

# THE PROPOSED EQUAL PROTECTION FIX FOR ABORTION LAW: REFLECTIONS ON CITIZENSHIP, GENDER, AND THE CONSTITUTION

ANITA L. ALLEN\*

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## I. INTRODUCTION

This essay links constitutional abortion rights, ideals of citizenship, and ideals of gender equality. It begins with a pair of endorsements and then critically assesses three popular arguments scholars offer in support of the view that a proposed doctrine of equal protection is superior to the Supreme Court's doctrine of privacy-related liberty, as the constitutional basis for abortion rights.

In Part I, I endorse a claim that many influential lawyers and judges regard as a fraud. The claim, implicit in abortion rights advocacy, is that abortion rights are a precondition of full or "first class" citizenship for women. In Part II, I endorse argu-

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\* Professor of Law, Georgetown Law Center. This essay includes remarks I made on March 5, 1994, at the Federalist Society Symposium at the University of Virginia, where I participated on a panel entitled "The Constitution on Sex." It also includes my lecture at a Brown University Conference, "Equal Protection and its Critics: The Law and Politics of First Class Citizenship," held on March 11, 1994. I am indebted to Norma Schrock and Elizabeth Allen for legal research, and to Professor Nancy Rosenblum for critical commentary.

ments for abortion premised on the constitutional embodiment of the ideal of political equality and full citizenship—the Equal Protection Clause of the Fourteenth Amendment. Having previously defended the Supreme Court's doctrine that privacy rights against restrictive abortion laws flow from the Fourteenth Amendment guarantee of liberty,<sup>1</sup> in this essay I embrace a proposed equal protection doctrine, as well.

Abortion policy implicates women's privacy and equality.<sup>2</sup> Advocates for abortion rights have sometimes implied the confluence of privacy and equality concerns by arguing for gender equality under the banner of the privacy doctrine.<sup>3</sup> Many have made privacy arguments with the goal of gender equality in mind; many have made equality arguments with the goal of increasing women's privacy-related liberty. A constitutional jurisprudence of abortion that expressly draws on the Fourteenth Amendment's language of "liberty" and "equal protection" would meld with the reality that many of the root concerns behind privacy arguments are not different from, or in opposition to, the root concerns of the gender equality arguments.<sup>4</sup>

1. See Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987); *Tribe's Judicious Feminism*, 44 STAN. L. REV. 179 (1991); *Autonomy's Magic Wand*, 72 B.U. L. REV. 683 (1992); *In the Wake of the Abortion Decision; For Some Women, Some Solace, New Concern*, LEGAL TIMES, July 6, 1992, at 23; *Court Disables Disputed Legacy of Privacy Right*, NAT'L L.J., August 13, 1990, at S8, S14; Anita L. Allen, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988).

2. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265, 377-379 (1992) ("Restrictions on abortion thus offend constitutional guarantees of equal protection, not simply because of the status-based injuries they inflict on women [that is, compromising opportunities for education and employment], but also because of the status-based attitudes about women they reflect." *Id.* at 379). Siegel astutely notes that "antiabortion laws . . . like antimiscegenation laws, have moorings in both privacy and equal protection." *Id.* at 263. See *Webster v. Reproductive Services*, No. 88-605 in the Supreme Court of the United States, Brief for the National Coalition Against Domestic Violence as Amici Curiae Supporting Appellees, 11 WOMEN'S RTS. L. REP. 281, 285 (1989) ("the Court should not overrule . . . *Roe* without considering . . . Equal Protection Clause argument[s]").

*Cf.* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L. J. 599 (1986) (asserting that the closely associated domain of fetal rights also implicates both the privacy and equality of women).

3. See, e.g., *Webster v. Reproductive Health Services*, No. 88-605 in the Supreme Court of the United States, Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, 11 WOMEN'S RTS. L. REP. 249, 260 (1989) ("restrictive abortion laws deprive women of their freedom to control the course of their lives and restrict their ability to participate in society equally with men"); *cf.* Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 110 (1989) ("The Court's privacy analysis . . . appeals to women's desire for equality and for sexual freedom").

4. In one respect privacy and equal protection concerns are quite distinct. The equal protection case for abortion presupposes gender differences and would therefore evaporate if everyone were of the same gender and a potential childbearer. By contrast,

My perspective endorsing the equal protection argument for abortion rights is "additive."<sup>5</sup> Since "any principled argument that may help safeguard women's freedom should be advanced,"<sup>6</sup> the equal protection argument should be added to the list of plausible constitutional arguments for abortion rights. Thus, the complete list of constitutional abortion arguments arguably includes distinct Fourteenth,<sup>7</sup> Thirteenth,<sup>8</sup> and First Amendment<sup>9</sup> arguments. A competing perspective supporting the Equal Protection Clause argument for abortion might be dubbed "fixative." This perspective maintains that the Fourteenth Amendment privacy-related liberty argument is seriously flawed,<sup>10</sup> and perhaps even antagonistic to ideals of gender equality and full citizenship for women.<sup>11</sup> The fixative perspective contends that an Equal Protection Clause argument could salvage the constitutional case for reproductive rights; privacy jurisprudence should yield to a conceptually, jurisprudentially, and politically superior equal protection alternative.

An Equal Protection Clause "fix" is tempting, in light of the actual and perceived limitations of the abortion privacy doc-

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the privacy case for abortion does not necessarily evaporate in the absence of gender differences. Limited government, along with opportunities for personal expression, self-development, intimacy, and repose would be important even in a hypothetical world in which all citizens were of the same gender and could bear children.

5. Professor Nancy Rosenblum suggested the term "additive" to characterize my position on the relationship of privacy and equality arguments. She suggested another apt characterization of my perspective: "co-dependency." Privacy and equal protection are mutually dependent, in my view, inasmuch as privacy rights can promote equality and equal protection can promote privacy and privacy-related liberties.

6. Linda McClain, *The Poverty of "Privacy?"*, 3 COLUM. J. GENDER & L. 119, 121-22 (1992) (defending abortion privacy jurisprudence while expressly reserving the "privacy versus equality" challenge).

7. Many charge that the language of "liberty" in the Fourteenth Amendment does not support the abortion privacy doctrine at all. I do not tackle their charge head-on here. Were they correct, however, any valid equal protection argument for abortion rights would stand as the lone Fourteenth Amendment argument. *But see* Sheldon Gelman, "Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights, 78 MINN. L. REV. 585 (1994) (arguing that the word "life" in the Fourteenth Amendment is a textual hook on which abortion law justifiably hangs its constitutional hat). Although I endorse equal protection approaches in this essay, I do not mount my own defense of them here.

8. *See generally* Andrew Koppleman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1984).

9. *See* Rachel Pine & Sylvia Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 418 (1992).

10. *See, e.g.*, Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 29-44 (1992). *See also* Ruth Colker, *Abortion and Dialogue: Pro-Choice and Pro-Life in American Law*, 63 TUL. L. REV. 1363 (1992).

11. *See generally*, Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L. J. 1281, 1311 (1991).

trine.<sup>12</sup> However, some of the most popular arguments employed to sustain claims of superiority for the Equal Protection Clause argument for abortion rights do not withstand close analysis. In Part III of this essay, I analyze three claims made by Cass Sunstein and others, starting with the claim that "conventional privacy" has nothing to do with abortion rights.<sup>13</sup> I maintain that ordinary understandings of privacy bear greatly on the purposes and conceptualization of abortion rights.<sup>14</sup> Next, I assess and reject Sunstein's further claim that privacy jurisprudence is inferior because it evidences disrespect for the unborn in a way equality jurisprudence does not.<sup>15</sup> I argue that privacy and equality jurisprudence are similarly neutral or non-neutral on the question of fetal humanity or personhood. Finally, I contend that the Supreme Court's abortion funding decisions are not straightforwardly attributable to the privacy doctrine.<sup>16</sup> There is reason to think the same outcome for poor women could have been reached, and is likely to have been reached, under an equal protection doctrine.

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12. Cf. John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (arguing that privacy doctrine resurrects untenable substantive due process doctrines); also cf. Olsen, *supra* note 3, at 117 ("Court should extend 'privacy' doctrine to women, even as we pursue efforts to dismantle the false dichotomies [of public and private] underlying it.").

13. See Sunstein, *supra* note 10, at 31 ("an abortion decision does not involve conventional privacy at all").

14. "Privacy" has a broad and varied usage. Scholars who believe abortion relates to privacy include both those who tend to characterize the meaning and value of privacy in terms relating to the preconditions of human dignity, personal responsibility, personal expression, self-development, intimacy, and repose; and those who emphasize understandings tied to the political value of limited, non-totalitarian government. Both emphases capture an important part of what male and female citizens merit. See generally, Anita L. Allen, *Uneasy Access*, *supra* note 1, at 5-25. But see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (contrasting personhood-related and limited government-related conceptions of privacy and rejecting the former emphasis).

15. See Sunstein, *supra* note 10, at 39-40 ("unlike privacy or liberty arguments, [equal protection arguments] do not devalue the legitimate interest in protecting the fetus, and indeed make it unnecessary to take any position on the moral and political status of unborn life"). See also Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1046 n.131 ("[P]ro-choice arguments often seem disrespectful of the seriousness of the pro-life position.").

16. See Olsen, *supra* note 3, at 113 ("The abortion funding cases highlight . . . limitations of the privacy analysis."); Deborah Rhode, *Reproductive Freedom*, in FEMINIST JURISPRUDENCE 313, 305-321 (Patricia Smith ed., 1993) ("The focus on privacy also has helped rationalize the Supreme Court's subsequent decisions upholding withdrawal of public funds for abortion services."); cf. Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 338 (1985) ("The Court's description of the woman's right as grounded in 'privacy,' rather than in the relationship of women to men, might give a surface implausibility to a refusal to provide public funding.").

