A JURISPRUDENCE OF DOUBT: DELIBERATIVE AUTONOMY AND ABORTION

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I. INTRODUCTION

"Liberty finds no refuge in a jurisprudence of doubt."[1] With this stirring pronouncement, the decision of the Supreme Court in *Planned Parenthood v. Casey* begins. The tense wait that had preceded the Court's decision had attained the quality of a death watch for *Roe v. Wade*.[2] Both proponents and opponents of the abortion right had predicted that *Casey* would engender a categorical response to *Roe*, despite the fact that the Pennsylvania statute under review did not deal with abortion in prohibitive terms: either, it was supposed, *Roe* would be overruled—the more common prediction, given the Court's most recent changes in membership—or, somehow, it would get reaffirmed.

These dichotomous predictions failed, even as *Casey*'s opening rhetoric fails, to account for the new positions in abortion jurisprudence that the Court's splintered decision making in the case denotes. While a fragile, five-member majority was able to preserve the "essential"[3] holding of *Roe v. Wade*[4] by affirming that states may not constitutionally prohibit abortion,

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This Essay is dedicated to John Paul Stevens, Associate Justice, United States Supreme Court, whose opinion in *Planned Parenthood v. Casey* was its inspiration.

My text owes much to many. For their efforts to improve an earlier draft, I thank Betsy Clark, Rusty Park (my Bible Answerman, U.U.), Ken Simons, and Avi Soifer. Hugh Baxter read this draft late-on and made several helpful suggestions. For his advice and extraordinary support, I am intensely grateful to Larry Sager. For their energetic research assistance, I thank Mary Pat Hagan and Hilary Sokolowski and these stalwarts among the present and former members of the B.U. (Pappas) Library Staff: Marlene Alderman, Kristin Cheney, Kim Dulin, and Jon Fernald. For his technical assistance and cultural expertise, I cannot be too grateful to my secretary, Bill Kaleva.

[1] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803 (1992).

[2] 410 U.S. 113 (1973).

[3] Casey, 112 S. Ct. at 2804.

[4] Casey, 112 S. Ct. at 2804 (citing Roe, 410 U.S. 113 (1973)). Adherence to *Roe*'s "essential" holding was pledged as to three designated components. A woman has a constitutional right to abortion before fetal viability and may choose to abort without "undue" interference by the state; the state may restrict post-viability abortion consonant with the needs of women's health; and the state has legitimate interests in potential life as well as in maternal health throughout pregnancy.

Roe's analytic structure, which had served as the bulwark against first-trimester regulation, was destroyed. At the same time, two separate coalitions of Justices, accounting for seven members of the Court, overcame their theoretical and strategic differences to join in upholding all but one of the abortion restrictions before them—restrictions whose prototypes had failed to pass constitutional muster in earlier attempts over the past decade.

But the most striking feature of the Court's latest abortion case may not be its hair-raising rescue of the abortion right, shorn naked of the protective analytic structure of *Roe*. Rather, the aspect of greatest continuing concern may be the attempt by the three Justices who authored *Casey*'s unusual joint opinion, to whom I shall refer as the O'Connor coalition,[5] to maroon abortion jurisprudence on an island heaped with doubt: a new sense of doubt about the integrity of the abortion right; doubt about the extent of its constitutionally permissible regulation; and a revived form of doubt about women's capacity to exercise autonomous judgment about the abortion decision—a doubt that has long functioned as a motivating force within our general culture and within the specific history of abortion law.

In this Essay, I intend to explore this new jurisprudence of doubt and to defend the right to abortion against the troubling regulatory encroachment on women's judgmental autonomy that the new jurisprudence portends.[6] In so doing, I shall argue that the effect of this encroachment and the justifications offered to support it in *Casey* is to split the abortion right into two components: a strong, non-regulable right to decide to end a pregnancy by means of abortion, which I shall call the right to decisional autonomy, and a more feeble, highly regulable right to deliberate on each woman's own terms about the decision to terminate her pregnancy, which I shall call the right of deliberative autonomy.[7] It is the latter of these rights which now must weigh off, in some uneasy balance, against state efforts to influence a woman's choice and to shape the environment of choice—efforts I shall refer to, in what follows, as deliberative interventionism. It is my intention to provide several bases for criticism of this dualistic approach to abortion regulation as well as reasons to be critical of

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[5] The three-Justice coalition that wrote in part for the majority and in part only for themselves consisted of Justices O'Connor, Kennedy, and Souter.

[6] To be clear, also, about what I intend *not* to do, I do not intend to reargue the case for a constitutional right to abortion. My point of departure for present purposes is the existence of a right to abortion, the justification of which I assume.

[7] In this divided terminology, I differ from the authors of the various opinions in *Casey*, including Justice Stevens, with whose argument I will be working closely. He uses the term "decisional autonomy" to refer to both of the aspects I have terminologically separated.

various modes of deliberative interventionism. Toward the end of the Essay, I target the effects of my criticism on the coming development of doctrine.

