allows for the possibility that the fetus has significant moral status, perhaps even the same moral status as a born person, and shows why the right to abortion should nonetheless be protected"); Frances Kissling, *Is There Life After Roe? How to Think About the Fetus*, CONSCIENCE, Winter 2004–05, available at [http://www.catholicsforchoice.org/conscience/archives/c2004win\\_lifeafterroe.asp](http://www.catholicsforchoice.org/conscience/archives/c2004win_lifeafterroe.asp); Robert K. Vishcher, *Culture War Dispatch: Open Hearts & Minds at Princeton*, COMMONWEAL MAGAZINE (Oct. 20, 2010), <http://www.commonwealmagazine.org/culture-war-dispatch> (reporting that prochoice scholars Peter Singer and Maggie Little acknowledged the humanity (and value, for Little) of fetal life during a debate on the moral status of the fetus at the "Open Hearts, Open Minds, Fair-Minded Words" conference at Princeton in October 2010).

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

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

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

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

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

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

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

105. Williams, *supra* note 10, at 127 (“[O]ne line of thought is that women are denied equal protection under the law because only mothers, but not fathers, have

child-abandoning male through abortion would seem rather contrary to prowoman ideals, but Justice Ginsburg offers the pro-choice rationale: “[Women’s] ability to realize their full potential . . . is intimately connected to ‘their ability to control their reproductive lives’” through abortion.<sup>106</sup> Women can reach their full potential, Justice Ginsburg intimates, only by imitating men.

The irony in prochoice feminist reasoning here is tragic in its proportions and yet so rarely acknowledged. The early American feminists fought against the categorization of women as legal nonentities or, viewed more charitably, as united in the legal personhood of their husbands.<sup>107</sup> Prochoice feminists now argue that the legal equality achieved in the modern era is dependent upon women denying that which distinguishes them most from men. Historically, woman was regarded as legally incorporated into man; now, she is equal only insofar as she imitates man.<sup>108</sup> Historical feminists fought the former while today’s prochoice feminists thought up the latter.<sup>109</sup> It hardly benefits women to include within the legal meaning of gender

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been required to bear the weight of children prior to their birth. Because fathers’ bodies are not housing the unborn child, fathers can abandon their children more easily than can mothers; mothers should, therefore, be allowed to abort their unborn children as a means of equalizing their status with potentially irresponsible fathers . . . . Justifying abortion on the basis that women must be treated as ‘equal’ to irresponsible fathers who are already in defiance of the law seems a giant step backward in legal logic as well as in our view of family.”)

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

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

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

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

equality the right to repudiate that which is most unique to women: the ability to bear children. As the late Elizabeth Fox-Genovese, distinguished social historian and founder of the Emory University Women's Studies Department, has stated, according to the prochoice feminist view:

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

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

### C. *Equal Status*

Inherent in Justice Ginsburg's use of equal citizenship is the concern abortion advocates have with the interrupted pursuit of "equal status."<sup>112</sup> That is, abortion is necessary to securing women's equal status in a society that devalues motherhood and makes it difficult to pursue status-bearing employment opportunities and motherhood simultaneously.<sup>113</sup> According to Professor Siegel, antiabortion laws "compel women to become mothers, while in no respect altering the conditions that make

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

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

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

113. *Id.* at 376–77.

the institution of motherhood a principal cause of women's subordinate social status."<sup>114</sup> Professor Siegel painstakingly argues what prolife feminists have been saying for some time, that the public sphere is not structured in a way that values the work of parenting. Professor Siegel's argument continues:

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

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

If women must submit to abortion to preserve their lifestyle or career, their economic or social status, they are pandering to a system devised and run by men for male convenience. The politics of sexism are perpetuated by accommodating to expedient societal structures, which decree that pregnancy is incompatible with other activities, and that children are the sole responsibility of their mother. The demand for abortion is a sell-out to male values and a capitulation to male lifestyles rather than a radical attempt to renegotiate

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

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

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



the terms by which women and men can live in the world as people with equal rights and equal opportunities. Accepting the “necessity” of abortion is accepting that pregnant women and mothers are unable to function as persons in this society. It indicates a willingness to adjust to the *status quo* which is a betrayal of the feminist cause, a loss of the revolutionary vision . . . .<sup>117</sup>

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

By accepting the social structure as given, *Casey’s* vision of equality embraced the division of the world into separate

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117. De Jong, *supra* note 107, at 233–34; see also Sidney Callahan, *Abortion and the Sexual Agenda*, in *THE ETHICS OF ABORTION: PROLIFE VS. PROCHOICE* 167, 177 (Robert M. Baird & Stuart E. Rosenbaum eds., 3rd ed. 2001) (“Since attitudes, the law, and behavior interact . . . unless there is enforced limitation of abortion, which currently confirms the sexual and social status quo, alternatives will never be developed. For women to get what they need to combine childbearing, education, and careers, society has to recognize that female bodies come with wombs.”).