This essay will not mount a complete defense of privacy-oriented and equal protection-oriented abortion jurisprudence. A defense of equal protection jurisprudence would necessitate coming to terms with *Geduldig v. Aiello*,<sup>17</sup> and the claim that the Equal Protection Clause is not a proper vehicle for addressing the overall inequality of women in society. A defense of privacy jurisprudence would include an understanding of why one need not reject *Roe v. Wade*<sup>18</sup> and *Planned Parenthood v. Casey*<sup>19</sup> as illegitimate substantive due process,<sup>20</sup> as an abandonment of family protection,<sup>21</sup> as "rootless activism,"<sup>22</sup> or as lacking a constitutional foundation.<sup>23</sup> Except by insinuation, I will not much broach that large task here. Nor do I attempt a complete defense of privacy jurisprudence against all of the important feminist criticisms.<sup>24</sup> I have undertaken elsewhere to reply to Catharine MacKinnon's well-known concerns that abortion law puts the cart of privacy before the horse of equality,<sup>25</sup> urging that privacy jurisprudence is not always conservative of a regime of affluent, white male-domination.<sup>26</sup> Linda McClain<sup>27</sup> and Dorothy Roberts<sup>28</sup> seem to agree with my basic assessment of MacKinnon and moreover, have thoughtfully assessed concerns of the sort voiced by Joan Williams,<sup>29</sup> Robin West,<sup>30</sup> and Ruth Colker<sup>31</sup> that privacy jurisprudence is in conflict with women's responsibilities or ideal ethics of care and compassion.<sup>32</sup>

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17. 417 U.S. 484 (1973).

18. 410 U.S. 113 (1972) (Blackmun, J.).

19. 112 S. Ct. 2791 (1992) (O'Connor, J.).

20. See generally Ely, *supra* note 12.

21. See David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975 (1992).

22. See Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 198-217 (1986).

23. Cf. Gelman, *supra* note 7 (writing that the original meaning of "liberty" in the Constitution is incompatible with the Court's abortion privacy jurisprudence).

24. See generally, Olsen, *supra* note 3, at 110-111 (privacy jurisprudence both attracts and repels women and feminists); see also Allen, *Taking Liberties*, *supra* note 1, at 470-473.

25. See generally MacKinnon, *supra* note 11, at 1289.

26. See Allen, *Uneasy Access*, *supra* note 1, at 54-81.

27. See generally McClain, *supra* note 6.

28. See generally Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991).

29. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1584 (1991).

30. See Robin West, *Forward: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 79-85 (1990).

31. See Colker, *supra* note 15, at 1050-1074.

32. Legal feminists are not alone in suggesting that privacy jurisprudence fails women. See, e.g., Smolin, *supra* note 21, at 1020 ("Privacy rhetorically claims to empower women

The specific goal for this essay is to deflate the previously identified trio of arguments commonly used by feminists and other theorists of varied stripes to support the thesis that equal protection is superior to privacy as a constitutional framework for abortion law. I believe abortion rights are a precondition of full citizenship for women and disagree with those who believe privacy-based abortion jurisprudence is more of an impediment than an aid. If it is true that privacy jurisprudence has delayed women's journey toward first-class citizenship,<sup>33</sup> it is unclear that an equal protection doctrine would serve as a surer ticket.

## II. SECOND-CLASS CITIZENSHIP

### A. *The Constitution on Gender*

Constitutional law treats gender. But how does it treat gender and how justly? Does it treat women as constitutional persons and full citizens? The men who wrote the original Constitution, the Bill of Rights, and the Thirteenth and Fourteenth Amendments did not intend a general release of women from subordinate and domestic roles. This history has led some to conclude that the text of the Constitution provides no authority for courts to invalidate legislation that discriminates on the basis of gender, or that compromises women's lives, liberty, and property more so than men's. Yet, one need not single out the jurisprudence of gender equality as egregious judicial activism. Scholars and judges commonly locate judicial authority in principled interpretations of the bare, abstract language of the Constitution.

A general principle of formal equality—a principle that just institutions treat like cases alike—is arguably the core meaning of the Equal Protection Clause of the Fourteenth Amendment.<sup>34</sup> Blacks and whites should be treated alike because they share a common humanity; similarly, men and women should be treated

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[but] it actually appears to increase the medical profession's domination over the pregnant woman's person and body.").

33. Cf. James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 277 (1993) (suggesting that Cass Sunstein's and Catharine MacKinnon's preference for equal protection argument may be based on the idea that constitutional privacy is actually a hindrance rather than a precondition of equal citizenship).

34. *But see* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982) (arguing that although appeals to equality are supplanting appeals to rights, equality is a purely formal, superfluous concept "should be banished from moral and legal discourse as an explanatory norm"). *See also* Peter Westen, *To Lure the Tarantula from its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983), responding to Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

alike, because they, too, share a common humanity. Of course, neither the races nor the sexes are alike in every regard. Respect for the principle of formal equality presumably squares with disparate treatment of men and women to the extent of relevant gender-specific biological differences.

It has proven impossible to demonstrate that gender-specific differences are relevant to each and every social, political and economic disadvantage imposed on women. The irrelevance of gender differences to competence to practice law<sup>35</sup> and serve on juries<sup>36</sup> seems clear enough today, but other supposed areas of incompetence and unsuitability remain. Women need the protection the Supreme Court has accorded them under the Equal Protection Clause. They need heightened judicial scrutiny of government classification on the basis of gender,<sup>37</sup> and preferential affirmative action in education and employment.<sup>38</sup>

Needless to say, others would sharply disagree with these conclusions. The Supreme Court's gender equality jurisprudence is controversial. Some critics blast the Court for policy-making at odds with ideals of the responsible nuclear family. Other critics accuse the Court of falling short of equally protecting the interests of poor women and women belonging to minority groups. Indeed, the Court does not require government welfare programs to subsidize elective abortions for poor women. Moreover, current equal protection standards applicable to employment classify discrimination as either race-based or gender-based, implying female gender and minority race are mutually exclusive traits incapable of compounding injury.<sup>39</sup>

Contemporary feminist legal theorists generally concur that constitutional doctrine imperfectly serves women and merits revision. We live in an age where it can seem doubtful that our society still needs the messages of legal feminism. Recent television advertisements, in which women stand on a corner comparing the size of a man's car to his penis and gather at their office

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35. *Bradwell v. Illinois*, 83 U.S. 130 (1872) (holding that Constitution does not invalidate state laws excluding women from law practice).

36. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

37. See generally *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *Reed v. Reed*, 404 U.S. 71 (1971).

38. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

39. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139; ALL THE WOMEN ARE WHITE; ALL THE BLACKS ARE MEN; BUT SOME OF US ARE BRAVE (G. Hull, P. Scott & B. Smith, eds., 1982).

windows to ogle a muscular construction worker, imply that young women are no different than their male counterparts. The careers of Hillary Rodham Clinton, Oprah Winfrey, and Madonna imply that women can be as smart, enterprising and raunchy as men. Although the lives of many individuals and many cultural phenomena reflect changing roles for women, supporters of thoroughgoing gender equality should not take them as evidence of adequate movement toward gender equality.

What appears on the surface to be gender inequality may sometimes reflect the voluntary preferences of men for traditional men's roles and women for traditional women's roles. But women doing the same work as men or similar work, rarely "prefer" lower wages and inadequate pregnancy benefits. Women seeking lives outside the home rarely "prefer" discriminatory barriers to their success. The inequality of the sexes visible in employment, business, politics, fine arts, science, and higher education is visible elsewhere. Gender inequality is particularly visible in social practices relating to families and in legal debates over regulating human reproduction.

For several decades abortion policy has been a focus of legal debates over regulating human reproduction.<sup>40</sup> The right to privacy dominates discussions of constitutional abortion law, but connections between abortion rights and ideals of gender equality have not gone unnoticed. Though shared to an extent by men, the burdens of sexuality, pregnancy, and child-rearing are overwhelmingly women's burdens. Laws restricting access to abortion make it more difficult for women to avoid these burdens. Women's legally enforced disadvantages suggest "second class" citizenship and unequal protection of law. Accordingly, permissive abortion laws would seem to be required by the Equal Protection Clause.

### B. *The Meaning of American Citizenship*

But what does it mean to be a full, first-class citizen? According to Judith Shklar, American citizenship entails "the equality of political rights" and "the dignity of work and of personal achievement."<sup>41</sup> Linda Hirshman embraces a similar view, extolling "a

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40. See generally, DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994).

41. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 1 (1991).

citizenship of politics and work."<sup>42</sup> Groups consigned to subordinate social and economic roles, by virtue of race, gender, or another "immutable characteristic"<sup>43</sup> fall short of the ideal of citizenship Shklar and Hirshman describe. Women with unwanted children to care for, with low incomes, and with undignifying work prospects are unlikely to vote, rule, or boast extraordinary levels of personal achievement. Barriers for women to meaningful participation in representative government and the commercial economy place full American citizenship out of reach.<sup>44</sup>

By comparison, men in the United States enjoy an enhanced level of citizenship—first-class citizenship. In addition to the slate of political rights they now formally share with women, men also have social and economic power. Most relevantly, they have the ability to enjoy sex, family life, school, and careers free of certain basic, direct concerns about unwanted pregnancy and childcare. To say that a man is a first-class citizen is to say that he is normally "treated by the organized society as a respected and responsible member, a participant, one who counts for something in the society."<sup>45</sup> Of course, some men are not treated with the respect they deserve. Their poverty, skin color, or immigrant status may reverse the presumption that they are capable of responsible participation. But the healthy, heterosexual, non-disabled, affluent, white, Christian men enjoy a particularly frictionless form of citizenship beyond the reach of other men and women.

Kenneth Karst partly attributes men's superior political and economic standing to differing social roles tied to their inability to bear children.<sup>46</sup> Many individual women arguably have achieved first-class citizenship, despite childbearing capacities. But the situation for women as a group is different. Despite significant legal gains, women as a group do not yet have the control over their lives that men as a group do, especially affluent, white men. For the ordinary woman to be an equal citizen, she must, as Karst argues, gain control over her "sexuality and mater-

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42. See Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 STAN. L. REV. 1905, 1936 (1993).