In assembling my thoughts on this matter, I have been greatly inspired and aided by the partial concurrence and dissent in *Casey* of Justice Stevens.[8] There, Justice Stevens has paid significant attention to the damage to women's autonomy as deliberative moral agents that the Court's new stance represents. I have dedicated this Essay to him. The four categories of analysis that comprise the separate lines of investigation I shall pursue here are adapted from the positions for which he argues in *Casey*.

These four strands of Justice Stevens' argument emerge as unusually pure announcements of concerns based in political morality—concerns sounding in historical injustice, autonomy, coercion, and equality.[9] Justice Stevens' treatment of these themes in his *Casey* opinion is cryptic. The more expansive possibilities for inquiry and discussion available in academic scholarship permit me to pursue the bases of his argument in detail, in furtherance of his defense of deliberative autonomy.

Accordingly, the structure and method of this Essay are as follows: In part II, I shall describe the conflict over abortion regulation that takes shape in *Casey* within the joint opinion of the O'Connor coalition and the opinion of Justice Stevens, with particular emphasis on the threat to women's deliberative autonomy to which the coalition's approbation of deliberative interventionism gives voice. There, too, I shall introduce the arguments from history, equality, autonomy, and coercion that Justice Stevens employs to analyze the provisions at issue in *Casey* and to justify his disagreement with the Court's treatment of almost all of them. In parts III and IV, I shall pursue these four strands of Justice Stevens' analysis, mining each, in turn, for its contribution to a defense of deliberative autonomy. The argument from history I shall reach in part III. Part IV then explores Justice Stevens' three arguments from contemporary political morality: those centered on equality, autonomy, and coercion. In part V, I reconsider the tension between regulatory intervention and deliberative autonomy in the abortion context from the combined perspective of these four previously separated strands of analysis.

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[8] Casey, 112 S. Ct. at 2838–43.

[9] Justice Stevens mentions a fifth concern, utility, which I do not pursue here.

II. *CASEY* AND THE CONFLICT OVER DELIBERATIVE AUTONOMY

A. The Birth of Post-*Roe* Deliberative Interventionism

In *Planned Parenthood v. Casey*,[10] the Supreme Court subjected to constitutional scrutiny five provisions of Pennsylvania's most recent abortion legislation. One of the five required that the informed consent of a pregnant woman be obtained prior to the procedure.[11] It put in place a twenty-four-hour minimum waiting period and stipulated that a physician must provide the woman with certain state-mandated information no later than the beginning of that period,[12] thus requiring that every woman who seeks an abortion in Pennsylvania incurs the cost and delay of two trips to any facility licensed to provide the service. Another provision required spousal notification by every married woman seeking to obtain an abortion.[13]

In identical or similar form, these and the other provisions at issue in *Casey* had been before the Court in earlier cases. On the application of *Roe v. Wade* by an increasingly slender and grudging majority, these earlier restrictions had been held unconstitutional.[14] In *Casey*, however, four of the five provisions under review—all but the spousal notification section[15] —were upheld, even as the "essential" holding of *Roe*—that the pre-viability abortion decision is constitutionally protected—was reaffirmed. This fresh combination of outcomes was accompanied by the repudiation of a significant portion of *Roe*: the adoption by a portion of the Court of a new

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[10] 112 S. Ct. 2791 (1992).

[11] 18 Pa. Cons. Stat. Ann. § 3205 (1990).

[12] Id. § 3205(a)(1)(2). The statutory mandates include the provision of both oral and written information. The oral information must be provided by either the physician who will perform the abortion or the referring physician, and may not be provided by counselors, nurses, or other care specialists at the abortion facility.

[13] 18 Pa. Cons. Stat. Ann. § 3209 (1990).

[14] See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (specific content of mandatory informed consent provisions held to be "antithesis of informed consent" and unconstitutional); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (specific content of mandatory informed consent provisions held unconstitutional). As to the former, see Chief Justice Rehnquist's partial concurrence and dissent in *Casey*, 112 S. Ct. at 2868 ("We acknowledge that in *Thornburgh* the Court struck down informed consent requirements similar to the ones at issue here.").

[15] 18 Pa. Cons. Stat. Ann. § 3209 (1990) ("spousal notification"). The joint opinion in *Casey* devoted considerable attention to the spousal notification provision. See Casey, 112 S. Ct. at 2826-33.

standard of review for abortion regulation, and the elevation of state interest in "potential life" into a justification for the regulation of pre-viability abortion, regulation that will now be entitled to include, as in the mandates at issue in *Casey*, interventions into a woman's heretofore private deliberations about her abortion decision.

