

## UPDATE: WHY THE EQUAL-PROTECTION CASE FOR ABORTION RIGHTS RISES OR FALLS WITH ROE'S RATIONALE

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*Editor's Note:* This is an update to an earlier Per Curiam post by the same author. See Sherif Girgis, *Why the Equal-Protection Case for Abortion Rights Rises or Falls with Roe's Rationale*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 13, available at <https://www.harvard-jlpp.com/2451-2/>. The original post was written in response to the leaked draft opinion in *Dobbs v. Jackson Women's Health Organization*; this updated post now refers to the final *Dobbs* decision and various opinions. Further, this update includes an additional point against the claim that abortion bans necessarily reflect impermissible attitudes towards women (the paragraph on page 7 beginning with the word "Second").

For nearly 50 years, legal scholars who favor *Roe v. Wade's*<sup>2</sup> outcome but scorn its rationale have tried to find firmer footing for a constitutional abortion right. *Roe* and its follow-on case, *Planned Parenthood v. Casey*,<sup>3</sup> claimed to derive such a right from the Due Process Clause. That proved deeply controversial, for reasons laid out in *Dobbs v. Jackson Women's Health Organization*.<sup>4</sup> Most prochoice critics of *Roe* would have relied instead on the Equal Protection Clause. Scores of essays on abortion rights have endorsed, developed, and refined the equality arguments over decades.<sup>5</sup> A book of proposals about what *Roe* should have said is filled with them.<sup>6</sup> A few separate judicial opinions are

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<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> 505 U.S. 833 (1992).

<sup>4</sup> See 142 S. Ct. 2228, 2248–60, 2265–70 (2022).

<sup>5</sup> See generally Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

<sup>6</sup> See Jack M. Balkin, *Introduction*, in WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin, ed., 2007).

sprinkled with them.<sup>7</sup> The *Dobbs* dissent hints at them.<sup>8</sup> But in the end, I think, the equality rationale is only as strong as *Roe*'s. They rise or fall together.

The equality arguments for abortion rights come in two varieties. A leading proponent of one variety, from whom I've learned (and to whom I owe) a great deal, is Professor Reva Siegel, who co-filed an amicus brief in *Dobbs*.<sup>9</sup> She argues that we cannot explain prolife states' policies in terms of their professed concern for fetal life alone. Those policies also reflect invidious motivations, like stereotypes about women's "proper" role as mothers before all else.<sup>10</sup> Other equal-protection arguments, including Professor Jack Balkin's, focus less on motivation than on impact.<sup>11</sup> They suggest that prolife states impose burdens on women they would never tolerate on men. Either way, the idea is that abortion bans—viewed together with prolife states' other policies—reflect or impose sexist double standards.

Aside from Erika Bachiochi's feminist critique of the equality arguments for abortion rights,<sup>12</sup> there has been a dearth of sustained responses. And *Dobbs*, for its part, simply finds the equality arguments foreclosed<sup>13</sup> by two cases holding that laws regulating sex-specific procedures don't trigger scrutiny absent some animus<sup>14</sup> and that we needn't posit animus to explain abortion laws.<sup>15</sup> Critics respond that this answer gives the equality arguments short shrift and refuses to revisit two precedents (including *Geduldig*,<sup>16</sup> which

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<sup>7</sup> See generally Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 U.C.L.A. REV. DISC. 160 (2013).

<sup>8</sup> See, e.g., *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2318 (Breyer, Sotomayor, & Kagan, JJ, dissenting).

<sup>9</sup> Brief of Equal Protection Constitutional Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, [https://www.supremecourt.gov/DocketPDF/19/19-1392/193048/20210920164113157\\_19-1392%20bsac%20Equal%20Protection%20Constitutional%20Law%20Scholars%20Final.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1392/193048/20210920164113157_19-1392%20bsac%20Equal%20Protection%20Constitutional%20Law%20Scholars%20Final.pdf) (hereinafter "Amicus Brief").

<sup>10</sup> See generally Siegel, *supra* note 5.

<sup>11</sup> See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291 (2007).

<sup>12</sup> See Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 893 (2011) (arguing 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").

<sup>13</sup> *Dobbs*, 142 S. Ct. at 2235.