43. See *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (describing immutable characteristics as "determined solely by the accident of birth" and as an inappropriate basis for assessing "ability to perform or contribute to society").

44. See Hirshman, *supra* note 42, at 1916-1921.

45. See Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L. J. 447, 465 (1984).

46. See Kenneth L. Karst, *The Supreme Court, 1976 Term - Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977).

nity . . . [of the sort] the abortion rights movement has epitomized in the slogan, 'choice.'<sup>47</sup> Society needs the legal guarantees of *Roe v. Wade*<sup>48</sup> —or something similar emanating from Congress,<sup>49</sup> state legislatures<sup>50</sup> or state courts.<sup>51</sup> Only then can women as a group participate as equal citizens alongside men at all levels of personal and community life.

The claim that women need abortion rights as a condition of first-class citizenship is usually understood as the claim that abortion rights are necessary, but not sufficient conditions for gender equality. The responsibilities of unwanted pregnancy and childcare can relegate women to second-class citizen status, when compared to men; but women who do not face unwanted pregnancy, due to their sterility, infertility or menopause, are not, *ipso facto*, first-class citizens, when compared to men. First, many women who do not care for their own children assume responsibility for the children of their daughters, sisters, or others.<sup>52</sup> Second, unwanted pregnancy and childcare are just two of the factors that make women second-class citizens. All women have certain social and economic disadvantages. All women are "kept down" by cultural stereotypes and reproductive policies that dictate domestic, maternal roles, and track young working women into low-paying jobs.

### C. *Life Before Privacy and Equality: An Example*

I claim a link can be established between first-class citizenship and abortion rights. But skeptics view this claim as hyperbole. Skeptics concede that homeless women or prostitutes in jail cells may be second-class citizens; but they doubt that in one of the richest nations on earth, women who are surrounded by loving families are second-class anything.

The American standard of living combined with the success many women boast with respect to their marriages, children,

47. See Karst, *supra* note 45, at 463.

48. 410 U.S. 113 (1973).

49. See Freedom of Choice Act of 1993, S. 25, 103rd Cong., 1st Sess. (1993) (proposed legislation that would codify the right to an abortion established by *Roe v. Wade*).

50. See CONN. GEN. STAT. ANN. § 19a-602 (1994) (codifying the right to an abortion prior to fetal viability).

51. See *In re T.W.*, 551 So.2d 1186 (Fla. 1989) (holding that there is a right to an abortion under the Florida Constitution, independent of the *Roe v. Wade* decision).

52. This is said to be true of African American women. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 115 (1991) ("Grandmothers, sisters, aunts, or cousins act as other mothers [sic] by taking child-care responsibilities for one another's children.").

housekeeping, community service, avocations, and employment can obscure the reality of the ascription "second class." The "second class" label, which ought to apply to women of all races who are incapable of avoiding basic social burdens, adheres more easily to poor women belonging to historically subordinated racial minority groups. Unlike affluent suburban housewives, these women are distinctly disadvantaged. This may be why abortion rights advocates fearing the death of *Roe v. Wade* in the Rehnquist Court of the late 1980s, often stressed the needs of poor minority women.<sup>53</sup>

The need for access to safe, voluntary reproductive services is acute for poor minority women.<sup>54</sup> It was acute in the life of my own mother, who lived the first two decades of her life in a poor, black, urban neighborhood. My mother's early history reads, for her generation, like a case study in the need for race and gender equality. She eventually moved to a racially integrated middle-class community and lived the life of a suburban housewife. The history of the second half of her life reads like the composite biography of a mid-century American everywoman coping with the consequences of laws and cultural patterns that dictate motherhood and marriage while restricting access to contraception and abortion.

Just a year after the Civil Rights Act of 1964 swept away formal barriers to race and gender discrimination in employment, education, housing, public accommodations and voting, the Supreme Court handed down its decision in *Griswold v. Connecticut*.<sup>55</sup> The *Griswold* case established the "right to privacy," and banned laws criminalizing married couples' use of contraception. The same year *Griswold* was decided, my mother became pregnant with her sixth child. She was not happy about the pregnancy, and everyone knew it. She believed she had enough children and enough hard luck.

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53. See generally LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990). See Brief for the National Coalition Against Domestic Violence, *supra* note 2.

54. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); *Racism and Patriarchy in the Meaning of Motherhood*, 1 J. GENDER & L. 1 (1993); ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* (1981); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Loretta J. Ross, *African-American Women and Abortion*, in *THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN* 182 (1993); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 115-138 (1991).

55. 381 U.S. 479 (1965).

Few things had gone right in her life. She was born in the 1930s in Atlanta, Georgia, where racial separation was strictly enforced by the police and the specter of the Ku Klux Klan. She grew up fearing, distrusting, and envying the whites who ruled her world. She was an orphan. Her mother gave her up to be raised by her paternal grandmother, and then died several years later of sickle cell anemia. Her first stepmother had a mental breakdown and died young. Her unreliable father was an alcoholic and a womanizer. Within her grandmother's crowded household lived aunts her own age who belittled her for being very dark-skinned and not having a mother. She was raped in adolescence. She became pregnant at fifteen. She married at nineteen, had a second child at twenty, and then gave birth every two to five years thereafter for nearly fifteen years. She devoted her entire adult life to her husband and their children. She never finished high school. She never had a job outside the home—her proud husband, my father, would not consider exposing her to the glare of other men in the workplace, even when bad debts led him to file for bankruptcy. My father, an enlisted man in the Army, was periodically sent to Asia for twelve to eighteen-month tours of duty. Yet, for the longest time my mother did not know how to operate an automobile; did not own anything of her own; and did not have power of attorney to do family business in the name of her spouse.

Despite these hardships, she maintained a household seemingly without want and conflict. Perhaps that is why, at the age of twelve, I could not comprehend why my mother did not want to have another child. When I overheard her saying to a friend that she would have an abortion, were it possible, I was angry. I wrote furiously in my journal: "How could she not want to have a baby; what else does she think she's for?" My mother did not have the illegal abortion she contemplated. She had a baby, hoping, she told us later, that maybe this child would be the one who would bring her a glass of water when she was old.

While my father was away in Vietnam, my mother mustered the courage to start taking oral contraceptives, against his will. In response, he had a vasectomy when he returned from the war. She said he felt the surgery restored his control and thus his passion.

After all of her children graduated from high school, and her husband left the army, went to college, and became manager of a consumer loan company, my mother earned a high school

equivalency degree, and attended a local business college. It took her a long time to complete her training. Her schooling was interrupted by serious illness, the births and needs of grandchildren, the marriages and divorces of daughters, and the slow deaths of her grandmother and father.

When her schooling was done, my mother was hard to employ. She was a frumpy fifty-five year old quarrelsome black lady who chain-smoked, openly resented authority, and did not speak in proper English. A few months after she landed her first full-time job as a sales clerk in a retail discount store, she was diagnosed with lung cancer and died, ironically, on the birthday of her sixth child.

Although the story of my mother's life may imply hard luck is the exclusive domain of second class citizens, it strikes first class citizens as well. My mother seemed to believe, correctly, I think, that her race and class origins in poverty inadequately accounted for the frustrations of her life. Her gender fixed her fate. Being a woman meant being a wife and mother to the exclusion of other ambitions.

When I was a girl, my mother preached that if I became pregnant or dropped out of school, the best part of my life would be over. I stayed in school for many years, and postponed motherhood until middle-age. My life has been much easier than my mother's. In many respects, I am the multi-dimensional citizen she longed to be. I am economically prosperous and have a happy family. Yet I have an ambivalent relationship with my status as a citizen, at least when citizenship is given its loftiest political meanings. Like many successful women, I feel that my citizenship is worth less than it would be if women as a whole were free of lingering inequality at home, at work, in government, in science, and in the arts.

#### D. *The Trivialization of Citizenship*

Despite exposure to poignant accounts of women's lives, committed skeptics will continue to doubt that women without liberal abortion rights are less than first class citizens. Conservatives on the abortion issue say that a person's political freedom and equality does not depend on access to a medical procedure designed to end pregnancy. The implication is that it would *trivialize* the democratic constitutional vision to include abortion rights as essential citizenship guarantees; that the linkage

claimed between first-class citizenship and abortion rights is wrong and fraudulent—just so much glib polemics and inflated rhetoric. The conservatives believe that abstinence and birth control, and if those fail, adoption and moderate sacrifice, can assure that women's lives are as good as any man's.

The debate in the Supreme Court over whether access to abortion should be deemed a fundamental right can be recast as a debate about whether women's citizenship status is diminished by unwanted pregnancy. Justice White's dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>56</sup> condemned Justice Blackmun's characterization of abortion rights as "fundamental."<sup>57</sup> Applying historical and political criteria called for by the Constitution, White argued that abortion rights are neither deeply rooted in the nation's history and tradition,<sup>58</sup> nor are they implicit in the concept of "ordered liberty."<sup>59</sup> While one can dispute both White's historiography and his political theory,<sup>60</sup> I am interested in his political theory.

Analyzing the concept of constitutional liberty guaranteed by the Due Process Clause is an exercise in itself.<sup>61</sup> But if constitutional liberty does not include reproductive control, then a national citizenship of persons free to engage in political participation and work continues to mean something disturbingly different for male and female citizens. Women would be assured an inferior status since abstinence, birth control, adoption, and sacrifice are not realistic options for all women.

The United States is only one of many nations whose political leaders, lawyers, and jurists fail to see the link between abortion rights and citizenship. It appears that the leaders of most Western democracies view the matter as American abortion conservatives do: liberal abortion rights are not essential to equal citizenship and liberty for women. Few countries in the world

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56. 476 U.S. 747 (1986) (Blackmun, J., authored the opinion of the Court, in which Brennan, Marshall, Powell, and Stevens JJ., joined. Stevens, J., also filed a concurring opinion. Burger, C. J., filed a dissenting opinion; White, J., filed a dissenting opinion joined by Rehnquist, J.; and O'Connor, J., filed a dissenting opinion in which Rehnquist, J., joined).