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

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

spheres and merely gave women the option of being like men . . . [It] challenge[d] neither the division of labor that makes motherhood, but not fatherhood, inconsistent with career success nor the structure of a public sphere that is hostile to caretaking demands.”<sup>120</sup>

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

The work of caring for children, which women have assumed in disproportionate measures both traditionally and in present times, has been culturally devalued vis-à-vis professional endeavors because nonremunerative work is devalued in our market economy.<sup>121</sup> Yet such a cultural valuation of paid work over care work fails to comport with the views held by most men and women today, especially among those age groups who are actually raising children.<sup>122</sup> Only a fraction of

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

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

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

the working population engage in professional endeavors outside of the home for the sheer pleasure and satisfaction their work offers them and for the personal gratification of enjoying high social status.<sup>123</sup> Most men, and women, who labor outside the home do so not for the status that work affords but because they need to financially support the family—the institution in which they place priority of focus, value, and responsibility.<sup>124</sup> Those men and women for whom professional work affords them great personal satisfaction tend to be highly educated professionals whose intellectually stimulating work bears little resemblance to the labor in which most individuals are employed.<sup>125</sup> A growing segment of the population would prefer to work less, enabling them to spend more time developing the familial bonds that will offer them connection and fulfillment throughout their lifetimes.<sup>126</sup>

Indeed, even after forty years of feminist gains for professional women, most women would elect to work part-time when their children are young, if it were economically feasible, and would especially appreciate the ability to enter and exit the labor market more flexibly without losing gains they have made professionally.<sup>127</sup> The availability of abortion has relieved

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

124. *Id.* at 24.

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

126. See, e.g., ELLEN GALINSKY ET AL., FEELING OVERWORKED: WHEN WORK BECOMES TOO MUCH 6 (2001) (reporting that fifty-four percent of employees report feeling overworked at least sometimes in the previous three months); OR. CHILD CARE INFO. P'SHIP, EMPLOYER-SUPPORTED CHILD CARE IN OREGON 2 (2003) (finding that “[t]he biggest concern among young workers—49% of women and 45% of men—[was] not having enough time for [both] family and work responsibilities (quoting PETER D. HART, HIGH HOPES, LITTLE TRUST: A STUDY OF YOUNG WORKERS AND THEIR UPS AND DOWNS IN THE NEW ECONOMY (1999))).

127. See, e.g., MARTHA FARRELL ERICKSON & ENOLA G. AIRD, THE MOTHERHOOD STUDY, STUDY: FRESH INSIGHTS ON MOTHERS' ATTITUDES AND CONCERNS (2005) (surveying more than 2,000 demographically diverse U.S. mothers eighteen and older with at least one child under the age of eighteen); Kim Parker, *The Harried Life of the Working Mother*, PEW CENTER: SOCIAL DEMOGRAPHIC TRENDS (Oct. 2009) <http://pewsocialtrends.org/2009/10/01/the-harried-life-of-the-working-mother/>.

a market-driven culture, and indeed the mainstream feminist movement, from attending to the needs of family life, needs that dominate the lives of most working individuals.<sup>128</sup> Were the market, the state, and the academy to give family life and care work the priority and value that most men and women accord them, motherhood would no longer hold the subordinate status it seems to have in the eyes of elite academic feminist scholars. Perhaps, then, abortion would not seem to them so necessary.

#### D. *Separate Spheres*

According to Professor Siegel, antiabortion laws, beginning in the nineteenth century and running through the 2006 referendum in South Dakota and other recent “women-protective” legislation, have always been predicated on what she has called “physiological naturalism.”<sup>129</sup> Such an approach regards the facts of biology as determinative of social (and legal) expectations for the sexes. Because women’s bodies naturally gestate fetal life, women are assumed by nature to be designed only, or even primarily, to be wives and mothers. Professor Siegel’s concern is that abortion-restrictive regulation “reflects [such]

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For a discussion of an ambitious set of proposals to make industry more flexible, see SYLVIA ANN HEWLETT, *OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS* (2007).

