3 Abortion as a Sex Equality Right: Its Basis in Feminist Theory

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The abortion right is generally discussed as a negative liberty, a right of privacy, a right to be let alone. This conception of the right is consistent with certain libertarian traditions in feminism, but it is also at odds with other important aspects of feminist thought. Conversations about the abortion right typically occur within a framework that is individualist, antistatist, and focused on the physiology of reproduction—that is, on matters of sex, not gender. This mode of speaking about the abortion right shares important features in common with the framework the Supreme Court adopted in *Roe v. Wade*.[1]

The abortion right is also sometimes discussed as an issue of equality for women, both in feminist circles and in the community at large. The Court's opinion in *Roe*, however, is generally oblivious to such concerns; indeed, *Roe* defines the abortion right in such a way as to make it difficult to speak about in sex equality terms. Recently, as judicial criticism of *Roe* has mounted, a growing number of scholars have attempted to reconceptualize the abortion right in a sex equality framework, developing arguments that draw upon diverse aspects of feminist legal and social theory. This essay situates the emergent sex equality argument for abortion rights in jurisprudential context and in an interdisciplinary field.

In the years since *Roe* was decided, feminist scholars have developed a sophisticated body of theory exploring the social organization of reproductive relations. The first wave of social construction theory demonstrated how much that was seemingly natural in reproduction

was in fact the product of social relations legitimated as expressions of nature (Ehrenreich and English 1978; Gordon 1974; Leavitt 1986; O'Brien 1981; Rosaldo and Lamphere 1974). A second wave of social construction theory appearing in the 1980s began to explore the body itself as a terrain of cultural signification and contestation (Jacobus, Keller, and Shuttleworth 1990; Laqueur 1986, 1990; Martin 1987; *Representations* 1986). Much of this work has focused on abortion. Scholars have explored the history of abortion regulation and provided a rich account of the sociology and iconography of abortion disputes, past and present (Condit 1990; Luker 1984; Petchesky 1984, 1987; Smith-Rosenberg 1985:217–44). These developments in social construction theory, when combined with more recent work in feminist jurisprudence, enable a variety of new approaches to analyzing reproductive regulation.

Since the mid-1980s a growing number of lawyers and legal academics have begun to analyze abortion restrictions in an equality framework; these arguments are quite various in style, focus, and intellectual tradition (MacKinnon 1983a, 1987:93–102, 1991:1308–24; Law 1984; Ginsburg 1985; Tribe 1988:1353–59; Olsen 1989:117–35; Colker 1991; Siegel 1992; Sunstein 1992:29–44, 1993:270–85; see also Karst 1977:53–59; Regan 1979).[2] I will discuss the theoretical basis of one such argument, developed in my article "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection" (Siegel 1992). The equality argument I present in the following sections builds upon and contributes to social construction theory as it situates abortion-restrictive regulation in a new jurisprudential framework.

Analyzing Abortion Restrictions as Gender Status Regulation

Legal and popular debate over abortion tends to focus on matters concerning the physical relations of reproduction. But, as feminist scholarship in the humanities and social sciences demonstrates, the ways a society regulates reproduction and the reasons it advances for doing so are part of the *social* relations of reproduction. This paradigm shift has significant jurisprudential consequences. When abortion restrictions are analyzed in sociohistorical perspective, it is possible to identify constitutionally significant features of such laws otherwise obscured by the naturalistic framework in which courts now analyze them.

America's criminal abortion laws were first enacted in the nineteenth century, the product of a campaign led by the medical profession, then in its infancy. Doctors urged the enactment of laws criminalizing abortion and contraception for a variety of reasons. They argued that it was important to prohibit abortion and contraception in order to protect the unborn, to ensure that married women performed their duties as wives and mothers, and to preserve the ethnic character of the nation. Obstetricians and gynecologists drew upon the discourse of their profession—the discourse of reproductive physiology—to advance these arguments against birth control practices, thereby infusing social arguments for criminalizing birth control with the authority of science.

Analyzing the record of the nineteenth-century criminalization campaign reveals how social discourses concerning women's roles have converged with physiological discourses concerning women's bodies, as two distinct but compatible ways of reasoning about women's obligations as mothers. As I will show, the physiological discourses that currently dominate the abortion debate have roots in the nineteenth-century antiabortion campaign, where they were employed interchangeably with arguments emphasizing the need to enforce women's duties as wives and mothers. Simply put, in debates over abortion, issues we habitually conceptualize in terms of women's bodies in fact involve questions concerning women's roles. An examination of the nineteenth-century criminalization campaign thus provides a new basis for analyzing abortion-restrictive regulation, illuminating its lineage and function as gender-caste regulation.

The Nineteenth-Century Campaign to Criminalize Abortion

At the opening of the nineteenth century, abortion in the United States was governed by the common law; under this regime, abortion was allowed until "quickening," the moment in gestation when women first perceive fetal movement, typically in the fourth or fifth month of pregnancy (Mohr 1978:3–6). By mid-century, obstetricians and gynecologists of the newly founded American Medical Association (AMA) had inaugurated a campaign to criminalize abortion and other methods of birth control, which they undertook for reasons involving both social morality and professional status (Siegel 1992:282–84; Smith-Rosenberg 1985:217–44). In response to this campaign, a growing number of states prohibited abortion induced before quickening—although many conditioned more severe criminal penalties upon proof of quickening. During this same period, many states banned contraceptives and

abortifacients, as well as the distribution of information about them; federal legislation enacted in 1873, popularly known as the Comstock Act, classified information concerning contraception and abortion as obscene, and prohibited its circulation in the U.S. mails (Comstock Act, ch. 258, 17 Stat. 598 (1873) [repealed 1909]; Siegel 1992: 314–15). To understand how the AMA persuaded social elites, who in the early years of industrialization were increasingly interested in limiting family size, to adopt laws criminalizing one of the most reliable methods of birth control of the era, it is necessary to examine the diverse arguments doctors marshaled against the practice. The profession's antiabortion arguments focused on the physiology of reproduction, the structure of the family, and the dynamics of population growth.

Doctors' Antiabortion Arguments The doctors who led the criminalization campaign sought, first of all, to discredit the customary and common law concept of quickening. Considered from the standpoint of medical science, the doctors argued, human development was continuous from the point of conception; therefore, quickening had no special physiological significance. The doctors then sought to use this scientific critique of quickening to demonstrate that life begins at conception, and thus that abortion at any point after conception was tantamount to murder.