57. *Thornburgh*, 476 U.S. at 772 (Blackmun, J.); *Roe*, 410 U.S. at 152, 155 (Blackmun, J.).

58. Justice White derived this test from *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

59. Justice White derived this test from *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

60. See generally, DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

61. See generally Gelman, *supra* note 7.

have enacted abortion laws that give women the freedom and economic subsidy they would need to control their reproductive capacities.<sup>62</sup> In Japan, abortion is readily available and more highly regarded by the medical establishment than oral contraceptives. But even there, abortion rights are not widely viewed as prerequisites of citizenship.

#### E. GERMAN CITIZENSHIP AND ABORTION RIGHTS

The patterns of abortion law around the world suggests four "models" of express regulation: (1) prohibition, (2) permission, (3) prescription, and (4) privacy.<sup>63</sup> Prohibition is the model in nations like Ireland that punish most abortions as criminal offenses.<sup>64</sup> The model of permission is in effect in countries like France where laws permit abortions that meet more or less stringent criteria established by government.<sup>65</sup> The model of prescription allows government officials to penalize unauthorized pregnancy and childbirth, as in the People's Republic of China.<sup>66</sup> Finally, where the model of privacy obtains, government may not enact legislation that criminalizes, prohibitively restricts, or requires medically safe abortions, as in the United States, immediately after the Supreme Court decriminalized abortion in 1973, the model of privacy exists.

Germany, which is still undergoing a complex process of nation rebuilding, aptly illustrates that Western liberal leaders do not view reproductive options as a core requirement of citizenship or "ordered" liberty. Rising from the dust of felled Berlin Wall was a hope of a better life for male and female citizens of East and West Germany.<sup>67</sup> German reunification required a reconciliation of the liberal abortion policies of the East, with the more restrictive policies of the West.<sup>68</sup> In function but not rheto-

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62. See INTERNATIONAL HANDBOOK ON ABORTION (Paul Sachdev ed., 1988). But see John Tackaberry, *Canada: New Abortion Law But Opponents Vow to Continue the Battle*, Inter Press Service, May 30, 1990, available in LEXIS, NEWS Library, INPRES File.

63. See Anita L. Allen, *Legal Aspects of Abortion*, in ENCYCLOPEDIA OF BIOETHICS (MacMillan 2d ed., 1994 forthcoming) (elaborating four models of abortion regulation).

64. See INTERNATIONAL HANDBOOK, *supra* note 62, at 458-62.

65. Cf. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 15-18 (1987) (describing abortion policies of European countries).

66. See INTERNATIONAL HANDBOOK, *supra* note 62, at 100-103.

67. Cf. Serge Schmemmann, *Germans Codify Details of Union*, N.Y. TIMES, Sept. 1, 1990, at A3 (describing the legal and social process of reunification).

68. See *Key Dates in History of German Abortion Law*, REUTERS, May 28, 1993 (available in LEXIS, NEWS Library, REUWLD File); Stephen Kinzer, *German Court Restricts Abortion, Angering Feminists and the East*, N.Y. TIMES, May 29, 1993, at A1.

ric, the model of privacy governed the East and the model of permission governed the West. Reunification made abortion law as controversial in Germany as it has been in the United States.

A compromise East-West German abortion statute was enacted into law on June 27, 1992.<sup>69</sup> The compromise law moving the enlarged nation of Germany towards the model of privacy was not liberal enough for many former East Germans. The law removed criminal penalties for medical abortions prior to the twelfth week, if preceded by physician counselling; thereby placing the decision for early abortion in the hands of the individual women. However, the requirement of counselling compelled women to justify and explain themselves to the authoritative designees of the state. Moreover, the captioning preamble to the law did not suggest any policy concern for women. It referred only to "the protection of prenatal/nascent life", the "promotion of a society suitable for children", and, vaguely, to "conflicts involving pregnancy, and the regulation of the termination of pregnancy."<sup>70</sup>

The German statute of 1992 was grounded in a model of permission. The statute was similar to the Pennsylvania law partly upheld by the Supreme Court in the 1992 *Planned Parenthood v. Casey*<sup>71</sup> decision. Women must endure waiting periods and other elaborate "informed consent" rituals that the state hopes will discourage abortion.<sup>72</sup> By virtue of *Webster v. Reproductive Health Services*<sup>73</sup> and *Casey* the United States has taken a giant step backwards away from the model of privacy towards paternalistic intervention and the model of permission.

On May 28, 1993, Germany's highest court ruled the 1992 compromise statute unconstitutional. The Court invalidated the law on the ground that it was in conflict with a constitutional provision it construed to require the state to protect *all* human life. The Court invited the Parliament to enact new legislation consistent with its findings that, although abortion in certain grave, exceptional instances can be permitted, the state must spe-

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69. Ferdinand Protzman, *Broader Abortion Law Leaves Germans Somber*, N.Y. TIMES, JUNE 27, 1992, at A3.

70. § 218 StGB (1992) [based on language of an unofficial translation of the compromise statute].

71. 112 S. Ct. 2791 (1992).

72. See David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 4.

73. 492 U.S. 490 (1989).

cifically discourage abortion through counselling and insurance policies.

A chief difference between the U.S. and German constitutional law of abortion is that Germany has a specific constitutional provision thought by its Supreme Court to address expressly the right to life of the unborn. Perhaps wary of seeming to flout post-Nazi commitments to preserving human life, the German Court found it impossible to endorse the modestly permissive scheme set forth in the 1992 law. Yet, the German High Court pronounced that abortion may be obtained under its ruling, if the life or health of the mother is at stake, the pregnancy results from rape, or the child would be born severely handicapped. The exceptions the Court recognized and its failure to mandate enforcement of criminal sanctions against those who illegally abort means that there will be abortions in Germany, and many will not meet the Court's official ideal. Germany seems trapped in the same quagmire of rules, exceptions, illogicy and hypocrisy that mars abortion policy in the United States.

The U.S. and German experiences reveal that democratic nations are not yet prepared to accept the proposition that citizenship implies legally guaranteed reproductive options for women. Western democratic liberalism is not prepared to accept abortion choice as a right no less than the right to travel, to practice one's faith, or to be free of arbitrary arrest. For now, for our leaders, first-class citizenship does not mean reproductive control.

### III. EQUAL PROTECTION FOR EQUAL CITIZENSHIP

#### A. *An Equal Protection Jurisprudence for Abortion Law*

Many scholars now believe that gender equality and equal citizenship require reproductive freedom, and that the Equal Protection Clause should be marshalled against state and federal abortion restrictions.<sup>74</sup> Although "laws restricting access to abortion plainly oppress women," explains Sylvia Law, originally the right to abortion was "not presented to the courts as a clear issue of sex equality."<sup>75</sup> Instead, advocates challenged abortion restric-

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74. See, e.g., GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* (1985); Colker, *supra* note 10; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Karst, *supra* note 45; Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *supra* note 11; Seigal, *supra* note 2, at 379; Sunstein, *supra* note 10.

75. See Law, *supra* note 74, at 973, 1020.

tions chiefly on two other grounds. First, building on *Griswold's* privacy doctrine, they challenged them on the basis of Fourteenth Amendment liberty. Second, they challenged them on the basis of Fourteenth Amendment equal protection, recognizing that the illegality of abortion had a especially harsh adverse impact on blacks, especially poor black women.<sup>76</sup> The racial impact argument never took hold in the Supreme Court, and the privacy argument stood alone. Liberals on the Court converted the advocates' call for equality for black and poor women into a side-bar pragmatic policy consideration, where it has remained. Ironically, the Burger Court has been criticized for inventing privacy jurisprudence in a moment of "rootless activism" precisely to make it possible to secure for poor women the reproductive freedom rich women enjoyed.<sup>77</sup> "No effort," Vincent Blasi concluded, "was made in the *Roe* opinion to relate the woman's burdens to more general conceptions of choice-making capacity, bodily integrity, nonsubordination to other human beings, or equality of treatment."<sup>78</sup> *Roe* was motivated "by largely pragmatic considerations"<sup>79</sup> relating to the fact that "many wealthy women were flouting the law to get abortions from respected physicians [while] many poor women were being injured by inadequately trained mass purveyors of illegal abortions."<sup>80</sup>

In *Planned Parenthood v. Casey*, the Supreme Court reaffirmed much of *Roe's* traditional privacy jurisprudence. However, Justice O'Connor's opinion for the Court expressly linked abortion rights to equality as well as privacy. Without their "unique" reproductive liberty, women are unable "to participate equally in the economic and social life of the Nation," she wrote.<sup>81</sup> Even before *Casey*, one could detect increasing awareness that the abortion debate has a "gender dimension."<sup>82</sup> In Justice Blackmun's passionate dissent in *Webster v. Reproductive Health Services*, he said he feared for the liberty and the equality of women.<sup>83</sup> Blackmun's majority opinion in *Thornburgh v. American College of Obstetricians and Gynecologists* referred to the "promise that a certain private sphere of individual liberty will be kept largely beyond the reach

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76. *Id.* at 973.

77. See Blasi, *supra* note 22, at 211.

78. *Id.* at 212.

79. *Id.* at 213.

80. *Id.*

81. *Casey*, *supra* note 71, at 2809.