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

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

social judgments about women's roles, and not simply solicitude for the welfare of the unborn."<sup>130</sup>

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

It is discriminatory or stereotypical judgments about women's social roles that conflict with the Equal Protection Clause for Professor Siegel, not antiabortion legislation in itself.<sup>133</sup> Professor Siegel lays out an exacting portrait of how a state could theoretically regulate abortion (or, in her view, "compel[] pregnancy") without, in so doing, dictating traditional sex roles for women.<sup>134</sup> A state would have to show: first, that it otherwise promotes the welfare of unborn life by fully supporting women in their efforts to bear and rear healthy children; sec-

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

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

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

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

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

ond, that it demands of men and the community at large sacrifices commensurate with those borne by women on behalf of the unborn; and, finally, that it is ready to compensate women for “the impositions and opportunity cost of bearing a child they do not wish to raise.”<sup>135</sup> She concludes:

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

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

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

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

And Justice Ginsburg herself wrote in *United States v. Virginia*, “Inherent differences between men and women, we have come to

135. *Id.* at 366–67.

136. *Id.* at 367.

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

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

139. *Id.* at 1045.

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

appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."<sup>141</sup> Statutes violate equal protection when they invoke biological differences to enshrine traditional views of family and workplace relations. They steer clear of violation when they regulate in mere recognition of such differences.

Government then cannot constitutionally impose caretaking responsibilities on women that it does not impose on men, but government can regulate in recognition of the biological reality that women, and not men, bear children. Thus, it would seem to follow from Professor Siegel's reasoning about current equal protection jurisprudence, government may compel childbearing to protect fetal life, because pregnancy is recognizably a biological phenomenon. But it may not compel childrearing, because such caretaking is of the social order.<sup>142</sup> Professor Siegel maintains, of course, that pregnancy is not merely biological but is social as well.<sup>143</sup> But the social expectations or conditions surrounding pregnancy that concern Professor Siegel are, again, merely of social construction. Professor Siegel admits as much when she comments on the various injuries to women: "Both the work of childbearing and . . . of childrearing

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

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

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

compromise women's opportunities in education and employment; neither . . . produces any material compensation; . . . [both] often . . . entangle women in relations of emotional and economic dependency . . ."<sup>144</sup> But she adds, crucially, "None of these consequences is inherent in the physiology of reproduction; all are socially produced . . ."<sup>145</sup> Yet, inherent in the physiology of reproduction, is the fact that women's biological nature is potentially procreative, and that when that potential is realized, another human being exists inside her. The state, according to Professor Siegel's own jurisprudential framework, is well within its powers vis-à-vis the Equal Protection Clause to recognize this fact and legislate to protect fetal life.

### III. BURDEN OF PREGNANCY ARGUMENTS

Ever since *Roe*, the prolife community has also emphasized and sought to answer, theoretically and practically, many of the burden of motherhood arguments highlighted above. And they are right to do so: Most women who have abortions do so because motherhood, rather than pregnancy, seems unbearable.<sup>146</sup> From the creation of thousands of crisis pregnancy centers and maternity homes across the nation to, more recently, making college campuses and workplaces more hospitable to childrearing,

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144. *Id.* at 377–78.

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

146. See, e.g., Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *PERSP. ON SEXUAL & REPRODUCTIVE HEALTH* 110, 110 (2005); Hendricks, *supra* note 11, at 352 n.116 (citing 2004 study that found that the vast majority of post-abortive women elected to have an abortion for emotional, relational, or economic reasons); Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interest in Motherhood*, 17 *BROOK. J.L. & POL'Y* 97, 106–07 & nn.27–28 (2008); Williams, *supra* note 10, at 136 (arguing that the bodily invasion argument for abortion may actually be reduced to a social argument demanding a right to be free of some of the consequences of sexual activity).



prolife activists have sought to assist women who bear children with the task of raising those children. There is much more to be done in this area, particularly in streamlining and normalizing adoption, in increasing workplace flexibility, in incentivizing marriage, in decreasing the tax burden on those who support children, and in finding ways to ensure greater social and legal enforcement of paternal responsibility.<sup>147</sup> But although individuals, organizations, and society at large can take on many of the difficulties of childrearing to relieve the burden of motherhood, burden of pregnancy arguments, by contrast, are more difficult to answer with practical assistance.