As doctors sought to equate abortion with the murder of a born person, however, they invested physiological facts with particular social significance. Doctors observed that the embryo/fetus had the physiological capacity to develop into a human being, and pointed to this capacity for physical growth as evidence that the embryo was an *autonomous* form of life. Doctors also cited the embryo's physical separation from the pregnant woman as evidence of its autonomy. Thus, Dr. Jesse Boring argued:

> [T]he fecundated ovum is not only the embryonic man, already vital, but it is, in an important sense, an independent, self-existent being, that is having in itself the materials for development, being actually separated from the mother, as well as from the father, though maintaining a connexion in utero by the vacular arrangement repeatedly referred to; there is, *really*, as has been fully demonstrated, no actual attachment of the placenta to the uterus. (Boring 1857:266)

Dr. Horatio Storer, leader of the criminalization campaign, contended that the embryo/fetus was for all practical purposes *outside* of the

woman bearing it—even going so far as to compare the embryo/fetus to a kangaroo gestating in its mother's abdominal pouch. As he explained in his popular antiabortion tract *Why Not? A Book for Every Woman*, "The first impregnation of the egg, whether in man or in kangaroo, is the birth of the offspring to life; its emergence into the outside world for a wholly separate existence is, for one as for the other, but an accident in time" (Storer 1866:30–31; Storer and Heard 1868:10–11). In their effort to demonstrate the autonomy of unborn life, physicians discussed the embryo's capacity for growth as if it could be exercised outside the womb; the doctors' arguments confused categories of time and space so that unborn life seemed to have scant relation to the woman bearing it.

Yet the doctors' most powerful strategy for demonstrating the autonomy of unborn life did not require confusing the facts of human development; instead, doctors depicted the facts of human development in a highly selective manner, emphasizing the physiological continuity of human life but omitting all reference to the physical and social work of reproduction women perform. Dr. Hugh Hodge traced the path of human maturation without once mentioning women's role in reproduction when he invited his audience to imagine the fertilized ovum developing into the highest form of social life—a fully matured man:

> [T]he invisible product of conception is developed, grows, passes through the embryonic and foetal stages of existence, appears as the breathing and lovely infant, the active, intelligent boy, the studious moral youth, the adult man, rejoicing the plenitude of his corporeal strength and intellectual powers, capable of moral and spiritual enjoyments, and finally, in this world, as the aged man.
>
> (Hodge 1869:35, quoted in Smith-Rosenberg 1985:242)

To defend the claim that life begins at conception, nineteenth-century physicians offered a "scientific" account of human development that treated women's role in reproduction as a matter of minor consequence—from the point of conception onwards. This description of the maternal/fetal relationship appeared only in debates about abortion, just as it does today. It was otherwise wholly at odds with the "separate spheres" tradition—regularly controverted by medical and popular authorities of the era who emphasized that mothers had a unique capacity to shape a child's development, during gestation and after (Siegel 1992:292).

When doctors criticized quickening, they depicted the reproductive process in ways that obscured women's role in gestating and nurturing human life. But other arguments advanced against abortion and contraception emphasized women's family role. Doctors repeatedly argued that women had a duty to bear children. Implicitly or explicitly, they were discussing *married* women. The AMA's 1871 "Report on Criminal Abortion" denounced the woman who aborted a pregnancy: "She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures—but shrinks from the pains and responsibilities of maternity" (O'Donnell and Adee 1871:241). A woman's duty to procreate was dictated by her anatomy, as the leader of the criminalization campaign explained:

> Were woman intended as a mere plaything, or for the gratification of her own or her husband's desires, there would have been need for her of neither uterus nor ovaries, nor would the prevention of their being used for their clearly legitimate purpose have been attended by such tremendous penalties as is in reality the case. (Storer 1866:80–81)

It followed that a woman who shirked her duty to bear children committed "physiological sin" (Pomeroy 1888:97). In this compound concept of physiological sin, the profession translated religious, legal, and customary norms of marital duty into therapeutic terms. As doctors repeatedly argued, abortion and contraception both threatened women's health (Siegel 1992:294–95, and nn. 123, 125, 126). The only way that a wife could ensure her health was to bear children, pregnancy being "a normal physiological condition, and often absolutely necessary to the physical and moral health of woman" (Hale 1867:6n.).

By defining the obligations of marriage in medical terms, doctors claimed special authority to mediate between a married woman and the state, thereby appropriating a role the common law of marital status otherwise defined as a husband's. The profession's claim of expertise justified the so-called therapeutic exception to birth control laws that vested in physicians authority to determine whether their patients might have legal access to abortion and contraception. In this way, a woman was made legal ward of her physician; a woman's choices regarding birth control were made subject to a man's consent, where no such requirement existed at common law before.[3]

Just as doctors translated concepts of marital duty into physiological terms, they also analyzed matters of civic governance in reproductive

paradigms. Another commonplace argument against abortion compared the birth rates of the white Anglo-Saxon middle class to that of the European-immigrant and African-American lower classes. In such arguments, the same doctors who condemned abortion as "feticide" condemned abortion and contraception as a form of "race suicide" (Calhoun 1919:225–54). Dr. Augustus Gardner dedicated a polemic against masturbation, contraception, and abortion, entitled *Conjugal Sins*, "To the Reverend Clergy of the United States who by example and instruction have the power to arrest the rapid extinction of the Native American People" (Gardner 1870:5). Dr. H. S. Pomeroy made the preoccupations of the criminalization campaign explicit when he observed: "[I]t is coming to pass that our voters—and so our lawmakers and rulers, indirectly, if not directly—come more and more from the lowest class, because that class is able and willing to have children, while the so-called better classes seem not to be" (Pomeroy 1888:39). Horatio Storer, who led the campaign, was equally blunt in describing the doctors' concerns:

> [T]he great territories of the far West, just opening to civilization, and the fertile savannas of the South, now disinthralled and first made habitable by freemen, offer homes for countless millions yet unborn. Shall they be filled by our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation. (Storer 1866:85)

As Storer made abundantly clear, political power resided in control of those citizens who would bear citizens. The doctors' physiological arguments against abortion thus channeled wide-ranging social concern into the act of reproduction itself. The claim that life begins at conception was but one of many arguments that identified the reproductive process as the basis of social life. Individually and collectively, these arguments suggested that regulating the physical act of reproduction was necessary to ensure reproduction of the social order.

Antiabortion as Antifeminism The campaign against abortion and contraception was quite specifically concerned with controlling the conduct of women. This is apparent in many of the physiological arguments the campaign directed against birth control practices, but it was also expressed in openly political terms. Physicians suggested that women's interest in controlling birth was incited by feminist advocacy, and depicted abortion and contraception as an expression of women's resistance to marital and maternal obligations (Smith-Rosenberg

1985:217–44). The same doctors who called abortion feticide also described the moral evils of abortion in the following terms:

> Woman's rights and woman's sphere are, as understood by the American public, quite different from that understood by us as Physicians, or as Anatomists, or Physiologists.
>
> "Woman's rights" now are understood to be, that she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making. (Pallen 1869:205–6)

Or, as another doctor put it:

> There are lecturers "to ladies only" who profess to be actuated simply by good-will toward their unfortunate sisters, who yet call woman's highest and holiest privilege by the name of slavery, and a law to protect the family from the first step toward extinction, tyranny.
>
> There are apostles of woman's rights who, in their well-meaning but misdirected efforts to arouse women to claim privileges now denied them, encourage their sisters to feel ashamed of the first and highest right which is theirs by the very idea of their nature.
>
> There are advocates of education who seek to deter woman by false pride, from performing the one duty she is perfectly sure of being able to do better than a man! And there are those who teach that their married sisters may save time and virality for high and noble pursuits by "electing" how few children shall be born to them. (Pomeroy 1888:95–96)

As these polemics suggest, doctors who opposed abortion and contraception were engaged in a wide-ranging debate with the feminist movement of the era. It was not feminist support for abortion rights that drew the physicians' ire; the nineteenth-century woman's rights movement in fact condemned abortion. But the movement did seek reproductive autonomy for wives, in the form of a demand for "voluntary motherhood": the claim that a married woman was entitled to refuse her husband's sexual advances (Gordon 1976:108–11). To understand how physicians and feminists—who together opposed abortion—were nevertheless engaged in far-ranging conflict about abortion, it is necessary to consider their strikingly divergent views of marriage.