These doctrinal developments had taken at least a decade to gestate. During this period, the Court's membership continued to change, and as it did, the strength of *Roe v. Wade* continued to decline. By the time *Casey* got handed down, only Justice Blackmun stood willing to justify the full measure of *Roe v. Wade* in the terms he had originally authored.[16] Arrayed at the other extreme—ready to overrule *Roe*, however untimely the moment[17]—was a bloc consisting of *Roe*'s earliest enemies, Chief Justice Rehnquist and Justice White, and the Court's newest ideological compatriots, Justices Scalia and Thomas. As the Chief Justice's partial concurrence and dissent for the foursome would have it, abortion is no constitutional right, and rational basis analysis of the pro forma variety is the only judicial constraint on its regulation that is required. On these grounds, the Rehnquist bloc made short shrift of the challenges to the Pennsylvania statute—it found all five provisions constitutional[18]—while providing

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[16] Casey, 112 S. Ct. at 2843-55. The extraordinarily personal conclusion to Justice Blackmun's opinion suggests the identification of this increasingly fragile elder of the Court with his increasingly fragile testament, *Roe v. Wade*.

[17] Of those Justices in *Casey* who dissented from the continued upholding of *Roe*, only Justice Scalia was on record as maintaining that the overruling of *Roe* did not depend on the Court's confrontation with an abortion-prohibiting statute. See Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989). In ruling on *Casey*, the Court of Appeals for the Third Circuit had observed that "this appeal does not directly implicate *Roe*; this case involves the regulation of abortions rather than their outright prohibition." Planned Parenthood v. Casey, 947 F.2d 682, 687 (3d Cir. 1991). In his partial concurrence and dissent, the Chief Justice quotes the Third Circuit's position and explicitly announces that his bloc agrees that *Roe* is not "directly implicated" in the *Casey* appeal before going on to advocate for the overruling of *Roe*, anyway. See Casey, 112 S. Ct. at 2855.

[18] The position espoused in regard to the statute's spousal notification provision is especially interesting in its application of an "irrationality" standard, according to which spousal notification passes muster. See Casey, 112 S. Ct. at 2872 ("Whether this was a wise decision or not, we cannot say that it was irrational."). In its arrival at this conclusion, the opinion sets aside the Court's prior rejection of spousal consent in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), while opening the door to the possibility that a consent provision, too, would pass muster under an irrationality standard. The opinion fails to confront the specifics of not just possible or occasional injury to pregnant women whose husbands might object, but the difficulty any statute would have in screening off adequately the far larger population of women at serious risk of injury and even death. Moreover, the opinion ignores the equal protection issue raised by the grant of notification to all husbands but to no other men responsible for, and therefore potentially responsive to, the "potential life" at issue. This matter, too,

obvious indicators of its future votes. Seconding these positions, but with biting disdain for the efforts of his colleagues,[19] Justice Scalia issued his own partial concurrence and dissent.

The methods, rationales, even the tone of the joint opinion of Justices O'Connor, Kennedy, and Souter have none of the formulaic quality or, in the case of Justice Scalia, the churlish pedantry, of the anti-*Roe* contingent. In substance and in manner, the joint opinion might well be termed an argument from accommodation. In keeping with the signal of their initial proclamation, the O'Connor coalition maintained that the essence of *Roe*—its "essential" holding—deserved judicial allegiance as a matter of stare decisis, and, to distinguish this instance from the abandonment of *Lochner v. New York*[20] and *Plessy v. Ferguson*,[21] on account of the absence of underlying change.[22] Accordingly, these Justices were willing to affirm that a woman's liberty interest in abortion, arising as a matter of substantive due process out of the Fourteenth Amendment, has attained the status of a fundamental right which, in alignment with *Roe*, a state may proscribe neither prior to fetal viability nor, in the event of a serious maternal health threat, afterward.[23] In this, they were joined by Justices Blackmun and Stevens.[24]

However, the O'Connor coalition jettisoned the two analytic features that *Roe* has been taken to stand for: its trimester framework—*Roe*'s unique contribution to the analysis of abortion regulation—and its applica-

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is saved for consideration, under the Rehnquist bloc's irrationality standard, for another day.

[19] Casey, 112 S. Ct. at 2873–85. Even for Justice Scalia, whose sharpness of intramural commentary is unique, there is a notable persistence of attack, especially toward his chief disappointments, the members of the O'Connor coalition. In regard to the joint opinion's opening phrase, which furnished the first line and the basis for the title of this Essay, Justice Scalia retorts: "One might have feared to encounter this august and sonorous phrase in an opinion defending the real *Roe v. Wade*, rather than the revised version fabricated today . . . . Reason finds no refuge in this jurisprudence of confusion." Casey, 112 S. Ct. at 2876, 2880.

[20] 198 U.S. 45 (1905).

[21] 163 U.S. 537 (1896).

[22] Casey, 112 S. Ct. at 2812–14.

[23] Id. at 2811.