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

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

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

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

A. *In Search of Workable Analogies*1. *Judith Jarvis Thomson's Famous 1971 Analogy*

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

2. *Conceding Biological Relation: Robin West*

More realistic, though still inherently problematic, analogies notice that the fetus is biologically related to the mother.<sup>153</sup> As Professor Robin West has recognized, the situation is "arguably more like the relationship of parent to child."<sup>154</sup> The parent-child relationship, as Professor West acknowledges, gives rise to special legal duties.<sup>155</sup> Yet, Professor West points out, despite the legal duty a parent has to rescue her infant (say, from

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

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

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

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

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

155. *Id.*

drowning in a pool of water), a parent has no affirmative legal duty to sacrifice part of her own body (for example, bone marrow or an organ) for her born child.<sup>156</sup> With this current state of the law in mind, Professor West seeks to compare the unborn child's unwelcome invasion of the pregnant woman's body to an adult who forcibly seeks to obtain blood or a kidney from her parent.<sup>157</sup> As Professor West points out, the aggressor child in this hypothetical, rather than the victim parent, would be the guilty one.<sup>158</sup> To be licit, of course, the parent would have to consent to such bodily sacrifice for the sake of her child.

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

This presumption of autonomy is even more apparent in Professor Thomson's attached-violist analogy where mother

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

157. *Id.* at 133.

158. *Id.* ("[T]here is a difference between the sacrifice demanded of parents and the sacrifice demanded of pregnant women: The requirement that parents care for their born children notably does not extend to a requirement that the parent sacrifice any part of his physical body to do so. A parent is not required to donate even a milliliter of blood, much less a kidney, or bone marrow, even to save the life of his born children, and even though the parent of the born child quite willfully and consensually brought the child into the world. Such a parent would be neither criminally nor civilly liable for his refusal to do so . . . . [S]hould the born child—perhaps a grown born child—attempt to extract the blood or the kidney from the parent by force . . . the state would step in when called upon to help the parent ward off the child's attack. The child, not the parent, would be charged with a crime.").

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

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

*B. Locating the Affirmative Duty of Care*

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

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

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

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

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

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

being. The dependency relationship children have with their parents is that which grounds obligations in family law.<sup>165</sup>

Consenting to sex is also not what grounds the duty parents have to their unborn children. Although sexual activity (usually) provides the conditions for conception, it is not the voluntariness of the sexual act in itself that binds those who engage in it to their potential offspring.<sup>166</sup> Rather, sexual intercourse, by its very nature, has the potential to create a human being who is utterly dependent upon those whose union brought her into existence.<sup>167</sup> It is the biological dependency of the child caused by the sexual union of the parents-to-be (rather than either their choice to “keep the child” or even their choice to engage in sex) that itself grounds parental duty.<sup>168</sup> After all, the

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

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

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

168. Beckwith, *supra* note 167, at 195. For a disagreement between Professors Peach and Lemmons regarding the nature of obligation, see R. Mary Hayden Lemmons, *The True Source of Parental Obligations*, in LIFE AND LEARNING XIV 219, 221 (Joseph Koterski ed., 2004). Professor Lemmons argues that Professor Peach is unable to ground parental obligation in biological relation alone, as in the case of an unrelated embryo implanted into a woman’s womb. My view is that, although Professor Peach gets us past the contractarian assumptions in the consent to pregnancy/consent to parenthood *and* consent-to-sex/consent-to-pregnancy frameworks, Professor Beckwith’s argument (that the parents acted to bring into existence a being who is needy by nature) grounds parental obligation to any who participate in the creation of an embryo (whether through intercourse or in a test tube). See also Callahan, *supra* note 10, at 135 (“Parent-child relationships are one instance of implicit moral obligations arising by virtue of our being part of the interdependent human community. A woman, involuntarily pregnant, has a moral obligation to the now-existing dependent fetus whether she explicitly consented to its existence or not. No

law holds that a party who causes the dependency or neediness of another is responsible for assisting the person whose need she caused; if I pushed you into a pool of water, it is my duty to assist in your rescue.<sup>169</sup> As Professor Beckwith so masterfully states, “[T]he parents of the fetus are responsible for assisting it because they are in fact responsible for bringing into existence a being that is needy by nature and thus are responsible for its neediness.”<sup>170</sup> Thus, a mother’s relationship with her unborn child can hardly be compared to a parent’s relationship with a relatively autonomous adult or an innocent bystander’s forced association with an unrelated albeit dependent intruder. Rather, the unborn child’s mother and father share an affirmative duty to care for the dependent child that their intimate union created. To think otherwise is to view unborn children as the property of their mothers, as once upon a time, the law viewed wives as the property of their husbands.<sup>171</sup>