When nineteenth-century feminists demanded voluntary motherhood, they were attacking customary and common law concepts of marriage (Siegel 1992:304–5). Feminists demanding voluntary motherhood hoped to secure for wives "self-ownership": control over their

daily lives in matters of sexuality, reproduction, and work (ibid., 305–8; Siegel 1994:1103–7). Indeed, the movement's criticisms of the legal and customary structure of the marriage relationship were sufficiently far-reaching that, while the movement did not openly support abortion, many feminists of the era tacitly condoned abortion as an act of self-defense under prevailing conditions of "forced motherhood" (Siegel 1992:307).

By contrast, physicians used antiabortion arguments to *oppose* the demands of the woman's rights movement. Antiabortion arguments explicitly and implicitly associated the practice of abortion with feminist efforts to reform the laws and customs of marriage and to expand women's participation in the nation's economic and political life, thus investing abortion with explosive social significance. In short, doctors urged legislators to criminalize abortion in order to preserve traditional gender roles in matters of sexuality and motherhood, education and work, and affairs of suffrage and state.

Even this cursory examination of the arguments advanced by the nineteenth-century criminalization campaign reveals that opposition to abortion was powerfully shaped by judgments rooted in relations of gender, race, ethnicity, and class. Those who sought to criminalize abortion were interested in protecting unborn life; yet it is equally clear that they viewed protecting the unborn as a means to control rebellious middle-class women and teeming immigrant populations, and it is in this context that their judgments about the morality of abortion and contraception must be understood. Concerns of gender, race, ethnicity, and class were not peripheral to this ethic, but were instead an integral part of it.

Criminalizing Birth Control: A New Mode of Regulating Gender Status

The campaign to criminalize birth control had significant effects on law, inaugurating a method of regulating women's social status unknown at common law. Restrictions on abortion and contraception were enacted at a time when state legislatures were liberalizing the marital status doctrines of the common law, modifying ancient restrictions on wives' conduct in an effort to accommodate the needs of a market society and to blunt criticisms of marriage advanced by advocates of woman suffrage (Basch 1982; Siegel 1994).[4] It is illuminating to consider the social preoccupations of the criminalization campaign against this backdrop. In advancing their case for criminalizing birth control practices, physicians offered the American public a *new* way of regulating wives' conduct, one that deviated in method and preoccupation from traditional doctrines of

marriage and family law. Laws against abortion and contraception enforced relations of social status by regulating the physical act of reproduction, in this respect resembling antimiscegenation laws and other eugenics legislation adopted in the postbellum period (Siegel 1992:319–20). Just as antimiscegenation laws of the era played an important role in maintaining a particular regime of racial status, laws that criminalized birth control played a crucial role in enforcing a particular regime of gender status. Considered in retrospect, the criminalization campaign can be understood as modernizing both the means of regulating gender status and the mode of its justification.

To appreciate the campaign's role in transforming discourses of gender status, it is helpful to examine the 1908 case of *Muller v. Oregon*.[5] In *Muller*, the Supreme Court upheld protective labor legislation regulating women's employment and justified this result on unprecedented constitutional grounds. To explain why the state of Oregon could restrict women's freedom of contract as it could not men's, the Court pointed to women's "physical structure," invoking women's bodies as the basis for gender-differentiated regulation of women's conduct in a fashion that no court of the early nineteenth century ever would. The Court understood that it was discussing matters of gender status in a fashion that broke with the conventions of the common law. The Court began its analysis in *Muller* by noting that Oregon had recently reformed the common law to allow wives to form binding contracts, yet the Court ruled that the state could impose new restrictions on women's capacity to form employment contracts, for reasons relating to their reproductive role:

> Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . [Woman's] physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. . . . Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each. . . . This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her. (*Muller*, 422–23)

In *Muller*, the Court employed claims about women's bodies to reach a result that some decades earlier it might have justified by invoking the common law of marital status.[6] The campaign to criminalize abortion did not supplant marital status law, nor did it eliminate the use of marriage concepts in explaining women's social status. Instead it gave them more "modern," scientific sense. As the *Muller* opinion illustrates, the campaign enabled the Court to repudiate traditional norms of gender status and still find reasons for enforcing women's roles—reasons now rooted in immutable facts of nature rather than transitory and contestable social norms.

Comparing the Abortion Debate, Past and Present

If one compares the contemporary abortion debate to the nineteenth-century campaign, certain commonalities and differences are immediately apparent. Arguments about human physiology continue to play an important part in the abortion controversy; yet today one does not commonly hear claims about women's roles of the sort openly voiced in the nineteenth century. In this section, I will examine the role of physiological discourses in the contemporary abortion debate, demonstrating how they simultaneously obscure and facilitate gender-based reasoning about the equities of reproductive regulation.

Today, secular arguments about abortion are conducted in a medical framework, just as they were in the nineteenth century. In fact, one can discern the legacy of the criminalization campaign in *Roe* itself. *Roe* recognizes that a woman has a privacy right to make decisions about abortion, and describes this right in medical terms: it is a right to be exercised under the guidance of a physician (*Roe*, 153–63, 165–66). *Roe* also allows the state to regulate a woman's abortion decision, in order to protect potential life. The opinion derives the state's interest in protecting potential life from a purely medical definition of pregnancy:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo, and later a fetus, if one accepts the medical definition of the developing young in the human uterus. See Dorland's *Medical Illustrated Dictionary*. . . . The situation is therefore inherently different from [all other privacy precedents]. (ibid., 159)

Recognizing both a woman's right to make decisions about abortion and the state's prerogative to regulate those decisions, *Roe* reconciles the conflict by means of its trimester framework, with the strength of each constitutional interest determined by temporal progress of gestation itself (ibid., 163).

The medico-physiological reasoning that supports *Roe* also undergirds secular arguments opposing the right *Roe* recognized. To take one example, an editorial in the *New York Post* urged its readers to examine a photo essay depicting the formation of a human being, observing:

> Here in graphic color is living, thrilling irrefutable proof that within hours of conception, a unique distinctive human being has been formed. The magazine says that within 20 hours of conception, when the sperm enters the ovum, "the result is a single nucleus that contains the entire biological blueprint for a new individual, genetic information governing everything from the length of the nose to the diseases that will be inherited." (Kerrison 1990:2)

The editorial asserts, without more, that these photographs "virtually render obsolete the whole abortion debate" (ibid., 2).