[24] I do not mean to suggest a narrow point of agreement among these five justices. The five concurred in respect to all but the portions of the opinion that announce the coalition's "undue burden" standard; its position on the informed consent and parental consent provisions of the Pennsylvania statute (respectively, parts V-B and V-D), as to which Justices Stevens and Blackmun dissented; and its position on the record-keeping agreement (part V-E), as to which Justice Blackmun, but not Justice Stevens, dissented. See id. at 2838–43 (Stevens, J., concurring in part, dissenting in part) and 2843–55 (Blackmun, J., concurring in part, dissenting in part).

tion of the strict scrutiny/compelling state interest test.[25] It was the overlay of these two elements that, with the noteworthy exception of the abortion funding cases and those involving minors, had succeeded in barring most direct intervention by the states against the decision to elect first-trimester abortions—the vast majority of abortions performed in the United States. This same analysis had permitted regulation in the interest of maternal health to ripen into a "compelling" interest in the second trimester, while the state's interest in the protection of fetal life was held to permit state prohibition of third-trimester abortions, except where grave health concerns threatened the pregnant woman.[26]

To be sure, the particular—or, to more than a few scholarly observers,[27] peculiar—accommodation of individual and state interests that was driven into alignment by the fundamental right/strict scrutiny/trimesterization architecture of *Roe* had been subjected to several forms of pressure since its announcement. Over time, certain patterns of attack became clear: the most direct, though not the most sophisticated, hit high and hit low. These hits consisted of the effort, in the courts, to have abortion repudiated as a matter of right,[28] and, in the streets, to deny women access to facilities necessary to the exercise of their right.[29]

Less direct but increasingly sophisticated was the continued draftsmanship of statutory[30] and administrative devices[31] aimed at carving both

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[25] Id. at 2818-20.

[26] Roe v. Wade, 410 U.S. 113, 163-65 (1973).

[27] See, e.g., John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920 (1973).

[28] The outlines of the attack through constitutional litigation are well-defined in Abortion and the Constitution: Reversing *Roe v. Wade* Through the Courts (Dennis Horan et al. eds., 1987). This compendium is especially interesting for its strategic as well as normative claims of fraternity with the civil rights movement.

[29] The press has covered the abortion war's street battles extensively. See, e.g., Catherine S. Manegold, Abortion War, Buffalo Front: Top Guns Use Battle Tactics, N.Y. Times, Apr. 25, 1992, at A1. The Court has agreed to hear a case that challenges the constitutionality of these efforts to impede women's access to abortion facilities in its current term. See National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990) (per curiam), cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

[30] By the time the abortion legislation at issue in *Casey* came to be written, the drafting process for statutory challenges involving informed consent, for example, had undergone an apparent evolution. Whereas several of the earlier enactments had contained a series of different constraints on the exercise of the abortion right, these constraints were typically of an unrelated nature. For example, the statute at issue in Planned Parenthood v. Danforth, 428 U.S. 52 (1976) contained entirely severable provisions pertaining to the locus of late abortions; parental consent; informed consent; a 24-hour waiting period; and a provision on fetal remains.

This scatter-shot approach was probably non-accidental, as a first pass. It allowed

larger and smaller pieces out of the abortion right on all of its various sides.[32]

By the time *Casey*'s closest ancestors, *City of Akron v. Akron Center*

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one statute to be used as several forms of test case litigation, while keeping all of the statutory eggs from being broken in any single interpretative basket in the era before the conservative turn in the Court's membership. But the strategy of severability engendered a certain risk: because the provisions were completely free-standing, none could lend significant support to the legitimacy of another.

By the time *Casey*'s closest ancestors reached the Court in 1983 and 1986 a new strategy had emerged, one that attempted to synthesize the disparate elements of earlier abortion-restrictive statutes into an informed consent scheme, the operative force of which depended on a central foundational premise—that the state exercises a legitimate prerogative in requiring that *stipulated information* about its preference for childbirth be imparted to pregnant women by their doctors to fulfill the mandate of informed consent. See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); see also infra note 36.

[31] The most important administrative regulation is that issued by the Department of Health and Human Services in connection with Title X of The Public Health Service Act, 42 U.S.C.A. §1008, as amended. Known as the "gag rule" for its prohibition of even the mention of abortion to women whose "family planning" needs are met under its provisions, the rule was upheld by the Supreme Court in Rust v. Sullivan, 111 S. Ct. 1759 (1991). In response to both severe criticism and public outcry, the rule has since been modified to permit doctors but not health-care workers who more routinely see women in these settings to provide counseling concerning abortion. Congress has failed to override President Bush's veto of legislation that would have nullified the Title X restriction. See, e.g., Adam Clymer, Congressional Roundup: Backing Abortion Counseling, Senate Votes to Override a Veto, N.Y. Times, Oct. 2, 1992, at A14; Adam Clymer, The 1992 Campaign: Bush Wins the Battle to Bar Abortion Counseling, N.Y. Times, Oct. 3, 1992, §1 at 10.