### C. *Relational Feminism and Abortion*

The presumption of autonomy on the part of Professor Robin West in her discussion of abortion is particularly ironic because

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prolife feminist would dispute the forceful observations of prochoice feminists about the extreme difficulties that bearing an unwanted child in our society can entail. But the stronger force of the fetal claim presses a woman to accept these burdens; the fetus possesses rights arising from its extreme need and the interdependency and unity of humankind. The woman’s moral obligation arises both from her status as a human being embedded in the interdependent human community and her unique lifegiving female reproductive power.”).

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

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

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

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

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

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

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

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

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

times dangerous for persons, especially women.”<sup>177</sup> And, I would add, their unborn children.

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

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177. *Id.*

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

179. *Id.* at 362.

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

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

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

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



have already borne children<sup>184</sup> and in the experiences of women who seek late-term and genetic abortions.<sup>185</sup>

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

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

Were pregnant women to recognize the humanity and dependency of the unborn child in their wombs (biological realities

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

185. *Id.* at 109–10, 115–18.

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

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

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

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

In a prepublication version of Professor Hendricks’s paper, she anticipated a possible critique of her theory: “Opponents of reproductive rights use a similar conception of pregnancy [as a form of parenting relationship] to suggest that the natural order of biology implies a woman’s duty to bear children.”<sup>193</sup> She continued, “That implication, however, depends on transforming an ability into a duty.”<sup>194</sup> Professor Hendricks is correct that

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

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

191. See *infra* Part III.E.

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

193. Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion* 38 (Legal Studies Research Paper Series, Research Paper No. 80, 2009), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=jennifer\\_hendricks](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=jennifer_hendricks). The quoted material was omitted from the article as eventually published in the *Harvard Civil Rights-Civil Liberties Law Review*.

194. *Id.*

the natural order of biology does not imply of women some general duty to bear children, but it most certainly implies an individual woman's duty to bear the dependent child presently developing in her womb.

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

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

196. *Id.* at 151.

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

lows directly when one concedes the humanity of the unborn), that child likewise deserves state protection from parental abuse and neglect. Professor Alvaré concludes that, “[n]o member of the parent-child dyad has unlimited legal rights in any other family context outside abortion.”<sup>198</sup>

D. *Are Women Disproportionately Burdened?*

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

There is no doubt that parenthood entails great duties and sacrifice. Professor Camille Williams writes that in “a very real sense, parents’ bodies *are conscripted* for the support of their

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

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

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

children in that the law expects parents to work on a round-the-clock basis to provide for the child's basic needs."<sup>201</sup> Professor Williams also points out that, although crisis pregnancies are surely most challenging, other family crises, such as caring for a severely physically or mentally handicapped parent or child, rival the level of sacrifice entailed.<sup>202</sup> The fact remains, however, that born children and other needy relatives simply do not require the same kind of physical care or bodily sacrifice that an unborn child does. The father, relatives, and other persons (paid or unpaid) can assist the mother once the baby is born; moreover, she can offer the baby for adoption. But she alone must carry her unborn child.

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

In our male-dominated world, what men don't do, doesn't count. [The] female disease or impairment [of pregnancy] . . . naturally handicaps women in the "real" world of hunting, war, and the corporate fast track. Many prochoice feminists . . . adopt the male perspective when they cite the "basic injustice that women have to bear the babies," instead

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

202. *Id.* at 131.