In debating the abortion question today, we reason within a physiological framework that abstracts the conflict from the social context in which judgments about abortion are formed and enforced. To understand the reasons why women seek to have children or to avoid having them, as well as the reasons why their choices are communally acceptable or not, one has to examine the social relations of reproduction and not merely its physiology. But the naturalistic rhetorics of the abortion debate deter this. As a consequence, we conceptualize the abortion question as a question concerning women's bodies, not women's roles. That women are the object of abortion-restrictive regulation is considered to be a matter of physiological necessity: women are where the embryo/fetus *is*. Indeed, as the *New York Post* editorial illustrates, medico-physiological discourses often present the fetus as if it were an autonomous form of life, depicting the process of human development as if it scarcely involved women at all (Perchesky 1987). Thus, today, as in the nineteenth century, antiabortion arguments use narratives of human genesis that omit all reference to women's work as mothers in order to condemn women who seek to avoid becoming mothers. An antiabortion pamphlet observes, "[n]othing has been added to the fertilized ovum you once were except nutrition" (Willke, n.d., quoted in Olsen 1989:128), just as Horatio Storer once argued that the "total independence" of the unborn could be discerned in the fact that "its subsequent history after impregnation is merely one of development, its attachment merely for nutrition and shelter" (Storer and Heard 1868:10–11).

While opponents of abortion no longer make claims about women's roles of the sort that dominated the nineteenth-century campaign, gender-based judgments do continue to inform arguments for regulating women's reproductive conduct; *today these judgments can be articulated in the physiological modes of reasoning the campaign inaugurated.* To appreciate how gender-based judgments can be expressed in physiological terms, it is helpful to consider the Court's reasoning in *Roe*. In *Roe*, the Court held that the state has an interest in protecting potential life that becomes compelling at the point of fetal viability, when this interest is strong enough to support state action prohibiting abortion (*Roe*, 163); critics of *Roe*'s trimester framework contend that the state's interest in protecting potential life "exists throughout the pregnancy."[7] This proposition bears consideration. Considered in social rather than physiological terms, the state's "interest in protecting potential life" is a state interest in compelling women who are resisting motherhood to bear children. Of course, legislators would dispute this characterization of the state's interest in regulating abortion. To do so, they would invoke the discourse of reproductive physiology, that is, they would argue that the state has no interest in the pregnant woman, save for the fact that she is where the embryo/fetus is. But this rejoinder does not alter the fact that a state forbidding abortion to protect potential life *is* forcing women who are resisting motherhood to bear children. Should legislators protest that they wish to prohibit abortion out of concern for the unborn and entertain no thoughts about the women on whom they would impose motherhood, such a defense would reveal that the policy was premised on gendered assumptions with deep roots in the nineteenth-century campaign: that the embryo/fetus is somehow "outside" women, like a kangaroo gestating in its mother's pouch—or that women are little more than reproductive organs. Alternatively, if legislators attempted to explain why they believed they were justified in forcing a pregnant woman to bear a child, each of the putatively gender-neutral explanations they might provide (e.g., consent, fault) could in turn be traced to a set of status-linked judgments about women.[8]

In short, claims about abortion that focus on the physical relations of reproduction often express judgments about abortion rooted in the social relations of reproduction. In *Abortion and the Politics of Motherhood*, Kristin Luker traces value judgments about protecting unborn life to value judgments about the structure of family life, contending that "[t]he abortion debate is so passionate and hard-fought because it is a referendum on the place and meaning of motherhood" (Luker 1984:193). As Luker persuasively demonstrates, divergent modes of reasoning about the unborn correlate with divergent modes of reason-

ing about the nature of sexuality, work, and family commitments in women's lives (ibid., 192–215). Thus, while the separate spheres tradition no longer receives official public sanction, the sex-role concepts it fostered continue to play a crucial role in the abortion controversy, supplying norms of sexual and maternal comportment for women that inform public judgments about the propriety of abortion. A 1990 poll of Louisiana residents indicated that 89 percent favored providing women access to abortion when pregnancy occurred because of rape or incest, while 79 percent opposed abortion "when childbirth might interrupt a woman's career" (J. Hill 1990). The most widespread support for abortion depended on a judgment about the sexual relations in which unborn life was conceived, and the most widespread opposition to abortion reflected a judgment about women's pursuit of career opportunities in conflict with the maternal role.

We can thus recharacterize the interest in regulating abortion. Those who seek to protect unborn life want to regulate the conduct of women who fail to act as good mothers should. Judgments about women's conduct as mothers are expressed by those interested in protecting unborn life outside the abortion context, as well. One commentator surveying a hospital ward of babies born to drug-dependent women angrily warned his readers that "[t]he sins of the mothers are apt to become the burden of society for generations to come," and then applauded a female journalist and six other women who had volunteered to hold the "damaged babies" with the exhortation, "Good for Victoria. Good for the women who cuddle babies" (Martinez 1991).

Yet this analysis remains incomplete. Certain forms of fetal-protective regulation are overwhelmingly directed at pregnant women who are poor, of color, and on public assistance (for example, forced surgical rearment, or drug-related prosecutions and custody deprivations; see Roberts 1991:1421 n. 6, 1432–36; Siegel 1992:335 n. 301). Clearly, such regulation does not reflect gender-based judgments alone. As the nineteenth-century criminalization campaign richly illustrates, judgments about women's reproductive conduct may be intersectional in character, reflecting concerns rooted in relations of gender, race, and class. Public authorities may focus their regulatory efforts on poor women of color because their lives diverge most sharply from the white, middle-class norms that define "good" motherhood in this society (see Fineman 1991b). Or, as the history of the nineteenth-century criminalization campaign suggests, regulation nominally undertaken to protect the unborn may in fact be driven by antipathy to poor women of

color and the children they might bear. Dorothy Roberts interprets the criminal prosecution of pregnant drug-dependent women in just this fashion. Roberts observes that criminal prosecutions provide no assistance to children, while punishing poor women of color for reproducing; she analyzes the prosecutions in light of the history of sterilization abuse in order to illustrate their underlying social logic (Roberts 1991:1442–44). The same analysis might be extended to other forms of birth-deterring regulation, such as recent welfare reform proposals that contemplate imposing "family-caps" on recipients of Aid to Families with Dependent Children (AFDC) (see L. Williams 1992:720 and n. 7, 736–41), or proposals that would make use of Norplant a condition for receipt of public assistance or for receipt of reduced criminal sentences (see Arthur 1992; Hand 1993).

The injuries fetal-protective regulation inflicts on women are most often justified as unfortunate incidents of a benign regulatory intention to protect children. But the structure of the regulation suggests otherwise. If one considers the means conventionally employed to protect the unborn, one finds ample evidence that fetal-protective policies do in fact reflect judgments about women, as well as the unborn life they bear. For example, a state criminalizing abortion to protect the unborn could nonetheless assist the women on whom it would impose motherhood. Why, then, is it that antiabortion laws do not assist pregnant women in coping with the social consequences of gestating and raising a child? Would every jurisdiction interested in prohibiting abortion do so if it were obliged to make women whole for the costs of bearing and raising a child? Do jurisdictions that wish to prohibit abortion employ all available *noncoercive* means to promote the welfare of unborn life, assisting those women who do want to become mothers so that they are bear and rear healthy children?