<sup>14</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>15</sup> *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

<sup>16</sup> *Supra* note 14.

for some has been overruled in the court of history<sup>17</sup>) in an opinion already rejecting much bigger ones.<sup>18</sup>

To be fair to the *Dobbs* majority, the equal protection arguments depart not only from two cases but from the Court's global framework for equal protection law — with its focus on disparate treatment rather than impact and on classifications as triggers for scrutiny. Balkin concedes as much.<sup>19</sup> But he says that departing from these doctrines would take us closer to the Constitution's original meaning.<sup>20</sup> Here I will assume that he is right.

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<sup>17</sup> Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (declaring that *Korematsu v. United States*, 323 U.S. 214 (1944) has been “overruled in the court of history”).

<sup>18</sup> Comments of Mary Ziegler, *The Dobbs v. Jackson Case – Part 3, We the People Podcast*, <https://www.stitcher.com/show/we-the-people/episode/the-dobbs-v-jackson-case-part-3-203140026>.

<sup>19</sup> See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 325 (2007). Professor Reva Siegel argues that even under current doctrine, a law classifies by sex — triggering heightened scrutiny — if it is a “pregnancy-based regulation[.]” Amicus Brief, *supra* note 9, at 9. But I do not see how a general feticide law — with no special penalty but also no exception for feticide resulting from an abortion requested by the pregnant woman — classifies by sex at all. See Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm”*, 64 CASE W. RES. L. REV. 1045, 1049 (2014) (Supreme Court applies heightened scrutiny only when a policy requires “officials, in allocating rights and burdens, to determine” certain traits’ presence or absence “in specific cases.”); cf. Benjamin Eidelson, *Dimensional Disparate Treatment*, at 42–44 (forthcoming *Southern California Law Review*), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3915787](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915787) (arguing that discrimination based on pregnancy is not, as a matter of ordinary meaning, discrimination based on sex).

Siegel elaborates that abortion laws classify by sex because they “single out women for regulation.” Siegel, et al., *Equal Protection in Dobbs and Beyond*, 32 COLUM. J. OF GENDER & THE LAW at 13 (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4115569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115569). Of course, abortion regulations do not single out women in the sense of prohibiting only women from performing abortions. To the contrary, the only differential treatment that contemporary abortion regulations show to any women is to *exempt* from liability the women who seek abortions (as opposed to the people who perform them). Obviously, a general feticide law will have a disparate impact on pregnant women if its main effect, in practice, is to prevent abortions requested by women; preventing those procedures burdens women far more than men. And perhaps this disparate impact *should*, in an ideal world, suffice to trigger scrutiny. The point is just that disparate impact does not make for a suspect classification under current doctrine — not for sex and not for any other protected trait.

Finally, Siegel suggests that “[e]ven if legislators drafted an abortion ban that expressly applied to all who become pregnant, that ban would be sex-based and unconstitutional if it were based on the sex-role stereotype that the state can coerce persons who are pregnant to continue pregnancy without recompense or support.” *Id.* But to ascribe abortion laws to such stereotypes is to assume just what Siegel’s equality arguments mean to prove (and what, I suggest below, they have not proven). In other words, the idea that abortion laws rest on unlawful stereotypes is the intended conclusion of Siegel’s analysis, not a premise — not a basis for triggering *heightened scrutiny* of such laws.

<sup>20</sup> Balkin, *supra* note 19, at 318–19, 325.

Specifically, as needed for both the unfair-motivations and unfair-impact versions of the argument, I will assume a doctrinal framework in which courts may reach equal-protection judgments by studying the whole body of a state's statutory (and common?) law to draw (1) inferences about the state's systematic motivations toward particular groups and (2) counterfactual judgments about how the state's laws might change if the burdens they imposed fell on different groups than they currently do. Granting all of this, I think the equality arguments are vulnerable to an objection not based on precedent.