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

of seeing the injustice in the fact that men cannot. Women's biologically unique capacity and privilege has been denied, despised, and suppressed under male domination; unfortunately, many women have fallen for the phallic fallacy.<sup>204</sup>

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

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

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

Pregnancy would be valued—and cherished—for the gift it is if the great dignity of the human being were more appreciated. What women can do that men cannot is undervalued because the human being, both born and unborn, is undervalued in comparison to material wealth, prestige, and creature comforts. But the cultural view we take of unborn human life, whether it be high or low, translates directly into the respect or disrespect pregnancy affords a woman, both socially and professionally. If pregnancy is just like any other medical condition—or worse, is a condition treated as a burden to women, a state that symbolizes their inability to compete with wombless men—pregnancy will never be accorded the respect and accommodation it deserves.<sup>206</sup> Not all women become mothers, but those

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

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

206. See Rosemary Oelrich Bottcher, *Abortion Threatens Women's Equality*, in *PROLIFE FEMINISM: YESTERDAY AND TODAY* 238, 239 (1995) ("Those who advocate legal abortion concede that pregnant women are intolerably handicapped; they cannot compete in a male world of wombless efficiency."); Alvaré, *supra* note 195, at 170 (arguing that denying women's bonds with their unborn children portrays childbearing and maternal responses as disabilities, and concluding that insisting "both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet, is both more realistic, and a more likely premise for a successful argument in favor of family-friendly work and education policies") (internal citation omitted); Fox-Genovese, *Wrong Turn*, *supra* note 10, at 12 ("[T]he courts have assumed that the pregnant woman deserves to be freed from the pregnancy—from the baby she is carrying—which amounts to

who do depend upon a cultural esteeming of the state of pregnancy—the nurture of an individual and unique human being—for their social and professional support. To belittle the moral status of the unborn child is to belittle the state of pregnancy, and so the pregnant woman. Indeed, the sacrifices that pregnant women endure during their pregnancies would be more honored (and perhaps more rewarded) were we as a culture honest about the dignity of the human beings who have been entrusted to their care.<sup>207</sup>

Contrary to some prochoice feminist assertions, the pregnant woman is in no way denigrated or marginalized if we recognize the moral status of the unborn. Indeed, a most apt legal analogy for the relationship between mother and unborn child, if one is possible, is drawn from the work of Professor Camille Williams. The pregnant woman, Professor Williams argues, acts as a trustee, while the unborn child is likened to a beneficiary. “As one standing in a position of trust relative to one [who is] vulnerable . . . [the] woman is, intuitively at least, held to a high standard of care because she has both legal capacity and power.”<sup>208</sup> In other words, both our social custom and law expect much of trustees, because we regard beneficiaries as worthy of a high standard of care. In like manner, were we to regard the vulnerable unborn as worthy of a standard of care that befits their dignity as human beings, law and social custom would not only expect much of the women in whose trust the vulnerable unborn are placed, but would also recognize that with such trust—and duty—comes much influence and power.

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the claim that being a woman is itself a disability and inherently an undesirable condition. The emphasis upon a pregnant woman’s right to an abortion effectively undercuts the dignity of the woman who is pregnant and, by extension, of all women who may become pregnant.”). Joan C. Williams argues use of the term “accommodation” perpetuates the masculine, unencumbered “ideal worker” norm, and so “re-inscribes gender inequality.” See Williams, *supra* note 57, at 27. She is probably right about this.

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

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

*E. Burdening Fathers*

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

The trouble with the right that *Roe* and its progeny have granted is that women alone have been given all the power of choice to abort and so are often left with all the responsibility for their child when they do not. Legal scholars from both the left and right have noticed that liberalized abortion laws have effectively offered the man a rationale for neglecting to support a child to whose existence he failed to consent.<sup>211</sup> The unborn child's father

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

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

211. West, *supra* note 19, at 1411 (“Narrowly, by giving her a choice, her consent legitimates the parental burden to which she has consented . . . . The choice-based arguments for abortion rights strengthen the impulse to simply leave her with the consequences of her bargain. She has chosen this route, so it is hers to travel alone. To presume otherwise would be paternalistic. The woman's ‘choice’ mutes any attempt to make her claims for assistance cognizable.”); see Hendricks, *supra* note 11, at 359; Paulsen, *supra* note 69, at 206 (“[The Court] . . . tell[s women] that abortion is their sacred ‘right.’ And others—men—for whom the creation of this right



may try to persuade, or even coerce, the child's mother to abort a child he neither wanted nor wishes to support, but in the end, the decision is entirely hers. And so, in his mind, she assumes sole responsibility for the child, because her decision not to abort is the reason the child enters the world in demand of his resources.

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

Culture is often a far more effective educator than the law, and so culturally, we must continue to renew the sense that both mothers and fathers share in the deeply important, albeit difficult,

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appears to terminate their own responsibilities, will tell women that abortion is their sacred duty."); Siegel, *Reasoning*, *supra* note 3, at 273–74 (arguing that *Roe's* privacy rationale "invites criticism of the abortion right as an instrument of feminine expedience . . . because it presents the burdens of motherhood as woman's destiny and dilemma—a condition for which no other social actor bears responsibility."); Stith, *supra* note 100, at 6.