82. See Olsen, *supra* note 3, at 118.

83. 492 U.S. 490, 556 (1989).

of government"<sup>84</sup> and asserted that this "promise extends to women as well as to men."<sup>85</sup>

A year after the *Casey* decision Justice Ruth Bader Ginsburg joined the Court. Ginsburg has advanced a strong equality-based perspective on abortion rights.<sup>86</sup> Her view is that gender inequality is perpetuated by abortion restrictions and that the Equal Protection Clause of the Fourteenth Amendment is a strong basis for claiming abortion rights under the Constitution. It is so strong that *Roe* was weakened by "concentration on a medically approved autonomy idea, to the exclusion of a constitutionally-based sex-equality idea."<sup>87</sup>

Noting that "abortion restrictions selectively turn women's reproductive capacities into something for the use and control of others" and that "[n]o parallel disability is imposed on men," Cass Sunstein has offered a particularly clear outline of the elements of a strong equal protection argument for abortion rights of the general sort Ginsburg and others advocate:

In its fullest form, the argument from equality is supported by four different points: (1) prohibiting abortion is a form of prima facie or de jure sex discrimination; (2) it is impermissibly selective [in compelling parentage]; (3) it results from constitutionally unacceptable stereotypes [of different roles for men and women]; and (4) it fails sufficiently to protect fetal lives [since history shows that nearly as many abortions occurred in the U.S. when abortion was illegal].<sup>88</sup>

I will not undertake to defend Sunstein's well-defended version of the equal protection argument. (Doing so would take me afield of my main objective, which is to evaluate claims of superiority for equal protection over privacy arguments.) The literature contains adequate defenses of similar equal protection arguments, including Sylvia Law's classic defense.<sup>89</sup> Professors Law and Sunstein have in common the desire to articulate what they call a "neutral" standard for review of abortion restrictions<sup>90</sup> a goal progressives may think hopeless. I will note that point (4) of Sunstein's outline may be the most difficult to sustain, as estimates of the number of illegal abortions prior to *Roe v. Wade*

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84. *Thornburgh*, 476 U.S. 747, 772 (1986).

85. *Id.*

86. See Ginsburg, *supra* note 74.

87. *Id.* at 386.

88. Sunstein, *supra* note 10, at 31-32.

89. See Law, *supra* note 74; see also Pine and Law, *supra* note 9.

90. See generally Law *supra* note 74; see generally Sunstein *supra* note 10.

range from a low of 200,000 to a high of 2 million.<sup>91</sup> It may be most fair to conclude that one cannot be certain that a lower percentage of pregnancies would be terminated if abortion were re-criminalized.

### B. *Equal Protection as a Replacement for Privacy*

The growing affinity among justices of the Supreme Court for an equality jurisprudence of reproductive rights is consistent with a "mounting consensus"<sup>92</sup> in the scholarly community that equality arguments are, not only available, but "better than liberty arguments with respect to abortion generally."<sup>93</sup> A number of feminist legal theorists who advocate strong abortion rights, favor constitutional alternatives to the doctrine of privacy-related liberty. They view privacy law as distorting the truths of women's lives and impeding women's equal citizenship. Catharine MacKinnon has broadly assaulted privacy jurisprudence in abortion law,<sup>94</sup> arguing that "the doctrine of privacy-related liberty has become the triumph of the state's abdication of women in the name of freedom and self-determination."<sup>95</sup> Privacy doctrine works only if women are equals within the private sphere. MacKinnon argues that privacy law and other "legal attempts to advance women"<sup>96</sup> are based on false assumptions about the status quo, "as if women were citizens—as if the doctrine was not gendered to women's disadvantage, as if the legal system had no sex, as if women were gender-neutral persons temporarily trapped by law in female bodies."<sup>97</sup> Joan Williams' ambivalence about arguments premised on "choice," "liberty" and "privacy" stems from her observation that women seeking abortion do not feel especially free.<sup>98</sup> The language of privacy implies that women are choosers against a background of a number of realistic, attractive alternatives. Pregnant women who consider abortion

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91. See H. ROSEN, *ABORTION IN AMERICA* (1967) (placing the number of criminal abortions as between 200,000 and 2 million). It is unclear whose estimates should be believed. Rosen's hold special interest as a pre-*Roe* estimate.

92. Sunstein, *supra* note 10, at 31 n.119; see also Calabresi, *supra* note 74, at 110-111.

93. *Id.*

94. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987).

95. MacKinnon, *supra* note 11, at 1311.

96. *Id.* at 1286.

97. *Id.*

98. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1584 (1991) ("The choice rhetoric is not the simple unadulterated truth of women's lives: many aborting women feel they have no choice but to abort."). Williams refers to "choice" as a libertarian rhetoric and an autonomy-self development rhetoric.

are not often so situated. The concepts of privacy, liberty and choice are at odds with the sense of choicelessness women seeking abortion actually feel. In general, "choice rhetoric is not appropriate where patterns of individual behavior follow largely unacknowledged gender norms that operate to disempower women."<sup>99</sup> Ruth Colker's rejection of the privacy doctrine is partly ontological. She insists that the privacy-related liberty doctrine relies on the false assumption of the existence of an autonomous sphere—women and fetuses—beyond public life. Colker sees a connection between reproductive rights and compassionate social participation that she believes equality perspectives capture better than privacy perspectives: "equality doctrine doesn't demand that women be allowed to choose to have abortions because women are entitled to be treated with autonomy," but "insists that women be allowed to choose to have abortions because of women's position in society—the roles and responsibilities of women in society."<sup>100</sup>

#### IV. ASSESSING THE EQUAL PROTECTION FIX

For theorists who believe the privacy doctrine should be abandoned, equal protection doctrine promises to "fix," not just supplement the constitutional case against abortion restrictions. They believe it is a superior constitutional framework. Are equality arguments better than privacy or liberty arguments with respect to abortion generally? I think the case has yet to be made that they are.

##### A. *Abortion as a "Privacy" Concern?*

Cass Sunstein bases his thesis of the superiority of equality arguments on a number of claims, including this one: Abortion rights relate to equality and liberty, but have little to do with

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99. *Id.* at 1633.

100. RUTH COLKER, *ABORTION AND DIALOGUE: PRO-CHOICE AND AMERICAN LAW* 85 (Bloomington: Indiana University Press 1992).

Ruth Colker explains that: "[M]y defense of women's ability to choose to have a baby is not absolute. . . it is not embedded in the argument that a woman has the right to control her body under any circumstances. . . A woman in my view has the right to seek an abortion to protect the value of her life in a society that disproportionately imposes the burdens of pregnancy and child care on women and does not sufficiently sponsor the development and use of safe, effective contraceptives." *Feminism, Theology and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1050 (1989).

“conventional privacy.”<sup>101</sup> On this point, Sunstein is wrong. “Conventional” privacy has much to do with abortion and with reproductive rights generally.

By “conventional privacy” Sunstein means privacy in the familiar senses of physical seclusion, solitude, anonymity, secrecy, and confidentiality. The First, Third, Fourth and Fifth Amendments are routinely interpreted as protecting these conventional privacy interests. Theorists sometimes contrast privacy in Sunstein’s conventional or paradigmatic sense of limited access to persons and information with the controversial idea of “decisional privacy.” Decisional privacy can be understood as the liberty, freedom or autonomy to make choices about one’s own life, minimally constrained by unwanted government or other outside interference. Those who reject the “decisional” sense of privacy as a semantic confusion of the word “privacy” with the words “liberty,” “freedom,” or “autonomy” easily fall into the trap of wrongly concluding that abortion rights have nothing to do with privacy. Whether or not constitutional abortion rights are coherently framed as promoting a decisional brand of privacy under the Fourteenth Amendment, abortion rights plainly promote conventional forms of privacy for women.

Sunstein and others have missed the evident connection between conventional privacy and reproductive rights because they overlook the respects in which the traditional roles of homemaker, wife, and mother are inconsistent with ideals of personal privacy. For many women, homelife is anything but a haven for the experience and enjoyment of personal privacy. Although meaningful opportunities for personal privacy consist of quality time and space for one’s self, caretakers often cannot seclude themselves. Successful parenting demands that women be highly accessible and highly responsive to the wants and needs of their children. Parenting may be a greater hour-to-hour psychological responsibility for mothers than for fathers. It remains to be seen what impact the consequences of motherhood will prove to have on women’s permanent entry into the public realm as equal participants and contributors.

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101. Sunstein, *supra* note 10, at 31. Although Sunstein recognizes the liberty interest in abortion, he believes the substantive due process critique of the privacy-related liberty jurisprudence, *see generally* Ely *supra* note 12, makes it less appealing than an equal protection jurisprudence.

All of this suggests that, for the sake of conventional privacy in the senses of seclusion and solitude, women ought to take special care when deciding whether or not to have children. Decisional privacy rights protecting access to birth control and abortion do not automatically entail conventional privacy and self-determination for all women. Two factors determine whether decisional privacy translates into genuine opportunities for salutary modes of personal privacy. First, women's decisional freedom must not be preempted by insurmountable social and economic barriers to the exercise of legally protected choice. Second, free women with a choice must be willing to choose privacy.

Procreative privacy rights are tools women can use, and are already using, to create opportunities for meaningful privacy in private life. This is why feminists are mistaken to dismiss "privacy" rights as mere conservative male ideology. For some feminists, "privacy" and "private sphere" connote problematic conditions of female seclusion and subordination in the home and in domestic caretaking roles. American women have had ample experience with privacy and the private sphere in this unhappy sense. Women have had too much of the wrong kinds of privacy: they have had home-centered, caretaker's lives, when they have often needed and wanted forms of privacy inside and outside the home that foster personal development, while also making them more fit for participation in social life.<sup>102</sup>

Traditional caretaking roles have kept women's lives centered in the privacy of the nuclear family home. Conventions of female chastity and modesty have shielded women in a mantle of privacy at a high cost to sexual choice and self-expression. Expectations of emotional intimacy have fostered beneficial personal ties. At the same time, women's prescribed roles have limited their opportunities for individual forms of privacy and independently chosen personal association. Maternal and social roles have kept women in the private sphere who might otherwise have distinguished themselves in the public sphere as businesswomen, scholars, artists and government leaders.

Women who seek out and utilize opportunities for privacy, enabling them to rejuvenate or to cultivate talents, are women with something qualitatively better to offer others. A degree of privacy in our lives can help to make us more fit for social participation.