[32] Thus was an increasingly conservative Supreme Court called upon to decide the constitutionality of legislation or administrative rules that required: First, spousal consent, then, spousal notification. Compare Planned Parenthood v. Danforth, 428 U.S. 52 (1976) with Casey, 112 S. Ct. at 2791. First, the failure to require the public funding of nontherapeutic abortions, later, the failure to require the public funding of medically necessary ones, still later, the refusal to permit federally-funded family planning counselors from even discussing abortion. Compare Beal v. Doe, 432 U.S. 438 (1977) and Maher v. Roe, 432 U.S. 464 (1977) and Poelker v. Doe, 432 U.S. 519 (1977) with Harris v. McRae, 448 U.S. 297 (1980) and Williams v. Zbaraz, 442 U.S. 1309 (1977); see also Rust v. Sullivan, 111 S. Ct. 1759 (1991). First, a requirement that second-trimester abortions be performed in a hospital, next, a requirement that they be performed in licensed clinics, still later, a prohibition on the performance by public employees of nontherapeutic abortions in public facilities. Compare City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) and Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) with Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) and Simopoulos v. Virginia, 462 U.S. 506 (1983). First, various parental consent and notification requirements for minors, subject to a judicial by-pass exception, later, a requirement that eligibility for the by-pass depend on clear and convincing evidence of maturity. Compare Bellotti v. Baird I, 428 U.S. 132 (1976) with Bellotti v. Baird II, 443 U.S. 622 (1979) and Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972 (1990).

for Reproductive Health[33] and *Thornburgh v. American College of Obstetricians and Gynecologists*,[34] reached the Court in 1982 and 1985, respectively, a new strategy had emerged, one that attempted to put pressure on the abortion decision as a manifestation of both privacy and autonomy by seeking constitutional legitimacy for state interventions into the relationship between the pregnant woman and her doctor. In each of these cases, the vehicle for such interventions was the requirement of an informed consent to the abortion procedure, a requirement that began its constitutional career with only the most hesitant consideration of state-mandated content provisos,[35] but which blossomed in these cases into a more full-blown treatment of this issue.[36]

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[33] 462 U.S. 416 (1983).

[34] 476 U.S. 747 (1986).

[35] See Planned Parenthood v. Danforth, 428 U.S. 52, 65–67 (1976).

[36] Looking back at three of the Court's pre-*Casey* decisions in cases involving informed consent, one can trace the manner in which the justification of deliberative interventionism evolved before reaching its mature articulation in *Casey*.

The earliest of these cases, Planned Parenthood v. Danforth, 428 U.S. 52 (1976), decided hard on the heels of *Roe*, involved an unadorned requirement that doctors elicit written informed consent from their abortion patients. Beyond the further requirement that each woman certify in writing that her consent was informed, freely given, and not coerced, the statute sought to inject no specific content into the meaning of informed consent. See id. app. at 84–89. Nevertheless, as Justice Blackmun's majority opinion mentioned in a footnote, the requirement was exceptional, since, aside from two quite special cases—one involved inmates of mental and correctional institutions—Missouri had no mandate of written informed consent for any other medical procedure at the time. Id. at 66 n.6. Perhaps it was the embarrassment of this unheeded circumstance that caused Justice Blackmun, in a further footnote, to muse:

> One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who composed the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable strait jacket in the practice of his profession.

Id. at 67 n.8.

This stated concern for the physician's professional well-being having been raised only to be put aside, the Court proceeded to its holding on the point:

> The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the state to the extent of requiring her prior written consent.

Id. at 67.

In the tension between these informal musings and the Court's stated position, the extent to which such a requirement might actually run afoul of *Roe v. Wade* was left for later address. The problems of meshing informed consent into *Roe*'s analytic

The informed consent provisions at issue in *Akron* and in *Thornburgh* were struck down by the Court. In both cases, the ground of unconstitutionality was that the provisions violated the privacy interest of a pregnant woman in a physician-patient relationship that should be tailored to the woman's actual circumstance.[37] Moreover, the provisions at issue were held to violate *Roe*'s requirement that, before the viability of the fetus, the state's only justification for regulation must be reasonably related to maternal health.[38] In both cases, a majority of the Court insisted that the maternal health justification cannot, in effect, be sharpened into a point the state may use to pry open the private sphere of the doctor-patient relationship.

These positions of the majority in *Akron* and *Thornburgh* did not persuade Justice O'Connor of the unconstitutionality of the states' increasingly interventionist approach to abortion decision-making, where the interventions implicated the decision procedure imposed upon women in the exercise of their choice. In *Akron*, a full decade before *Casey*, Justice

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framework did not acquit themselves so readily, however, once *Danforth*-literate drafters developed an interest in informed consent of a content-specific nature. The next two versions of informed consent to reach the Court both evidenced efforts to push past *Roe* along these lines. Both were highly ambitious and, in terms of the Court's evolving membership, both were ahead of their time.