To preview: Despite their professed goal, the equality arguments ultimately have to assume that it is not even permissible for states to believe that fetal life is innocent human life. They must assume that the *Constitution itself* somewhere mandates a position on fetal moral worth—one that discounts early fetuses. But this was the weakest and most widely criticized premise of *Roe* and *Casey*. The equality arguments would thus be no stronger than *Roe* and *Casey's* rationale. And so, for the *Dobbs* majority's purposes, they would fail for the same reasons. In fact, the premise they share with *Roe* and *Casey* would do most of the work in the equality arguments for abortion. There would be little left to be done by the appeal to equality itself.

For background, start with *Roe* and *Casey's* rationale (since equal-protection arguments are supposed to improve on it). In their own telling, *Roe* and *Casey* rested at bottom on a balancing of two interests: the interest in aborting and the interest in protecting fetal life. They held that the moral balance tips toward the fetus (enough to justify protection) only at viability.<sup>21</sup> And they ascribed this moral discounting of pre-viable fetal worth to the Constitution. But for this they gave no historical or precedential support. Effectively, then, *Roe* and *Casey* hang on the surprising premise that the Due Process Clause takes a position found nowhere in our history on when the human fetus counts enough to be protected—that the Clause itself rejects higher estimations of pre-viable fetal worth.

Few appreciate that it was *Roe's* defense of this *particular* premise that John Hart Ely and Laurence Tribe so famously scorned. Ely said *Roe's* argument for discounting pre-viable moral worth was transparently circular, “mistak[ing] a definition [of viability] for a syllogism,”<sup>22</sup> and Tribe wrote that one has to “read[] the Court's explanation” for this premise “several times before becoming convinced that nothing has inadvertently been omitted.”<sup>23</sup> And *Dobbs's* historical analysis argues that the Constitution does *not* enshrine

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<sup>21</sup> See Sherif Girgis, *Misreading and Transforming Casey for Dobbs*, 20 GEO. J. L. & PUB. POL'Y 331, 340–41 & n.46 (2022).

<sup>22</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973).

<sup>23</sup> Laurene H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

*Roe* and *Casey*'s moral premise that pre-viable fetuses lack sufficient worth.<sup>24</sup> That is why *Dobbs* rejects any attempt to "impose on the people a particular theory about when the rights of personhood begin."<sup>25</sup> (Note that states could be constitutionally permitted to regard fetal life as human life even if they aren't *required* to do so by the Fourteenth Amendment—i.e., even if fetuses are not constitutional "persons." That is clear from the example set by *Roe* and *Casey* themselves,<sup>26</sup> not to mention the fact that some 40 states permissibly treat *non*-abortion feticide as a crime, most often as homicide.<sup>27</sup>) So if the equality arguments are to move the ball—in particular, if they are to escape any rebuttals on the merits that *Dobbs* makes against *Roe* and *Casey*—they must avoid resting on this constitutional discounting of early fetal worth.

Some aspire to do that. The equality arguments summarized by Professor Reva Siegel and Professor Neil Siegel<sup>28</sup> (and separately by Reva Siegel<sup>29</sup>) recognize a "bona fide interest in protecting potential life."<sup>30</sup> Granting that abortion bans are partly "about" protecting "the unborn,"<sup>31</sup> these arguments do not say that this motivation is off-limits or insufficient under the Due Process Clause. (So they see no *inherent* constitutional problem with regarding fetal life as innocent human life weighty enough to justify abortion restrictions.) Instead, equality arguments submit that prolife states' policies *also* reflect *other* motivations—or have *effects*—that *are* forbidden, but by a different clause: equal protection. Specifically, as Siegel and Siegel sort them, these arguments rest on one of two broad claims: that (1) prolife states unjustly burden women in ways they would never burden men, and that (2) prolife states must be motivated by biased ideas about women. I'll take them in turn.

1. "Gendered impact of abortion restrictions":<sup>32</sup> The first argument is that by banning abortion without offsetting the burden to women in certain ways (e.g., without "providing

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<sup>24</sup> See *Dobbs*, 142 S. Ct. at 2248–60, 2265–70.

<sup>25</sup> *Id.* at 2261.

<sup>26</sup> *Roe* and *Casey* taught that saving *X*'s life can be an interest of the highest order—a *compelling* interest—even if *X* isn't a person; they said just that of viable fetuses. Under *Roe* and *Casey*, post-viability abortion bans were permitted (though they burden a right) because they serve a compelling interest—but not required, because the late-term fetus isn't a constitutional person. See Girgis, *Misreading*, *supra* note 21, at 340–41 & n.46.