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102. See generally ALLEN, *UNEASY ACCESS*, *supra* note 1.

It can help us to contribute to the full level of our capacities. It can make us better, more equal citizens. Procreative rights promote privacy by helping women preserve and create opportunities for privacy in the context of responsible lives.

Of course, to concede that abortion rights promote conventional privacy is not to concede that the Court ever had good reason to embrace or stipulate a decisional understanding of "privacy" and to associate it with the Constitution.<sup>103</sup> Many theorists (perhaps Sunstein included) insist that the whole idea of "decisional" privacy is a mistake.<sup>104</sup> They raise several arguments.<sup>105</sup> First, they argue that, as an aspect of liberty, freedom, or autonomy, decisional privacy stands apart from paradigmatic forms of privacy such as seclusion, solitude, and anonymity. Second, theorists contend that we lose our ability to treat privacy and liberty as distinct concepts if we speak of "decisional" privacy. Defenders of the decisional usage of "privacy" counter that decisional privacy is worthy of the name.<sup>106</sup> They emphasize that although decisional privacy denotes aspects of liberty, freedom, and autonomy, it denotes aspects of these that pertain to deeply felt conceptions of a private life beyond legitimate social involvement.

Controversial or not, using "privacy" to denote a domain outside of legitimate social concern is now an entrenched practice in the United States. It may be significant that women in the United States now believe that their privacy, as well as their liberty and equality, is compromised by harsh abortion restrictions. If they did not always feel that way, feminists and liberals have taught two entire generations of women to describe the intuitive wrong they feel when denied reproductive options as invasions of their privacy. Whatever "privacy" may have once meant, it now also means freedom from abortion restrictions. This linguistic development undercuts some of the power of critics wedded exclusively to the "conventional" or paradigmatic understanding of privacy. Large segments of the male and female public now view

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103. Cf. *Whalen v. Roe*, 429 U.S. 589 (1977) (acknowledging physical, informational and decisional conceptions of privacy as pervasive in constitutional law).

104. See, e.g., Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L. J.* 421 (1980).

105. See Anita L. Allen, *Privacy in Health Care*, *Encyclopedia of Bioethics* (Macmillan, 2d ed., forthcoming 1994) (discussing decisional privacy and its antecedents in classical antiquity).

106. See, e.g., Judith W. DeCew, *Defending the Private in Constitutional Privacy*, 21 *J. VALUE INQUIRY* 171 (1987).

excluding others from "personal" decisionmaking as a form of privacy.

Western law and political theory are rooted in the Greco-Roman tradition, a heritage which may provide a degree of historic and etymological validity to the current practice of referring to freedom from interference with personal life as "privacy." The decisional usage of "privacy" has origins in classical antiquity's distinction between private and public spheres.

The Greeks distinguished the "public" sphere of the *polis*, or city-state, from the "private" sphere of the *oikos*, or household. The Romans similarly distinguished *res publicae*, concerns of the community, from *res privatae*, concerns of individuals and families. The ancients celebrated the public sphere as the sphere of political freedom for citizens. The public realm was the sector in which select men—those whose property and economic virtue had earned them citizenship and the right to participate in collective governance—could truly flourish. By contrast, the private realm was the sector of mundane economic and biologic necessity. Wives, children and slaves populated the private economic sphere, living as subordinates and ancillaries to autonomous male caretakers.

The Post-Enlightenment Western liberal tradition inherited the premise that social life ought to be organized into public and private spheres.<sup>107</sup> It also inherited the premise that the private sphere is properly constituted by the home, the family, and intimate association. However, while ancient thought tolerated the private and celebrated the public, modern liberal thought often reflects an opposing tendency: it tolerates the public as pervasive and necessary for collective welfare, but celebrates the private as an essential expression of personal identity, freedom, and responsibility.

The political concept of a limited, tolerant government is elaborated by John Locke and Thomas Jefferson as a requirement of natural rights, and by John Stuart Mill and Adam Smith as a requirement of utility. Both of these objectives require a non-governmental, private sphere of autonomous individuals, families and voluntary associations. Though liberals sometimes speak of public and private as if they were fixed natural categories, feminist privacy theorists often emphasize that the public and the

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107. See HANNAH ARENDT, *THE HUMAN CONDITION* 38-78 (1958); JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 3-4 (1962).

private are not metaphysical realities, but contingent understandings of how, as a matter of policy, we believe power ought to be allocated among individuals, various social units, and government. Liberals often explain privacy rights as negative liberties to freedom from government involvement; but feminists often give privacy an affirmative twist, arguing that privacy rights can mandate government involvement where, without it, material needs render privacy rights ineffective.

The time has come for constitutional lawyers to abandon their stock and trade criticism that abortion jurisprudence is premised on semantic confusion about privacy. It is true that early reproductive rights cases reflected a degree of confusion. However, the Supreme Court has remedied the simplistic and confused understandings of "conventional" and "decisional" privacy reflected in the earliest reproductive rights cases.

The precise relationship presumed to exist between decisional privacy and conventional privacy was not clear in *Griswold* and *Roe*. In *Griswold* Justice Douglas seemed to conflate physical privacy and decisional privacy when he raised the issue of enforcement of criminal contraception laws.<sup>108</sup> Justice Blackmun in *Roe* seemed to conflate "conventional" restricted access privacy rights with decisional privacy rights when he made his metaphysically suspect judgment that a "pregnant woman cannot be isolated [from the fetus] in her pregnancy" as a ground for limiting her decisional prerogatives.<sup>109</sup>

Yet, in the *Thornburgh* case, Blackmun cleared up the confusion well enough: stipulating that the "privacy" of the Fourteenth Amendment abortion cases is the claim to be free from forms of government interference with decisions affecting sex, reproduction, marriage, and family life.<sup>110</sup> At the same time, Blackmun expressly recognized that, in the context of abortion, conventional forms of privacy, namely anonymity and confidentiality in health-care recordkeeping and reporting, are key ancillaries for safeguarding decisional privacy.<sup>111</sup> After *Thornburgh*, abortion law cases reviewing the constitutionality of spousal and parental notification and consent requirements have raised anonymity, secrecy, confidentiality, and other information access concerns

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108. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Douglas, J.).

109. See generally Allen, *Taking Liberties*, *supra* note 1.

110. *Thornburgh*, 476 U.S. 747, 765-767 (1986).

111. *Id.* ("The decision to terminate abortion is an intensely private one that must be protected in a way that assures anonymity.")

without appearing to confuse or conflate conventional with decisional privacy concerns.<sup>112</sup> Indeed, the body of constitutional abortion law as a whole reflects a solid understanding of the semantics of “privacy.” It acknowledges decisional and non-decisional uses of privacy and appreciates that confidentiality and anonymity are needed to protect independent abortion decision and action.

These several considerations—the practical link between reproductive rights and paradigmatic forms of privacy such as medical confidentiality and solitude at home; the Supreme Court’s eventually careful distinction among decisional, physical, and informational forms of privacy; the etymology of *res privatae*, and patterns of popular “privacy” usage—strongly mandate rejecting Sunstein’s claim that abortion rights have little to do with conventional privacy. If an equality jurisprudence for abortion is superior to a privacy jurisprudence, it is not because the practice and regulations of abortion lack conceptual ties to privacy.

Today, constitutional abortion law reflects clarity about the definition of the word “privacy.” More than twenty years and twenty cases after *Roe v. Wade*, constitutional lawyers are unfair in their designation of abortion jurisprudence as conceptually confused about privacy. Bases for debate over the reach of Fourteenth Amendment liberty remain for abortion law. This might imply the superiority of equal protection-based abortion jurisprudence were it not the case that equality jurisprudence also inspires serious debates about the reach of the Fourteenth Amendment.

### B. *Greater Respect for the “Pro-life” Perspective*

Cass Sunstein claims a second advantage for equality and equal protection arguments over privacy or liberty arguments:

Moreover these [equality] . . . arguments have a large advantage in that unlike privacy or liberty arguments, they do not devalue the legitimate interest in protecting the fetus, and indeed make it unnecessary to take any position on the moral and political status of unborn life. Even if the fetus has all of the status of human life, the bodies of women cannot be conscripted in order to protect it.<sup>113</sup>

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112. See, e.g., *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

113. Sunstein, *supra* note 10, at 39-40.

In claiming this advantage, too, Sunstein is mistaken. As I will argue, in principle, privacy arguments do not devalue the legitimate interests in protecting the fetus any more than equality arguments; nor do they, in principle, make it any more or less necessary to take a position on the moral and political status of unborn life.

Blackmun's opinion in *Roe v. Wade* employed a privacy rationale. As a consequence, the most familiar pro-choice arguments happen to be privacy arguments, and privacy arguments are associated with vehement pro-choice and pro-life conflict in the United States. Privacy is blamed for the vehemence of the conflicts even though there is little reason to think pro-life activism would have been less committed or hostile had women's equality rather than their privacy been held out as the justification for permissive abortion laws. The pro-choice position seems shrill and unreasonable to those who do not share it because it places a range of concerns, including women's privacy, equal protection, personal satisfaction, bodily integrity, and economic well-being above the protection of the beginnings of innocent human life.

Sunstein's claim that privacy needlessly devalues the unborn was doubtless prompted by *Roe v. Wade's* stance, maddening to some, that the state lacks an interest in the unborn at the start of pregnancy. The Court in *Roe* concluded that "[a]t some point in pregnancy" the state interest in "protecting potential life" becomes "sufficiently compelling to sustain regulation"; and went on to identify "viability" as the point at which the State's interest in potential life becomes "compelling."<sup>114</sup> But *Casey* modified this feature of *Roe v. Wade*, holding that the state has an interest in the unborn sufficient to warrant protective regulation on behalf of the unborn at all stages of pregnancy, so long as the regulation does not "unduly burden" the woman's right to privacy.<sup>115</sup> By affirming the basic privacy right of access to early abortion, while asserting a governmental interest in the unborn at every stage of pregnancy, *Casey* enacts the analytic possibility of asserting governmental interest in the unborn while conferring strong privacy rights for women seeking early abortion. *Casey* may be an uneasy compromise, but it establishes that valuing the unborn and advocating a significant degree of decisional privacy for women are not utterly incompatible.