In the first of the two cases, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983), the Court reviewed an ordinance that incorporated the relevant portion of the *Danforth* statute as the effective platform for its content-specific mandates. Thus, it stated that no abortion shall be performed without "'the informed written consent of the pregnant woman . . . given freely and without coercion,'" and then it continued, "'[I]n order to insure that the consent for an abortion is truly informed consent,'" the physician must "inform" the patient of the physical and emotional complications that may result from an abortion by setting out a lengthy list of consequences and the availability of state agencies to aid with adoption and childbirth. Id. at 423 n.5 (citing Akron Codified Ordinances, Ch. 1870, § 1870.06(A)-(B)). Additionally, the statute required the physician to "inform" the pregnant woman that "'the unborn child is a human life from the moment of conception.'" Id. (citing § 1870.06(b)(3)). The statute also put in place a 24-hour waiting period between the signing of the consent and the first availability of the abortion procedure. Id. at 423 n.5 (citing § 1870.07).

The second of the two cases was Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). Here, the content required to be imparted to the pregnant woman was even more elaborate than in *Akron*, including both information to be orally imparted by the physician and additional materials in printed form. The "information" in question included the facts that there may be "detrimental physical and psychological effects" from abortion—though no such warning was required concerning the similar potential effects of childbirth; the availability of prenatal and neonatal care and paternal child support; and a description of the probable anatomical and physiological characteristics of an "unborn child" at "two-week gestational increments." Thornburgh, 476 U.S. at 761-62. The Pennsylvania statute at issue integrated these mandates into its informed consent requirement. On the concept of "integrated" informed consent see supra note 30.

[37] See Thornburgh, 476 U.S. at 759, 762-63, 767; Akron, 462 U.S. at 443.

[38] See Thornburgh, 476 U.S. at 759, 766; Akron, 462 U.S. at 422-44.

O'Connor announced her view that *Roe*'s trimesterized analysis of abortion regulation found no support in either "law or logic" and should, therefore, be abandoned.[39] Though she did not articulate an equivalent hostility toward strict scrutiny analysis, she relegated it to a far narrower role than that operative in the Court's applications of *Roe*; advocated the adoption of an "unduly burdensome" standard to be used for any and all regulation throughout pregnancy; and opined that a regulation could be "undue" and yet survive strict scrutiny if based on a "sufficiently" compelling state interest.[40] She found state interest in protecting potential life to be both "important" and "legitimate" and, "since *potential* life is not less potential in the first weeks of pregnancy than it is at viability or afterward," worthy of intervention throughout pregnancy.[41] Moreover, although the "compelling" nature of the state's interest in potential life was not adopted by the majority in *Akron*, Justice O'Connor took pains to reference it as such in her dissent in *Thornburgh*.[42]

The joint opinion of Justices Kennedy, O'Connor, and Souter in *Casey*[43] does not represent a wholesale adoption of these earlier views of Justice O'Connor.[44] But two of the strongest doctrinal shifts that the joint opinion emphasizes—the rejection of *Roe*'s trimesterized strict scrutiny analysis and the emphatic accommodation of abortion regulation in the interest of potential life—are both pre-figured in her earlier work. It is this pre-figuration of these central features of the joint opinion in *Casey* that underlies my reference to its authors as the O'Connor coalition.

What is not pre-figured in Justice O'Connor's *Akron* and *Thornburgh* dissents is the effort to dovetail major revisions of *Roe* with independent justifications of deliberative interventionism, all for the explicit purpose of accommodating state interest in potential life. It is that set of mutually reinforcing efforts with which Justice Stevens has taken issue, in the name of preserving deliberative autonomy as a functional component of the abortion right. The conflict between the coalition's position and his, as

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[39] Akron, 462 U.S. at 459.

[40] Id. at 463.

[41] Id. at 461.

[42] 476 U.S. at 828.

[43] 112 S. Ct. at 2791–2833.

[44] The joint opinion confronts this fact and the similar manner in which its response to *Roe* and adoption of the undue burden test differ from prior positions taken by Justice Kennedy. See id. at 2820. One of the many bases on which Justice Scalia sets out to skewer the coalition involves its prior inconsistencies in analysis, which neither he nor they take the obvious step of describing as a series of rehearsals unenhanced by the coalition's new-found strength in mutual deliberation. See id. at 2876–77. To be sure, Justice Scalia's criticisms run both deeper and wider than his objection from inconsistency.

articulated in *Casey*, is described in subsections B and C, below.

B. The O'Connor Coalition's Justification of Deliberative Interventionism

Viewed as a substantial effort to accommodate state interest in potential life while maintaining the existence of an abortion right, three of the major doctrinal components of the O'Connor coalition's joint opinion in *Casey*[45] attain the force of a unified, instrumental logic. These three components involve the justification of deliberative interventionism; the tacit reproval of privacy as a condition and basis of the abortion right; and the repudiation of trimesterized strict scrutiny analysis in favor of a more relaxed standard of review.