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

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

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

task of parenting.<sup>215</sup> Parents must know that the sacrifices they make and services they render are valued beyond mere political rhetoric. Esteeming parents takes many forms, not the least of which would be substantial public support of caretaking through tax breaks (or subsidies) to adults who care for children.

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

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

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

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

217. Professor Robin West has suggested contraceptive use ought to be a moral duty for sexual partners not yet prepared for parenthood. See, e.g., West, *supra* note 19, at 1429. In theory, she, like many other well-intentioned prochoice (and prolife) advocates, seeks to reduce abortion rates while encouraging pleasurable sexual activity by consenting adults. *Id.* at 1430. Yet failure rates for all contraceptive methods are quite high, leading to scores of unintended pregnancies nationally. See Kathryn Kost et al., *Estimates of Contraceptive Failure From the 2002 National Survey of Family Growth*, 77 *CONTRACEPTION* 10 (2008). Professor Helen Alvaré argues that comprehensive sex education programs often treat the connection between sex and babies as rather tangential. She quotes a public school sex-educated woman: "we learned not that sex creates babies, but that unprotected sex creates babies . . . . Because I saw sex as being by default closed to the possibil-

A sexual ethic that denies that women have far more at stake in sexual intercourse than men utterly neglects the authentic sexual needs of women. Prochoice feminist Pamela Karlan sheds light on the matter when she says that “telling women that they must make the ‘large sacrifices’ of carrying a pregnancy to term as the (ultimately unavoidable) price of sexual activity is likely to burden their choice whether to engage in such activity.”<sup>218</sup> Professor Karlan is correct, but her insight is far more poignant and powerful if reversed: Women are likely to exercise restraint in their sexual activity, and ask that their partners do the same, when they recognize that the act in which they seek to engage has the potential to make them a mother, and their partner a father.

Prochoice feminists often regard abortion restrictions as fundamentally depriving a woman of her ability to exercise her moral agency and exert control over her reproductive future.<sup>219</sup> Under ordinary circumstances, women do have the power to exert such control—indeed, the power to choose, with whom and at which stage of life they will engage in potentially procreative sexual activity. Prochoice scholars often lament that connecting the choice to engage in sex with the duty to bear the consequences punishes those women who, unlike rape victims, have willingly engaged in the sexual act.<sup>220</sup> These scholars ac-

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ity of life, I thought of unplanned pregnancies as akin to being struck by lightning while walking down the street—something totally unpredictable . . .” Helen Alvaré, *Beyond the Sex-Ed Wars: Addressing Disadvantaged Single Mothers’ Search for Community*, 44 AKRON L. REV. 167, 208 (2011) (arguing that sex education programs, whether comprehensive or abstinence-based, ought to find ways to speak to women’s desire for relationship and community rather than simply educate to prevent pregnancy and disease).

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

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

220. See, e.g., Daly, *supra* note 3, at 124; Hendricks, *supra* note 11, at 336; Siegel, *Reasoning*, *supra* note 3, at 364. In principle, the value of fetal life does not depend upon whether conception was caused by consensual intercourse or rape. Again, consent to sex does not ground parental duty; engaging in an act that causes the biological dependency of one’s unborn child grounds such duty. Still, because victims of rape do not willfully engage in an act that may produce such a foreseeable result, but are rather preyed upon by violent aggressors, prolife legislators are often willing to allow for rape exceptions to abortion regulations, especially if such an exception would serve as a compromise measure for more extensive regulations. From a prolife feminist perspective, however, abortion is viewed as a second violent assault on the rape victim rather than a path toward healing; more humane responses have been shown successful. See, e.g., Sandra K. Mahkom, *Pregnancy and Sexual Assault*, in *THE PSYCHOLOGICAL ASPECTS OF ABORTION* 53–72

cuse prolife activists of outwardly showing concern for fetal life, but in reality, seeking to impose their prudish sexual morality on society, and especially on women.<sup>221</sup>