The same analysis of regulatory means can be extended to fetal-protective policies outside the abortion context. As evidence accumulates that toxins injurious to the unborn can be transmitted through men as well as women, is it likely that employers will decide to prohibit fertile men from working in substantial sectors of the industrial workforce? Would this society so readily contemplate criminal prosecution, "protective incarceration," or custody deprivation as responses to maternal addiction if the policies were to be applied to privileged women rather than the poor? An analysis of the means this society employs to protect the unborn reveals that fetal-protective policies reflect judgments rooted in relations of gender, race, and class, whose normative sense can

be elucidated by examining status concerns expressed in the nineteenth-century campaign.

Analyzing reproductive regulation in historical perspective thus yields several critical insights that might be used in studying the regulation from a variety of disciplinary perspectives:

1. *In the abortion debate, the discourse of reproductive physiology functions as a discourse of gender status.* The ways in which the nineteenth-century medical profession addressed the abortion question still shape the way it is analyzed today, in legal and popular fora. Modes of describing the maternal/fetal relation and the process of human development that would seem to be purely empirical are in fact specific to the abortion debate; they have a rhetorical history and a conceptual bias consistent with this history. These rhetorics of the body are part of a discourse of gender status, long used to justify regulating women's reproductive conduct. Consequently, in contemporary debates about abortion, gendered judgments can be articulated in the physiological discourses the nineteenth-century campaign inaugurated. (The "state's interest in protecting potential life" is an expression of this discursive tradition; the Court's reasoning in *Roe* unfolds within, and not against, the logic of the criminalization campaign.)

2. *Laws criminalizing abortion and contraception compel motherhood, and from an historical perspective can be understood as a form of gender status regulation.* In the nineteenth century, the criminalization of abortion and contraception was advocated as a method of ensuring that women performed their duties as wives and mothers. Laws criminalizing birth control enacted in this period can be understood as a new form of gender status regulation, adopted in an era in which the older common law regime of marital status was under feminist attack and undergoing liberalization. Today, as in the past, public interest in regulating women's reproductive conduct has grown as older forms of patriarchal regulation have declined in legitimacy. Now, as then, new forms of reproductive regulation are justified with reference to "facts of nature" rather than to relations of social status, a justificatory stance necessitated by the waning legitimacy of overtly patriarchal discourses and the enshrinement of a "genderless" citizen subject. (With the appearance of modern equal protection doctrines forbidding discrimination on the basis of sex, arguments grounded in reproductive physiology constitute one of the strongest constitutional rationales for class-based regulation of women's conduct.[9])

3. *The nineteenth-century campaign to criminalize birth control was shaped by concerns of gender, race, and class—notwithstanding the apparent universality of its physiological polemics; the same is true of contemporary interest in reproductive regulation.* In the nineteenth century, the "native" American middle class responded to the populationist "threat" posed by immigrant and African-American families by regulating the reproductive conduct of its own women. Today, with the growth of the state apparatus, reproductive regulation has multiplied and diversified in form. While all modes of fetal-protective regulation are aimed at women, such regulation may vary in class and race salience. An integrated approach to analyzing reproductive regulation will attempt to ascertain the gender, race, and class salience of such regulation, whether birth-compelling or birth-deterring in form.

4. *All regulation directed at women's reproductive conduct reflects judgments about women and the children they might bear; to determine whether such regulation is animated by benign judgments, judgments infected by gender, class, or racial bias, or some amalgam of both, it is necessary to analyze the structure of the regulation in light of the social, as well as physical, relations of reproduction—an inquiry that should include an examination of the historical lineage or antecedents of the practice.* Reproductive regulation has served to enforce or maintain caste relations in times past. For this reason, examining past regulatory practices can illuminate tacit forms of bias structuring present regulatory practices; Mary Becker and Dorothy Roberts have recently demonstrated how such historical analysis can be used to illuminate the status logic of fetal-protective regulation that restricts women's employment and that criminalizes women's use of drugs during pregnancy (Becker 1986; Roberts 1991). Thus, in attempting to determine whether contemporary regulatory practices are benign or biased in motivation, justification, and/or structure, it is helpful to consult the history of reproductive regulation. Such an historical inquiry might consider: the regulation of abortion and contraception; antimiscegenation laws; the eugenics and sterilization movements; laws governing adoption, custody, and other aspects of family structure; welfare laws; and diverse modes of regulating women's labor force participation, including restrictions on the employment of married women and sex-based protective labor legislation.

The Legal Context: Developments in Feminist Jurisprudence Since Roe

The foregoing analysis of abortion restrictions draws upon and contributes to social construction theory—the body of feminist theory

exploring the social organization of reproductive relations. But this method of analyzing reproductive regulation shares little in common with the framework the Supreme Court employs in interpreting the Constitution. To appreciate the distance between the critical premises of social construction theory and the interpretive assumptions of the Court, a brief examination of constitutional doctrine is required.

This section reviews privacy and equal protection doctrine concerning the regulation of women's reproductive conduct. It then demonstrates how feminists have challenged equal protection doctrine in the years since *Roe*. Feminist jurisprudence now offers an alternative constitutional framework for analyzing restrictions on abortion—one that can draw on social construction theory in ways the prevailing constitutional framework does not.

In *Roe v. Wade*, the Supreme Court held that the right to privacy protects women's decisions about abortion; at the same time, the Court recognized the state's interest in regulating such decisions. *Roe* explains women's right to choose abortion and the state's right to regulate that choice with reference to the physiology of gestation (*Roe*, 163). Women have the liberty to control matters of bodily integrity and medical care; and the state has the pretogative to regulate matters affecting the genesis and physical development of future citizens ("the state's interest in potential life"). *Roe* reconciles the conflict between individual right and state regulatory prerogative in a "trimester framework" providing that a woman's privacy interest in making the abortion decision wanes over the course of gestation, while the state's interest in regulating the decision grows.

Roe protected women's right to make the abortion decision as a right of privacy not equality. In fact, when *Roe* was decided in 1973, the Court had not yet interpreted the equal protection clause to require government adherence to principles of sex equality. As important, *Roe* could not be easily incorporated into the constitutional sex discrimination tradition that would develop shortly thereafter. The modern equal protection tradition defines equality as a relation of similarity and discrimination as an illegitimate act of differentiation (Tussman and ten-Broek 1949:344).[10] Roe, however, analyzed abortion restrictions in physiological terms. Considered from a physiological standpoint, no man is similarly situated to the pregnant woman facing abortion restrictions; hence, state action restricting a woman's abortion choices does not seem to present a problem of sex discrimination.