The starting point for the coalition's analysis appears to be Justice O'Connor's long-held position that the state's interest in potential life was arbitrarily suppressed under *Roe*.[46] With its insistence that this interest became a sufficient justification for regulation only at viability, *Roe* employed trimesterization and strict scrutiny analysis to secure an essentially regulation-free first trimester and a woman-oriented regulatory regime for the second trimester of pregnancy.[47] In contrast, the coalition's nullification of these approaches, when joined with the analysis of the Rehnquist bloc, created, in *Casey*, a new form of permission for state regulation throughout pregnancy in the name of potential life.

As to the means by which the state may regulate, the coalition set no strictures; indeed, it side-stepped opportunities to give explicit guidance on the subject, focusing, instead, on a first elaboration of the relationship between informed consent and the state's new regulatory posture.

> We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.[48]

Considered in the light of *Roe* but more particularly in light of *Danforth*'s concern and *Akron*'s and *Thornburgh*'s refusals to permit states the role of suasive intervener in the doctor-patient relationship,[49] this

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[45] 112 S. Ct. at 2791-2833.

[46] See my discussion of her prior analyses supra text accompanying notes 39-42.

[47] See Roe v. Wade, 410 U.S. 113, 162-64 (1973).

[48] Casey, 112 S. Ct. at 2821.

[49] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S.

invitation to states to interject their own brand of advocacy into the abortion decision marks a striking change in the normative landscape of abortion law. The coalition's further rationale for this assertion of legitimacy underscores the self-consciousness of its maturation from Justice O'Connor's earlier announcements of sympathy into a full-blown justification for intervention.

> Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . . It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.[50]

Despite this attempt to claim a consistency between *Roe*'s "central premises"[51] and state intervention into the pregnant woman's decision procedure, it is obvious that direct interventions of the sort that the coalition means to legitimize in *Casey* are antagonistic to the constitutionalized concept of privacy and to the functional embodiment of a private sphere of decisional autonomy advanced in *Roe*. Perhaps it is for this reason that the coalition privileges the term "liberty" and largely abandons the term "privacy" throughout the joint opinion.[52] Through this separation of "liberty" from "privacy," the relational aspect of privacy—treated, in *Roe*, as belonging to the doctor-patient relationship[53]—is caused to relinquish its affinity with its constitutional progenitor, the private sphere of the marital relationship, which, in *Griswold v. Connecticut*,[54] the state was forbidden

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747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). See discussion supra text accompanying notes 33–38.

[50] Casey, 112 S. Ct. at 2818.

[51] Id. at 2823.

[52] Throughout the joint opinion, the concept of "privacy" is referenced by name typically when the coalition means to distinguish its approval of interventionism from announcements in prior opinions that, on grounds of privacy, are inconsistent with such approval. See, e.g., id. at 2823–24.

[53] See Roe v. Wade, 410 U.S. 113, 152–54 (1973). For a fuller and more satisfactory mobilization of the right of privacy than I attempt here, see the Article by my co-panelist Linda McClain, The Poverty of Privacy?, 3 Colum. J. Gender & L. 119 (1992).

[54] 381 U.S. 479 (1965).

to enter. Moreover, by means of this virtual abandonment, privacy is deprived of its status as lexical courier between our constitutional tradition of liberty insulated from state intervention and the various encroachments of interventionist abortion regulation. The coalition's version of the abortion right thus becomes porous: it is far less able to resist the advances of the interventionist state than was the privacy-protected right envisioned by *Roe*.

The remaining portion of the Court's analysis announces the standard of review by which the coalition undertook to measure the constitutionality of *Casey*'s abortion restrictions and to which it intends to "adhere"[55] in future cases. This standard, a modification of Justice O'Connor's earlier work, the coalition offered in these terms:

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.
>
> . . .
>
> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends . . . .
>
> Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.[56]

The difficulty that this standard will bring to the achievement of reliable boundaries between the state's newly legitimated interest in potential life and the interests in privacy and autonomy of the pregnant woman are partially inherent in its formulation. In the terms of logic and linguistics, the problem of unreliability is wrought in by the fact that the "test" involves concepts that are non-absolute and that attract borderline cases they are incapable of resolving. This is because the filter for severity

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[55] Casey, 112 S. Ct. at 2820.

[56] Id. at 2820-21.

in the coalition's standard—"obstacles" are to be proscribed only if "substantial"—relies on a scaling adjective that has no truth-value, is indefinite, and is non-representative of the act of line-drawing.[57] Moreover, as a matter of prior experience, the Court's recent attempts to assign content to the concept of "burden" in areas of constitutional right outside the abortion context are sufficiently opaque as to inspire an independent basis for skepticism about the clarity of a test that rests on a further metaphysics—the nature of "undueness."[58]

The coalition had an obvious means at hand by which to steer an initial course through these evident shoals of doubt. They could have given guidance by way of example.[59] But the most serious concerns raised by the O'Connor coalition's efforts do not rest on doubts about the extent of regulatory permissiveness entailed by future applications of its new standard of review. The most serious concerns are those raised in Justice Stevens' responses to the coalition in the dialogue he inaugurates over deliberative autonomy and the integrity of the abortion right. Seen through the lenses

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[57] For a useful discussion of scaling adjectives, see Wilfred Hodges, Logic 31-34 (1977).