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114. 410 U.S. 133, 154, 163-164 (1973).

115. *Casey*, 112 S.Ct. 2791, 2820 (1992).

In associating the devaluation of the public interest in unborn life with privacy arguments, Sunstein may have been reacting, not only to *Roe*, but to abortion privacy advocates who agree with the philosophy that fetuses are not human beings or persons meriting state protection. A number of philosophers supportive of abortion privacy jurisprudence have aggressively argued that fetuses are neither moral persons<sup>116</sup> nor constitutional persons,<sup>117</sup> but merely potential persons lacking serious rights to life or interests government may protect at pregnant women's expense.

The privacy argument associated with *Roe v. Wade* and defended by philosophers who deny fetal personhood does not "devalue" the concept of fetal protection by government in the strong sense needed to give Sunstein's claim weight. That is, it does not ridicule the very idea of fetal humanity or community interest in the fate of the unborn. A belittling *ad hominem* attack against the Pope or an imprudent analogy of fetuses to cancers or parasites amounts to ridicule. By contrast, the serious privacy argument typically advanced simply disagrees that the government has legitimate grounds for categorically prohibiting the interruption of pregnancy.

Moreover, far from denying fetal personhood or humanity, some versions of the privacy-related liberty argument advanced by pro-choice theorists expressly concede it. Some versions of the privacy argument admit or avoid taking a position on the moral and legal status of the unborn. The privacy argument is no more wedded to the claim that the government lacks an interest in the unborn than is the equality argument. Some exponents of the privacy argument may happen to believe fetuses lack moral and legal interests the state is bound to protect. Some exponents of the privacy argument may happen to believe that fetuses are par-

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116. MICHAEL TOOLEY, ABORTION AND INFANTICIDE, IN *THE RIGHTS AND WRONGS OF ABORTION* 52, 77 (Marshall Cohen, Thomas Nagel and Thomas Scanlon eds., 1974). Tooley argues against personhood for the unborn on the ground that personhood requires characteristics the unborn and perhaps even infants do not possess, such as the capacity for self-conscious reflection. "[A]n organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states and believes that it is such a continuing entity." *Id.*

117. See, e.g., Ronald Dworkin, *The Great Abortion Case*, *NEW YORK REVIEW OF BOOKS*, June 29, 1989, at 49-53. Dworkin argued that "if the fetus is a constitutional person then *Roe v. Wade* is plainly wrong." *Id.* at 50. He then argues that the fetus is not a constitutional person, only "an entity of considerable moral and emotional significance in our culture" that can be protected "in ways that fall short of any substantial abridgement of a woman's constitutional right over the use of her own body." *Id.* at 52.

asites or the Pope a joke. But the same is true of some exponents of the equal protection argument.

To grasp this idea, it is useful to compare Sunstein's anti-conscription version of the equality argument, grounded in ideals of equal protection, to Judith Thomson's anti-conscription argument, grounded in ideals of (privacy-related) liberty.<sup>118</sup> Sunstein recognizes Thomson's argument as an example of one that "sees a prohibition on abortion as invalid because it involves a co-optation of women's bodies for the protection of fetuses," but that does not base opposition to abortion prohibition on robust equality grounds.<sup>119</sup> He fails to recognize that the possibility of a liberty-oriented anti-conscription argument that concedes the worth of the unborn, could undermine his claims that equal protection arguments are superior by virtue of their concessions of fetal worth.

Both Sunstein and Thomson are prepared to grant the moral worth of the unborn as a premise of their arguments. As Sunstein says describing his own argument, their arguments "freely acknowledge[ ] and, indeed, insist[ ] on the strength of the interest in protecting fetal life."<sup>120</sup> The thrust of Sunstein's argument is that by restricting access to abortion, government is conscripting women to share their bodily resources, while not imposing similar Good Samaritan duties on other citizens:

Government never imposes an obligation of this sort on its citizens—even when human life is uncontroversially at stake. Parents are not compelled to devote their bodies to the protection of children, even if, for example, a risk-free kidney transplant is necessary to prevent the death of their child.<sup>121</sup>

To sharpen his ultimate constitutional point that government cannot conscript women into the service of others, Sunstein draws an analogy to what he regards as a patently unacceptable

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118. Judith Jarvis Thomson, *A Defense of Abortion*, in *THE RIGHTS AND WRONGS OF ABORTION*, 3-4 (Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., 1974). It is not relevant to this discussion that Thomson is among those reductionist privacy theorists who advocate using the language of liberty and property rather than privacy to describe freedom from government interference. See also Judith Jarvis Thomson, *The Right to Privacy*, 4 *PHIL. & PUB. AFF.*, 315-333 (1975). My point is that, however denominated, Thomson believes that what the Court calls its "privacy" jurisprudence is defensible with or without the premise that the fetus is a person or human.

119. Sunstein remarks that "I am indebted to" Thomson but her treatment of abortion prohibitions does not "sufficiently emphasize issues of sexual equality." Sunstein, *supra* note 10, at 31 and n.120.

120. *Id.*

121. *Id.* at 34.

hypothetical case of race-based conscription. He contends that constitutionally, African-Americans may not be turned into unwilling lifesaving blood donors, even for other blacks or minority group members. The Equal Protection Clause prohibits singling out a person on the basis of race or gender for service to others.

Thomson stresses the general abhorrence to compulsory Good Samaritanism in American law,<sup>122</sup> agreeing with Sunstein that "abortion restrictions selectively turn women's reproductive capacities into something for the use and control of others."<sup>123</sup> Thomson's libertarian defense of abortion choice features a hypothetical: a person abducted in the night, whose body is attached to a famous violinist as life support, has no obligation to remain, but is morally at liberty to detach herself and leave the violinist to die of renal failure.<sup>124</sup> One may not be conscripted to save the violinist, whatever the violinist's human worth.

Thomson's argument points to unwilling conscripts' and pregnant women's right to choose—their decisional privacy, one might say—to use their bodies and lives as they please. However, the structure of her liberty argument is identical to the structure of Sunstein's equality argument. Thomson's liberty-based anti-conscription argument, like Sunstein's equality-based argument, expressly seeks to avoid a stand which denigrates the moral and political status of the fetus. Thomson's contention is that, however precious the fetus or talented the violinist, a woman cannot be made to sacrifice herself. Fetuses have no right to life requiring that they be carried to term in a society in which women's lives are uniquely impaired by unwanted pregnancies. Both liberty and equality versions of the anti-conscription argument place the forces of law ideally on the side of the would-be conscript—the pregnant woman—and not the fetus.

It is implausible to suppose that privacy rhetoric inflames the pro-choice and pro-life debates in a way that equality rhetoric would not have, had it been the choice of the Court in *Roe v. Wade*. As Joan Williams points out, "claims for women's equality, particularly in contexts involving sexuality, trigger fears of chaos, filth, and defilement."<sup>125</sup> Surely it is the common bottom-line of permissive abortion policy that provokes the virulence of pro-

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122. See Thomson, *supra* note 116, at 20-21.

123. Sunstein, *supra* note 10, at 31.

124. See Judith Jarvis Thomson, *Rights and Deaths, in THE RIGHTS AND WRONGS OF ABORTION* 114 (Marshall Cohen *et al.* eds., 1974).

125. Williams, *supra* note 29, at 1586.

choice and pro-life politics. Those who blame privacy jurisprudence for the intractability of abortion politics imply that pro-life Americans would quietly accept the deaths of the unborn if they were premised on women's right to equal treatment rather than on women's right to make their own decisions about their bodies.

On December 30, 1994, two women were killed at Planned Parenthood and Preterm Health Services clinics in Brookline, Massachusetts. Accused killer John C. Salvi, who also wounded several other people at those clinics that day, was apparently a strong opponent of abortion.

On July 29, 1994, Dr. John Britton, a Florida abortion doctor, and two elderly pro-choice volunteer escorts were gunned down by Paul Hill, director of the violence-advocating anti-abortion group Defensive Action.<sup>126</sup> Hill, a former Presbyterian minister, killed the doctor and one of the escorts with a twelve-gauge shotgun aimed at their heads.<sup>127</sup> In the same town seventeen months earlier, Dr. David Gunn, another abortion provider, was murdered by a man associated with the pro-life movement.<sup>128</sup> While denounced by some pro-life advocates, Paul Hill does have "some significant support"<sup>129</sup> for his position that:

"[t]he Christian principle is to do unto others as you would have them do unto you. If an abortionist is about to violently take an innocent person's life, you are entirely morally justified in trying to prevent him from taking that life."<sup>130</sup>

Applying this logic, those who kill at abortion sites do not care whether women's equality or privacy is the reason legal abortions take place. From their perspective, the substance rules.

126. Ronald Smothers, *Death of a Doctor: The Overview—Abortion Doctor and Bodyguard Slain in Florida; Protester is Arrested in Pensacola's Second Clinic Killing*, N.Y. TIMES, July 30, 1994, at A1.

127. *Id.*

128. See *Griffin to Appeal His Conviction of Murdering Doctor*, MIAMI HERALD, Mar. 7, 1994, at 5B. The defense claimed that graphic videos and anti-abortion literature "disturbed Griffin's state of mind to the extent he confessed to a crime he did not commit," *Id.* The brother of the victim agreed that "maybe the [anti-abortion] propaganda . . . the movies . . . [and] the meetings . . . may have pushed [Griffin]" to kill his brother." *Griffin Verdict Praised*, MIAMI HERALD, Mar. 7, 1994, at 5B. However, the Prosecution called the items "irrelevant and inflammatory," and the judge ruled that the jury would not see the evidence, *id.*, at 5B.