My argument, however, is far more pragmatic. Both mothers and fathers have an affirmative duty of care for their children, born and unborn. Therefore both women and men ought to engage in sexual intercourse with full knowledge that even in the most “safe” of circumstances a pregnancy may result, transforming them from intimate (or casual) sexual partners into parents.<sup>222</sup> But because women experience the duties that result from pregnancy far more intimately than men do, it is in women’s best interest, as a matter of moral agency and ability to exercise “control” over their reproductive future, to guard their sexual appetites until they are prepared to become mothers.<sup>223</sup> This usually also requires that women shield themselves

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(David Mall & Walter F. Watts eds., 1979). For a discussion of the interplay of principle and prudence in politics, see generally CLARKE FORSYTHE, *POLITICS FOR THE GREATEST GOOD: THE CASE FOR PRUDENCE IN THE PUBLIC SQUARE* (2009).

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

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

223. The early American feminists understood that truly respecting women meant taking seriously their procreative capacities. Not only were these women prolife through and through, but they also embraced an ideal of “voluntary motherhood” in which women and men, in appreciation of the creative potential of the sexual act, engaged in the act according to the so-called rhythm of the female reproductive system. See, e.g., LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 57 (2002); Angela Franks, *The Gift of Female Fertility*, in *WOMEN, SEX, & THE CHURCH* (Erika Bachiochi ed., 2010); Linda Gordon, *Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States*, in *WOMEN AND HEALTH IN AMERICA: HISTORICAL READINGS* 253 (Judith Walzer Leavitt ed., 2d ed. 1999); Hendricks, *supra* note 11, at 332 (noting first-wave feminist public opposition to abortion and contraception); Siegel, *Sex Equality*, *supra* note 3, at 819 (acknowledging that nineteenth century feminists “did not endorse abortion or contraception,” but instead practiced sexual restraint within marriage to regulate birth). An early forerunner to the highly scientific and effective method of fertility awareness method (or natural family planning) utilized today by both orthodox Catholics and back-to-the-earth feminists, this method required self-restraint on the part of the man in particular, an essential characteristic of an authentically prowoman sexuality. For a popular secular account of natural family planning, see generally TONI WESCHLER, *TAKING CHARGE OF YOUR FERTILITY* (2006). Sidney Callahan, in her criticism of the “masculiniz[ation] of female sexuality,” comments upon how the ethic of commitment and self-discipline, so revered in the world of work by feminists, is denounced as unnatural in the sphere of sexuality. See Callahan, *supra* note 10, at 139–40 (“While the ideal has never been universally obtained, a culturally dominant demand for monogamy, self-control, and emotionally bonded and committed sex works well for women in every stage of their sexual life cycles. When love,

from social and relational pressures to become sexual before they are prepared to do so.<sup>224</sup> Again, this does not detract from men's responsibility to exercise discipline over their appetites as well, because, in like manner, sexual activity has the potential to make them fathers. It merely calls attention to the biological fact that the consequences of casual sex are far more immediate and serious for women than for men, even if abortion is an open option.<sup>225</sup> As discussed in Part II, women, not men, must undergo abortion to escape the consequences of unintentionally procreative sex. For some women, the escape itself has serious, long-term consequences of its own.<sup>226</sup>

### CONCLUSION

Prochoice feminists' quest to locate abortion rights in the Equal Protection Clause is an effort, first, to rectify the legal community's critical view of current constitutional justifications for abortion by appealing to equality arguments that resonate more fully with abortion advocates' views of abortion rights, and second, to provide more solid constitutional support for governmental funding of abortion. But the Equal Protection Clause governs only those regulations that discriminate between persons who are similarly situated. Prochoice feminists have made various attempts to meet that criterion, often by ignoring outright the physiological differences between men and women.

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chastity, fidelity, and commitment for better or worse are the ascendant cultural prerequisites for sexual functioning, young girls [are protected], adult women justifiably demand male support in childrearing, and older women are more protected from abandonment as their biological attractions wane."'). But commitment and sexual restraint, while not at all antithetical to sexual pleasure, are the necessary ingredients of true "reproductive choice," or as earlier feminists called it, voluntary motherhood.

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

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

West, *supra* note 19, at 1429–30.

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

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

In denying the significance of the body, abortion-rights advocates do a disservice to women who, throughout human history, have been denigrated because of their physical differences from men. The plight of women who have children—whether professional or poor, married or single—will continue to be viewed as theirs alone until pregnancy and motherhood are properly esteemed, rather than viewed as simply another “lifestyle option” in a post-*Roe* culture taken by “choice.”<sup>227</sup>

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

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