In the mid-1970s, shortly after *Roe* was decided, the Court began to

apply the equal protection clause to questions of sex discrimination. In a series of precedent-setting decisions, the Court declared that it would scrutinize sex-based regulation closely and invalidate the legislation if it was premised on "old notions of role typing" or other vestiges of the separate spheres tradition[11] (such as the assumption that women are "child-rearers"[12] or the assumption that "the female [is] destined solely for the home and the rearing of the family"[13]). But the Court refused to analyze legislation regulating women's reproductive role similarly. In *Geduldig v. Aeillo*,[14] the Court ruled that a law governing pregnancy was not sex-based state action for purposes of equal protection doctrine, and thus did not warrant heightened constitutional scrutiny; on other occasions, the Court observed that the reality of reproductive differences between the sexes justified their differential regulatory treatment.[15]

While feminists protested the *Geduldig* decision, few were concerned about its implications for the abortion right. Initially, at least, neither legal academics nor litigators were interested in translating the abortion right into a sex equality framework. Feminist activists had little incentive to question *Roe* when the opinion represented an enormous victory for the movement—in result, if not in reasoning. In addition, so long as the movement was still seeking ratification of the Equal Rights Amendment, *Roe*'s silence about issues of sex equality had certain advantages, serving to isolate two controversial items on the feminist agenda (Law 1984:985 nn. 114–15, 986–87). Finally, it is not clear that in this period feminist lawyers had the critical tools necessary to translate *Roe* into an equality framework.

During the 1970s feminist legal theory substantially adhered to the comparative logic of the constitutional tradition. Advocates devoted their efforts to demonstrating the similarity of the sexes (Law 1984:975–82), even in those circumstances where it was necessary to deal with questions concerning pregnancy. For example, when the Court applied its reasoning in *Geduldig* to the nation's civil rights laws, holding in *General Electric Co. v. Gilbert*[16] that employment discrimination on the basis of pregnancy was not discrimination on the basis of sex, feminists sought to reverse the decision by amending Title VII of the Civil Rights Act of 1964[17] in accordance with principles of comparable treatment. The feminist lawyers who supported the Pregnancy Discrimination Amendment of 1978[18] argued that it was possible to identify certain forms of discriminatory bias by comparing the treatment of the pregnant employee to others similarly situated in their abil-

ity to work (W. Williams 1984–85:351–56). This model of functional comparability provided a standard that could protect pregnant employees from overtly exclusionary treatment in the workplace.[19] But because this standard of comparable treatment defined equality and discrimination in such a way as to obscure the distinctive physical and social characteristics of pregnancy,[20] it had little to say about protecting women's decisions concerning abortion.

By the 1980s *Roe* was engulfed in legal and political controversy, and the decision appeared increasingly vulnerable to reversal. An administration openly hostile to *Roe* was elected, and announced its commitment to select Supreme Court justices from the growing body of jurists and scholars who questioned the constitutional basis of the privacy right on which *Roe* rested (Tribe 1990:17–21). As jurisprudential criticism of the *Roe* decision mounted, legal academics began to explore alternative constitutional foundations for the abortion right.

During this same period there were developments in feminist jurisprudence that facilitated a new conceptualization of the abortion right. A number of feminist legal scholars began to repudiate equality theory focused on issues of similarity and difference and to argue for an inquiry focused on issues of hierarchy and subordination (MacKinnon 1979; West 1990:57–62). This approach removed a crucial stumbling block to analyzing abortion in a sex equality framework. No longer was it necessary to demonstrate sex discrimination by comparing the treatment of women to a group of similarly situated men; instead, as Catharine MacKinnon argued, it was enough to show that "the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status" (MacKinnon 1979:117). Indeed, as MacKinnon conceptualized the problem of inequality, gender-differentiated practices such as rape, pornography, and abortion-restrictive regulation played a central role in women's subordination (MacKinnon 1983a; 1983b:646–55; 1987:40–45). This paradigm shift facilitated equal protection challenges to abortion restrictions. For example, in 1984 Sylvia Law drew on MacKinnon's work in one of the first major articles to explore the abortion right in a sex equality framework, "Rethinking Sex and the Constitution." Law argued that because women's capacity to bear children represented a real and significant biological difference between the sexes, reproductive regulation should be evaluated under an anti-subordination framework; at the same time, she contended that the traditional comparative treatment approach to equal protection analysis

should be retained for all other forms of sex-based regulation (1984:1007–13).

From Privacy to Equality: Analyzing Abortion Restrictions as Caste Regulation

A growing number of constitutional scholars now defend the abortion right on sex equality grounds. This section will briefly consider the new sex equality arguments for abortion, and then analyze their judicial reception to date.

Sex Equality Arguments for the Abortion Right

As it is currently interpreted, the equal protection clause imposes virtually no restraints on state regulation of women's reproductive lives. Together, the Court's physiological view of reproduction and its comparative understanding of equality present formidable obstacles to equal protection analysis of abortion restrictions. Yet, analyzed in historical perspective, it is clear that restrictions on abortion are deeply at odds with the values and commitments informing the constitutional guarantee of equal protection. As our analysis of the nineteenth-century criminalization campaign reveals, laws restricting abortion do not just regulate women's bodies; they regulate women's roles. Because abortion restrictions can enforce caste or status relations, such laws implicate constitutional guarantees of equality as well as privacy.

While the Court often reasons comparatively in interpreting the equal protection clause of the fourteenth amendment, it has also drawn upon a cluster of concepts associated with social status or caste.[21] As Kenneth Karst observes: "[T]he equality that matters in our Supreme Court is not the simple abstraction that likes should be treated alike. . . . The equal citizenship principle that is the core of the fourteenth amendment . . . is presumptively violated when the organized society treats someone as an inferior, as part of a dependent caste, or as a nonparticipant" (Karst 1983:248; see also Karst 1977:48; Lawrence 1990:439).[22] Other scholars have employed the concept of caste to criticize the Court's interpretation of the equal protection clause as excessively formalist. Cass Sunstein argues that "understanding . . . the equal protection principle as an attack on irrational differentiation—treating likes differently—has been a large mistake for constitutional law, which might instead have understood the principle as an attack on caste legis-

lation. This understanding draws firm support from history" (Sunstein 1992:39 n. 143). Commentators who would replace the "equal treatment principle" with a mediating principle focused on issues of group subordination also invoke concepts associated with caste to describe the practices prohibited by the fourteenth amendment (Fiss 1976:157; MacKinnon 1979:117; Tribe 1988:1520).[23]

As this paper demonstrates, restrictions on abortion are readily analyzed as a form of caste regulation. In the nineteenth century, restrictions on abortion and contraception were enacted for the explicit purpose of forcing married women to bear children. Abortion restrictions were used to enforce the gender status norms of the separate spheres tradition; they perform a similar function today. Today, no less than in the past, restrictions on abortion force women to assume the status and perform the work of motherhood (Siegel 1992:371–77). Such restrictions do not merely inflict status-based injuries on women; they reflect status-based judgments about women. While the gendered judgments informing abortion restrictions are often obscured by the physiological discourses employed to justify the regulation, it is possible to see how gendered judgments shape the regulation by considering its justifications and structure in light of its social history (ibid., 359–68). For these reasons, the history of abortion-restrictive regulation calls into question its legitimacy under prevailing equal protection jurisprudence, which specifically condemns regulation of women's conduct rooted in archaic gender-based judgments about women's roles.[24] At the same time, because an historical analysis of abortion-restrictive regulation reveals its lineage and function as gender-caste regulation, this approach renders the regulation more amenable to review within the antisubordination framework proposed by critics of prevailing equal protection law.