<sup>27</sup> See National Council of State Legislatures, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women* (May 1, 2018), <https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>

<sup>28</sup> See generally Siegel & Siegel, *supra* note 7.

<sup>29</sup> See generally Siegel, *supra* note 5.

<sup>30</sup> Siegel & Siegel, *supra* note 7, at 163.

<sup>31</sup> *Id.*

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

material resources to support” mothers<sup>33</sup>), states would impose X burden on women that they would never impose on men.

But I don’t see how this argument could really grant the premise that it is constitutionally permissible for states to see fetal life as innocent human life (as needed if it’s to improve on *Roe* and *Casey*). To grant this and still establish a sexist double standard, the argument would have to identify situations where prolife states would lift burdens like X from men (but not from women) at the cost of *legally permitting the intentional taking of innocent life or something morally comparable*. And it’s hard to see how one could do that. What policy protects men’s interests at the cost of legally permitting the intentional killing of innocents or anything morally close to it?

The costs of pregnancy cannot be trivialized. And given the limits of our technology, some of those costs cannot be transferred to another person or a machine. But if the equal-protection arguments are to add anything to *Roe* and *Casey*, they must allow that the costs of permitting abortion might also be grave—possibly as grave as permitting the intentional killing of innocent human life. And assuming those are the costs, we would have to find something similarly morally egregious that prolife states *would* tolerate to benefit *men*, if we’re to establish a double standard.<sup>34</sup>

Compare conscription. Its costs—separation from friends, family, and work, and possibly death—fall on able-bodied adults. That doesn’t mean that it reflects animus against the able-bodied relative to the disabled. That’s because we couldn’t transfer those costs even if we wanted to; we have very weighty reasons to tolerate them; and there’s no evidence that we would refuse to accept similar tradeoffs when the disabled are the ones bearing the costs. (Just the opposite, unfortunately.) So too here, assuming—as any promising equality argument should—that the reasons to tolerate the burdens of abortion bans may well be as weighty as prolife states think.

2. “Constitutionally suspect judgments about women”:<sup>35</sup> A similar issue plagues the second family of equality arguments, each of which reasons as follows: By banning abortion but failing to protect human life in XYZ other ways (e.g., reducing abortion rates by providing “appropriate and effective sex education,” or enhancing health outcomes by “provid[ing] assistance to needy families”<sup>36</sup>), states manifest not only concern for fetal life

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<sup>33</sup> Siegel, *supra* note 5, at 822.

<sup>34</sup> Or we would have to find other combinations of cost and benefit that reveal that prolife states in particular apply less generous tradeoff rates to women.

<sup>35</sup> Siegel & Siegel, *supra* note 7, at 163.

<sup>36</sup> Amicus Brief, *supra* note 9, at 20.

but also impermissible attitudes toward women (e.g., “stereotypes about women’s roles as child bearers before all else”<sup>37</sup>).

In other words, prolife states are too callous toward human life in other contexts for their abortion bans to reflect a pure (admittedly legitimate) concern for fetal life, rather than also reflecting suspect judgments about women.

But *first*, to establish that, this argument would have to identify situations where prolife states not only fail to effectively *promote* life in XYZ ways, but do something as callous toward life as *withdrawing the protection of homicide laws from a class of innocents*. Is failing to subsidize certain forms of health care—or failing to subsidize childcare, or for that matter failing to subsidize childcare when this will make someone marginally likelier to get an abortion—the moral equivalent of denying the protection of homicide laws to a class of innocents? It seems not to be.

Yet if we *cannot* point to such moral equivalents, we have not shown that prolife states’ policies must have a hidden, invidious motivation.

To be clear, I think no matter what abortion policies we have, we can and should do more—much more—to support pregnant women, parents, and children. The narrow analytic point is just that withdrawing the protection of homicide laws from (what are conceded *arguendo* to be) innocent human lives is generally worse than failing to provide resources. With born persons, for instance, we must protect everyone against homicide, but we don’t automatically give everyone every vital resource in every context—due to scarcity and costs, the unintended effects of some redistributive policies, competing policy needs, and other tradeoffs. So *if* states can see abortion as the intentional killing of innocents (as equality arguments mean to grant), they can see a world of difference between withdrawing the protection of homicide laws from the unborn, and giving the born and unborn this or that form of public support. We needn’t posit that this difference is driven by suspect judgments about women.