129. See generally Tamar Lewin, *Death of a Doctor: The Moral Debate — Abortion Doctor and Bodyguard Slain in Florida; A Cause Worth Killing For? Debate Splits Abortion Foes*, N.Y. TIMES, July 30, 1994, at A1. Some of the nearly 100 anti-abortion leaders, who recently conferred in Chicago, have not voiced their condemnation of Hill's violence, instead they are "reserving most of their outrage for those who interfere with abortion protests." *Id.*

130. Smothers, *supra* note 126, at A1.

In sum, neither the privacy nor the equality arguments for reproductive control, in principle, condemn unborn life as worthless and claims of state interest as spurious. Both conclude that government may not assume the absolute power to decide the fate of the unborn, given what is at stake for women. Disagreements about bottom lines, about the extent to which abortion is permitted or restricted, is what divides Americans.<sup>131</sup>

### C. *Pinning the Blame for the Funding Decisions*

Privacy jurisprudence is blamed for the Court's refusal to grant poor women the right to state and federal assistance for elective or "non-therapeutic" abortions.<sup>132</sup> The usual argument is that conceptually privatizing abortion as in *Roe* rules out public assistance.<sup>133</sup> Critics say the right to privacy means limited government involvement; it would be reasoning against the grain of privacy jurisprudence to find in the idea of a governmental duty to leave people alone, the idea of a governmental duty to assist the poor in seeking abortions.

This criticism of the *Roe* decision is problematic for a number of reasons. First, it implies that liberal values in principle rule out all public programs. Although extreme libertarians have taken this view, more moderate and nuanced liberal political theories that value limited government do not proscribe all forms of public assistance. The "liberal" Western nations have sought in practice to balance independence from government interference with reliance on government aid needed to make meaningful in-

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131. My own basic bottom-line response is the same as it was in my book, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988). See also Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683 (1992), Tribe's *Judicious Feminism*, 44 STAN. L. REV. 179 (1991), and *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987).

132. See *Harris v. McCrae*, 448 U.S. 297 (1980) and *Maher v. Roe*, 432 U.S. 464 (1977) (holding that neither state nor federal government must pay for a poor woman's abortion). See also *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding, under Title X of the Public Health Act, that the Government has no affirmative duty to commit any resources to facilitating abortions); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding a state may restrict the use of public funds and facilities for the performance or assistance of non-therapeutic abortions); *Beal v. Doe*, 432 U.S. 438 (1977) (holding that Title XIX of the Social Security Act does not require a state to fund non-therapeutic abortions as a condition of participation in the Medicaid program established by that Act).

133. See generally Ruth Colker, *supra* note 15; MacKinnon, *supra* note 11; Olsen, *supra* note 3; Sunstein, *supra* note 10. But see Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 338 (1985) (concluding "it becomes difficult indeed to justify the government's decision not to fund an impecunious woman's choice of abortion").

dependence possible. A number of feminists, including Rachel Pine and Sylvia Law, have suggested that American constitutionalism could accommodate affirmative understandings of privacy-related liberty that are broad enough to support abortion funding. For example, responding critically to the abortion funding cases, Pine and Law countered with a "feminist concept of reproductive freedom" based on "affirmative liberty" and the idea that "government has the obligation to insure that people can make reproductive decisions freely."<sup>134</sup> Dorothy Roberts, in reaction to *Rust v. Sullivan*,<sup>135</sup> describes a "liberation theory" version of constitutional liberty that would "recognize the importance of information for self-determination and therefore "place an affirmative obligation on the government to provide [abortion] information to people who are dependent on government funds."<sup>136</sup>

Blaming privacy jurisprudence for the funding decisions is problematic for a second reason: it implies that these decisions would have stood a chance of coming out differently had *Roe* been decided on equal protection grounds. It is highly implausible to suppose that the funding cases would have come out differently if *Roe* had been expressly defended under equal protection principles. The logic of equal protection in American constitutional law has not always required that the poor be given the resources needed to make them the substantive equals of other citizens. Equality is open in our jurisprudence to "equal opportunity" rather than "equality of results" interpretations. The Court could have acknowledged the goal of abolishing discriminatory abortion laws, while ruling that the Constitution's Equal Protection Clause does not require government abortion subsidies.

*Roe v. Wade* was a Burger Court decision. It is especially unlikely that that particular Supreme Court would have made the short leap from abortion equality to abortion subsidies. The Burger Court was notable for an expansive Due Process Clause jurisprudence, but a narrow reading of Equal Protection.<sup>137</sup> The Burger Court constricted the fundamental rights strand of equal protection that had enjoyed expansion during the Warren Court

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134. Pine and Law, *supra* note 9, at 421 and n.53 and 54.

135. 500 U.S. 173 (1991).

136. Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 640 (1993).

137. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 289-90 (1991).

era. In deciding equal protection cases, the Justices of the Burger Court "were more comfortable forbidding state regulation of certain spheres than requiring government equalization . . . of fundamental interests such as education, food, shelter, and medical care."<sup>138</sup> For the Burger Court the "reconceptualization of equal protection as an entitlement to affirmative government assistance" was "unpalatable."<sup>139</sup> And because it was, the Court could have reasoned that prohibiting states from criminalizing abortion was a requirement of gender equality, but compelling state and federal government to pay for poor women's abortions was not.

It is often assumed that concerns for women's equality argue, without question, for abortion subsidies. Yet many in the United States are mindful of the history of slavery and medical abuses of women and people of color.<sup>140</sup> As a consequence, state and federal legislators supportive of gender equality can cite egalitarian reasons for caution about sponsoring non-therapeutic abortions for poor women on welfare, many of whom are Latinos, recent immigrants, and African-Americans. Such sponsorship could lead to the appearance or reality of compulsory abortion. Although I favor public abortion subsidies, I do so circumspectfully.

The future of meaningful health care reform in the United States is uncertain. However, the intense debates in 1993 and 1994 over abortion benefits under President Bill Clinton's proposed Health Security Act remain instructive on the question of whether privacy jurisprudence is to blame for the adverse outcome in the abortion funding cases. In the context of proposed Congressional legislation, as in the context of judicial adjudication, accepting the right to abortion has not required accepting the concept of public funding. It is unlikely that a *Roe v. Wade* premised on equal protection would have made a difference in the outcome of the debates about publically subsidized health insurance. Some members of Congress and their constituents oppose the idea of forcing taxpayers to subsidize acts they find heinous on moral and religious grounds. The real foe of subsidized

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138. *Id.* at 289.

139. *Id.* at 289-90.

140. See, e.g., Roberts, *supra* note 54, at 1444; Diana Axelsen, *Women as Victims of Medical Experimentation: J. Marian Sims' Surgery on Slave Women, 1845-1850*, 2 SAGE 10 (1985). Cf. JAMES JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1981) (chronicle of government-sponsored experiments on black men with syphilis).

medical abortion is not the supposed conceptual implications of privacy jurisprudence. Rather it is the widespread moral and religious substantive opposition to killing the unborn,<sup>141</sup> combined with pervasive political opposition to government compelled complicity with felt moral and religious wrongs.

The rhetoric of privacy may fuel the abortion debates, but the substance is driving them: a segment of our society is opposed to abortion. Some people are pro-life and do not want to pay for abortions through their taxes. Indeed, some people who are pro-choice and pro-gender equality do not think it is clearly proper to ask those who are pro-life to subsidize abortions. Were the current Supreme Court miraculously to adopt the equal protection framework for abortion law tomorrow, and the next day hear a constitutional challenge to a comprehensive national health insurance law that excluded mandatory abortion coverage, it is an open question how the Court would decide the contest. It seems probable that the Court would find the law constitutional.

## V. CONCLUSION

Privacy jurisprudence is criticized as too flimsy to serve as a stable base for abortion rights.<sup>142</sup> Some critics of *Roe* embrace an equal protection alternative not yet expressly tested in the Supreme Court. Opponents of *Roe* on the Court have not said they would change their votes if the grounds of abortion were presented in equal protection terms. Nor have the pro-life activists parading in front of clinics and vying for the attention of the media promised to throw down their placards in retreat if the Court adopts an equal protection analysis of abortion law. The reason, I believe, is that some judges and activists oppose the practice of abortion, not only "right to privacy" jurisprudence.

In identifying factors that galvanized the anti-abortion movement, Justice Ginsburg did not cite privacy jurisprudence itself;

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141. See Robin Toner, *Political Memo: Abortion and the Health Plan: Hard Questions in Both Camps*, N.Y. TIMES, Oct. 12, 1993, at A20. The Clinton health plan "creates a complicated new issue for" both pro-life and pro-choice activists "because [the plan's] unified system with subsidies for the poor will largely erase the line between Federal and private money in the insurance system." *Id.* Anna Quindlen, *Public and Private; Trading Card*, N.Y. TIMES, Dec. 2, 1993, at A27. Clinton's plan offers a new set of conscientious objections for an issue which "will be argued on the basis of deeply held feelings about what is just and moral, not on fiscal prudence." *Id.*

142. See David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 985 n.51 (citing numerous works critical of *Roe v. Wade's* adoption of privacy jurisprudence).

rather she cites the “sweep and detail” of the opinion in *Roe v. Wade*.<sup>143</sup> The Court all at once swept away most of the nation’s criminal abortion statutes and handed the states a trimester-based guideline for regulation aimed at protecting women’s health and the state’s interest in potential life. Among those who oppose “[h]eavy-handed”<sup>144</sup> judicial intervention in whatever guise, for whatever cause, privacy jurisprudence is blamed for the unpopularity of permissive abortion laws. Yet an equal protection-based abortion jurisprudence of similar sweep and detail—striking down all criminal abortion statutes that categorically outlawed early abortion and dividing pregnancy into trimesters of permissible and impermissible forms of regulation—might have inspired similar reactions. One must consider the possibility that equal protection can look “better” today only because it has not yet been tousled in the fray.

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143. See Ginsburg, *supra* note 74, at 381.

144. *Id.* at 385.