An increasing number of scholars have advanced equal protection arguments against abortion restrictions. While these equality arguments do not specifically invoke the history of criminal abortion laws or analyze the regulation in a caste framework, they do emphasize that abortion restrictions are (1) a form of class legislation that (2) reflects status-based judgments about women and (3) inflicts status-based injuries on women. The new equal protection arguments point out that:

1. *Abortion restrictions single out women for an especially burdensome and invasive form of public regulation* (Law 1984:1015; Tribe 1988:1353–54; MacKinnon 1991:1321; Regan 1979:1623; Siegel 1992:354; Sunstein 1992:32–33).

2. *Abortion restrictions are gender-biased in justification and structure, reflecting diverse forms of status-based reasoning about women's roles.* When justifications for abortion restrictions are considered in a larger social context, it appears that they rest on a distinctive set of judgments about the unborn, not consistently expressed in other social settings and often controverted by other social practices (Tribe 1988:1354; Olsen 1989:126–30; Siegel 1992:318 n. 236, 365–66). The regulations are selective, imposing a duty of lifesaving on pregnant women not otherwise imposed on citizens or family members who have the capacity to save the life of another (Olsen 1989:129–30; Regan 1979; Siegel 1992:335–47, 366; Sunstein 1992:33–36). The selectivity of the compulsion is rarely noted because women are expected to perform the work of motherhood, and this role expectation makes reasonable, or invisible, the impositions of forced motherhood. Thus, in justification and structure, abortion restrictions reflect stereotypical assumptions about women's roles (Tribe 1988:1354; MacKinnon 1991:1320–21; Siegel 1992:361–68; Sunstein 1992:36–37).

3. *Restrictions on abortion injure women by compelling motherhood, forcing women to assume a role and to perform work that has long been used to subordinate them as a class.* The injuries inflicted on women by abortion restrictions are not attributable to nature, but instead reflect institutional practices of the society that would force women to bear children (MacKinnon 1991:1311–13; Siegel 1992:372–77). Because abortion-restrictive regulation coerces women to perform the work of motherhood without altering the conditions that continue to make such work a principal cause of their subordinate social status, it is a form of status-reinforcing state action that offends constitutional guarantees of equal protection (MacKinnon 1991:1319–21; Siegel 1992:377–79).

4. *Too often, legal restrictions on abortion do not save fetal lives but instead subject women, especially poor women, to unsafe, life-threatening medical procedures* (Olsen 1989:132; Sunstein 1992:37–39; cf. Tribe 1988:1353 and n. 111). If the state is genuinely interested in promoting the welfare of the unborn, it can and should do so by means that support women in the work of bearing and rearing children (MacKinnon 1991:1318–19; Siegel 1992:345–47, 380–81).

Judicial Reception of the Sex Equality Argument

In the years since *Roe* the Court has grown to better appreciate the gendered character of the abortion conflict. In part this is because the

Court has acquired experience interpreting the federal law prohibiting pregnancy discrimination in employment (Pregnancy Discrimination Act, 42 U.S.C. §2000e[k] [1993]).[25] But the Court's understanding of the abortion conflict has also been shaped by sex equality arguments for the abortion right.

In its most recent pronouncement on the abortion right, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[26] the Court upheld waiting-period restrictions on abortion, insisting that the state has the power to protect the sanctity of human life by requiring women who seek abortions to meditate on the consequences of their act. But it also reaffirmed women's privacy right, under *Roe*, to abort such pregnancies after due deliberation. In the *Casey* opinion, the Court identified constitutional reasons for protecting this privacy right not discussed in *Roe*. The Court observed that the state was obliged to respect a pregnant woman's decisions about abortion because her "suffering is too intimate and personal for the State to insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society" (*Casey*, 2807). In short, the Court ruled that laws prohibiting abortion offend the Constitution because they use the power of the state to impose traditional sex roles on women.

For similar reasons, the Court struck down a provision of the Pennsylvania statute requiring a married woman to notify her husband before obtaining an abortion. The Court was concerned that, in conflict-ridden marriages, forcing women to inform their husbands about an abortion might deter them from "procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases" (ibid., 2829), and it ruled that the state lacked authority to constrain women's choices this way. But the Court also condemned the spousal notice rule as a traditional form of gender-status regulation. The notice requirement "give[s] to a man the kind of dominion over his wife that parents exercise over their children" (ibid., 2831) and thus reflects a "common-law understanding of a woman's role within the family," harkening back to a time when "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state" (ibid., 2830–31, quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 [1873] [Bradley, J., concurring]). "These views," the Court observed, "are no longer consistent with our understanding of the family, the individual, or the Constitution" (ibid., 2831).

Justice Blackmun, who authored *Roe*, endorsed the gender-conscious reasoning of the *Casey* decision and drew upon it to advance the argument that restrictions on abortion offend constitutional guarantees of *equality* as well as privacy. In this equality argument, Justice Blackmun emphasized that abortion restrictions are gender-biased in impetus and impact. When the state restricts abortion, it exacts the work of motherhood from women without compensating their labor because it assumes that it is women's "natural" duty to perform such labor:

> The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. (ibid., 2847; citations and footnote omitted)

Restrictions on abortion do not stem solely from a desire to protect the unborn; they reflect—and enforce—judgments about women's roles. While the abortion controversy is typically discussed as a conflict between an individual's freedom of choice and the community's interest in protecting unborn life, Justice Blackmun's opinion reframes the conflict. The community's decision to intervene in women's lives is no longer presumptively benign; its decision to compel motherhood is presumptively suspect, one more instance of the sex-role restrictions imposed on women throughout American history.

While Justice Blackmun has recently retired from the Court, Justice Ruth Bader Ginsburg, who has recently joined the Court, shares the view that restrictions on abortion may violate constitutional guarantees of sex equality (Ginsburg 1985:1992). The Court as a whole is by no means ready to embrace the view that restrictions on abortion violate guarantees of equal protection;[27] but its opinion in *Casey* makes clear, as *Roe* did not, that "[t]he 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" (*Casey*, 2809).

What the Equality Argument Illuminates: Advantages of Analyzing Abortion Restrictions as Caste- or Status-Enforcing State Action

There are several advantages to analyzing abortion restrictions as caste- or status-enforcing state action. First, as this paper illustrates, the frame-

work creates a hermeneutic of suspicion: historical analysis can be combined with conventional methods of demonstrating discriminatory bias, to show that gender-, race-, and class-based judgments may animate or structure abortion restrictions—and so call into question the "benign" justifications conventionally offered for fetal-protective regulation. As *Casey* illustrates, the Court will oppose abortion restrictions when it believes they are gender biased in impetus or impact, even if the Court is not ready to adopt the equal protection clause as the constitutional basis for protecting the abortion right.

Second, the caste framework offers a basis for discriminating between subordinating and emancipating forms of state intervention in women's reproductive lives. Because the inquiry focuses attention on the normative premises of reproductive regulation and its practical impact on women's lives, it supplies a framework that reconciles feminist objections to state involvement in matters of reproduction with feminist demands for state involvement in matters of reproduction.