*Second*, as to at least some of the judgments said to make abortion laws infirm, even the very premise that those notions are *suspect*, may presuppose that it’s irrational to see the unborn as persons. Take the notion—which equality arguments identify as an invidious gender stereotype behind many abortion laws—that women ought to bear the burdens of pregnancy (except where those burdens are unusually severe).<sup>38</sup> Suppose it

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<sup>37</sup> *Id.*

<sup>38</sup> Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 328 & n.275 (1992).

turns out that this notion flows *entirely* from two other ideas: that (1) the unborn are moral persons and that (2) we have an enforceable duty to bear the ordinary burdens of not causing moral persons'—or at least our own children's—deaths. Now, idea (2) seems constitutionally unobjectionable. Thus, if idea (1) is also permissible, surely so is the mere product of both ideas—the notion that women should bear the burdens of pregnancy (when those burdens are not unusual). Conversely, then, to say that this last notion is suspect, one would have to say that states *cannot* embrace idea (1)—the idea that the unborn are moral persons.

*Third*, while we may have more direct evidence that some abortion opponents harbor what are undeniably invidious attitudes toward women, we also have sociological and historical evidence that many do not. Sociologically, there are the tiny gender differences in public opinion on abortion and high proportion of prolife women. From the 1970s onward, the gender gap on abortion has consistently been smaller than on almost any other political issue.<sup>39</sup> If suspect judgements about women drive prolife views, then women hold constitutionally infirm views about women at nearly the same rate as men. And in absolute terms, just under half of all American women are guilty of misogyny and plagued by false consciousness. The fact that prolife or antiabortion views are barely more common among men than women, and are quite common among women, is a serious point against suspect-judgment arguments. And from a historical perspective, so is the fact that the pro-life movement has deep roots in the civil-rights movement—in New Deal-era civil-rights crusaders who “viewed their campaign as an effort to extend state protections to the rights of a defenseless minority (in this case, the unborn).”<sup>40</sup>

*Finally*, and more generally, there is no (other) context where anyone thinks that states must license something they permissibly see as comparable to the intentional killing of one group, in order to secure equality for another group. Nor is there any context where we would even ask whether equality required such a thing.

So the equality arguments must, after all, presuppose that it is *not* permissible for states to see fetuses as innocent human lives on a par with the born—that states *must* discount the intentional killing of fetal lives. But then equality arguments will need a defense of this further, purely moral judgment about fetal worth. That defense will need to improve on *Roe* and *Casey*'s plainly circular one. It will need to trace this view of fetal

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<sup>39</sup> See Frank Newport, *Men, Women Generally Hold Similar Abortion Attitudes*, GALLUP (June 14, 2018), <https://news.gallup.com/poll/235646/men-women-generally-hold-similar-abortion-attitudes.aspx>; see also Matthew Yglesias, *Men and Women Have Similar Views on Abortion*, VOX (May 20, 2019), <https://www.vox.com/2019/5/20/18629644/abortion-gender-gap-public-opinion>.

<sup>40</sup> DANIEL K. WILLIAMS, *DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE ROE V. WADE* 4 (2019).

moral worth to some part of the Constitution, in order to justify its imposition by courts. And if an argument did all of that, I don't see what further work would remain to be done by appeals to equality. A constitutional abortion right would already have been established.

Those convinced by Peter Westen's argument that appeals to equality *never* do the work in an argument about rights will be unsurprised if it holds true here.<sup>41</sup>

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Even granting the equality arguments' reading of the Equal Protection Clause, their proposed doctrines for implementing it, and their rejection of *Geduldig* and other precedents, I think the arguments fail to establish an abortion right unless they assume with *Roe* and *Casey* that the Constitution itself takes a position discounting fetal moral worth. If *Dobbs*'s historical analysis proves that the Constitution does no such thing, it refutes the equality arguments, too.

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<sup>41</sup> Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).