Third, the caste framework is useful because it shifts the focus of critical inquiry from the physical to the social relations of reproduction—from the maternal/fetal relation to the network of social relations in which women conceive, gestate, and raise children. In distinct but related ways, this paradigm shift is important for purposes of legal argumentation and political coalition-building. Focusing analysis on the social conditions of motherhood reveals how discriminatory bias can infect reproductive regulation; this exercise in turn demonstrates that this society's professed concern for the welfare of future generations is pervasively contradicted by the manner in which it treats children and the women who raise them. Thus, the very analysis that reveals discriminatory bias in abortion restrictions and other forms of fetal-protective regulation simultaneously advances an argument that this society needs to reform the social conditions of motherhood if it in fact intends to promote the welfare of future generations. In this way, objections to coercive interventions in women's reproductive lives lead to demands for supportive intervention in women's reproductive lives, so that legislative support for the Freedom of Choice Act,[28] adequate child care, the Family and Medical Leave Act,[29] and supplemental nutrition programs[30] are tied together, as they are not under a privacy analysis. When the abortion question is reconfigured in this fashion, it is possible to argue for abortion rights without seeming to oppose motherhood; the charge that

women seeking abortions devalue children and the work of raising them can be turned on its head and aimed at the society that would regulate their conduct. The argument for abortion rights is thus transformed into a dare and a demand: that this society honor the commitments putatively expressed in fetal-protective regulation by supporting those who are struggling to raise children.

Finally, there is value in the act of translation itself. Becoming multilingual about rights discourse facilitates a certain self-consciousness about advocacy. In this case, examining equality arguments for the abortion right can help identify elements of pro-choice rhetoric that are dysfunctional artifacts of early second-wave feminism. For example, some arguments in defense of the abortion right have equated freedom of choice with freedom from motherhood, without demanding the social reforms that would enable women to choose motherhood freely, i.e., without status-linked consequences for their welfare or autonomy. Moreover, defenses of the abortion right rarely address the ways that racism has shaped reproductive policies in this nation—focusing on birth-compelling regulation without acknowledging the history of birth-deterring regulation directed at poor peoples of color. Analyzing the case for abortion rights in a caste or equality framework illuminates these antimaternalist and race-essentialist tendencies in pro-choice arguments, and so explains why such arguments may alienate many women and men who otherwise might support the abortion right. For this reason and others, developing equality arguments for the abortion right can in fact reinvigorate privacy discourse. The exercise in translation should encourage us to identify the peculiar strengths of privacy discourse and to articulate privacy-based claims in ways that complement, rather than contradict, equality-based arguments for the abortion right (cf. Cohen 1992; Gavison 1992).

NOTES

1. 410 U.S. 113 (1973).

2. For some briefs written from the sex equality perspective, see Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); Brief of Canadian Women's Organizations, Amici Curiae in Support of Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490

(1989); Brief Amici Curiae on Behalf of the New Jersey Coalition for Battered Women et al., *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982).

3. While the common law required a wife to obtain her husband's consent to engage in many transactions, it did not require wives to obtain spousal consent for an abortion, thus treating the law of abortion in terms entirely distinct from the law of marriage. See Means 1968:428–34.

4. For analysis of the ways in which the reform of marital status law diverged from and converged with the criminalization of birth control practices in the postwar era, see Siegel 1992:319–23.

5. 208 U.S. 412 (1908).

6. For example, in 1873, when the Court upheld Myra Bradwell's exclusion from the Illinois bar, Justice Bradley justified the State's decision to prohibit women from practicing law by citing the contractual disabilities imposed on wives by the common law. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

7. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) ("[P]otential life is not less potential in the first weeks of pregnancy than it is at viability or afterward. . . . Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy").

8. For an analysis of how gendered assumptions structure putatively gender-neutral justifications for abortion restrictions, see Siegel 1992:350 and n., 362, 361–68.

9. See infra, text accompanying nn. 11–15.

10. See Tussman and tenBroek 1949:344 ("The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated").

11. See *Craig v. Boren*, 429 U.S. 190, 198 (1976); ibid., 198–99 (rejecting statutory schemes premised on "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' ") (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 [1975]).

12. *Califano v. Webster*, 430 U.S. 313, 317 (1977).

13. *Stanton*, 421 U.S. 7, 14.

14. 417 U.S. 484 (1974).

15. *Michael M. v. Superior Court*, 450 U.S. 464, 469, 471 (1981) (plurality opinion); ibid., 478 (Stewart J., concurring).

16. 1429 U.S. 125 (1976).

17. 42 U.S.C. §§2000e to 2000h–6 (1989).

18. Pub. L. No. 95–555, §1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. §2000e[k]) (1989) (amendment to federal employment discrimination law, providing that distinctions on the basis of pregnancy are distinctions on the basis of sex).

19. The comparable treatment standard defined equality formally, and so provided no basis for challenging "facially neutral" employment practices having an exclusionary impact on pregnant women. See Siegel 1985: 931–33.

20. A leading feminist proponent of the comparable treatment standard described its purpose in the following terms: "It sought to overcome the definition of the prototypical worker as male and to promote an integrated—and *androgynous*—prototype" (W. Williams 1984–85:363) (footnote omitted; emphasis added).

21. As Justice Brennan observed in *Plyler v. Doe*, 457 U.S. 202, 217 n. 14 (1982), "[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." See Strauss 1989:940–44 (equal protection jurisprudence concerned with issues of partiality, subordination, stigma, and second-class citizenship).

22. See Lawrence 1990:439 ("The holding in *Brown*—that racially segregated schools violate the equal protection clause—reflects the fact that segregation amounts to a demeaning, caste-creating practice").

23. See Fiss 1976:157 (condemning practices that inflict "status harm"); MacKinnon 1979:117 (condemning practices that "contribute to the maintenance of an underclass"); Tribe 1988:1520 (condemning practices that "perpetuate subordination [and] reflect a tradition of hostility toward an historically subjugated group").

24. See text accompanying nn. 11–13.

25. Recently, for example, in *UAW v. Johnson Controls*, 111 S.Ct. 1196 (1991), the Court held that a battery manufacturing plant could not protect the offspring of its employees by prohibiting fertile women from working in lead-exposed jobs; the Court ruled that such a policy, directed at fertile women, but not at fertile men, was a form of sex discrimination. While the *Johnson Controls* opinion rests in significant part on the text of the Pregnancy Discrimination Act, the opinion also reflects the Court's growing appreciation of the fact that fetal-protective regulation may reflect judgments about women's roles, and not simply their bodies. In *Johnson Controls*, the Court observed that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities" (1206) and cited *Muller v. Oregon* in support of this point.

26. 112 S.Ct. 2791 (1992).

27. It is noteworthy, for example, that in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), a case deciding whether federal civil rights laws apply to protesters at abortion clinics, Justice Scalia, writing for a majority of the Court, rejected the notion that "opposition to abortion can reasonably be presumed to reflect a sex-based intent" (761).

28. S. 25, 103d Cong., 1st sess. (1993); H.R. 25, 103d Cong., 1st sess. (1993); H.R. 1068, 103d Cong., 1st sess. (1993).

29. P. L. 103–03, 107 Stat. 6 (1993).

30. For example, the supplemental food program for needy women, infants, and children (commonly known by the acronym WIC), *Child Nutrition Act of 1966*, §17, U.S. Code, Vol. 42, §1786 (1989).