[58] For a clarifying discussion that departs from the Court's failures to demarcate the boundaries of "burden" in the free exercise area, see Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933 (1989). Justice Scalia's attack on the coalition's undue burden standard, while failing to give ground to the distinction between rules and standards and the necessity of judicial reliance on both, is both extensive and rigorous in its criticisms. See Casey, 112 S. Ct. at 2876-79. It is possible the coalition assumes it has sufficiently responded to these criticisms, blunting their force with passive resistance in its gentle acknowledgement that one must be prepared for vagaries in the application of their sort of standard across the broad terrain of factual experience. See id. at 2821 ("Even when jurists reason from shared premises, some disagreement is inevitable . . . .").

[59] That is, the joint opinion could have clarified the limits beyond which a state may not go in attempting to "persuade" a pregnant woman of the desirability of adopting, in the circumstances she faces, the outcome the state prefers. For instance, in the course of accepting as constitutional Pennsylvania's informed consent provision, with its 24-hour mandatory delay, the coalition might have indicated whether a yet-longer delay should fail. Similarly, as to the provision requiring a doctor to convey to the pregnant woman the probable gestational age of the fetus, the coalition could have stated whether Pennsylvania's earlier, unsuccessful attempt to require the description of the fetus at gestational "increments" may now be revived. See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 761-62 (1986).

Moreover, in respect to the "information" the state may require the doctor to transmit, the coalition notes that if this be "truthful" and "not misleading," it "may be permissible." Casey, 112 S. Ct. at 2823. But the coalition does not stipulate that such "information" must be factual. Rather, such "guidance" as is given pulls in two directions, requiring, on the one hand, that the state's communications be "truthful," but suggesting, on the other, that the state may proffer non-fact-based arguments, the truth-value of which it may be impossible to ascertain, in order to "persuade" the woman to choose childbirth over abortion. Casey, 112 S. Ct. at 2821, 2823.

he employs, the rescue of a woman's right to decisional autonomy—the nub of *Roe*—at the expense of her autonomous right to decide the abortion question privately and on her own terms is a wrongful outcome. The four arguments through which Justice Stevens advances that position are traced out, in the terms in which he employs them, in the next subsection.

C. Justice Stevens and the Defense of Deliberative Autonomy

Justice Stevens' analysis of what is at stake in abortion regulation joins issue with the analysis of the O'Connor coalition at its point of departure—assessment of the state interest in potential life. In an effort to demote the coalition's elevation of that interest to a significance competitive with the woman's right to abortion, Justice Stevens opens his argument by reminding the coalition of their acknowledgment, *sub silentio*, that fetal life is not cognizable as personhood under the Fourteenth Amendment.[60]

In substitution for any of the familiar structures of analysis he might have then interposed to balance the conflict between these interests, Justice Stevens first makes a strong claim on behalf of the commutation of constitutionally-recognized liberty into decisional autonomy regarding abortion.

> One aspect of liberty is a right to bodily integrity, a right to control one's person . . . . The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature . . . . A woman considering abortion faces 'a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul' . . . . The authority to make such traumatic and yet empowering decisions is an element of basic human dignity . . . .[61]

As to this foundational premise—that decisional autonomy remains the true legacy of the constitutional analysis of abortion—Justice Stevens rightly assumes no disagreement with the O'Connor coalition. But his demotion of potential life to the status of a legitimate interest untethered to the

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[60] Casey, 112 S. Ct. at 2838. By way of further reminder based on recent case law, Justice Stevens adds as qualifying conditions that the state's interest in potential life must be neither theological nor sectarian. Lastly, he chides the coalition on its displacement of trimesterization to accommodate this interest of the state, noting that the legitimacy of the state's interest in potential life "does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty."

[61] Id. at 2840 (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 781 (1986)).

Constitution's commanding interest in personhood divides his analysis from the coalition's. This division was further widened by Justice Stevens' framing of the abortion right within the broad terms of political morality, several of which he applies to the various provisions of the Pennsylvania statute, with autonomy as his first and overarching concern.

The second of Justice Stevens' concerns is the history of discrimination against women on grounds of judgmental deficiency. The mandatory waiting period, he found, rested on "outmoded and unacceptable assumptions about the decision-making capacity of women."[62] He also found the waiting period unacceptable to the extent it may be premised on the view that only childbirth is the correct outcome of pregnancy—a premise that is illegitimate, in view of the abortion right.[63] Therefore, he maintained, "[a] woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion"—an argument from coercion, the third of his announced concerns from the realm of underlying values.[64] Lastly as to the waiting period, Justice Stevens offered an argument from equality—that the dignity the state accords to women who carry to term is offended by the requirement that women who may decide to abort are forced to delay their decision.[65]

As to the required information that Pennsylvania implanted in the informed consent mandate, Justice Stevens introduced his analysis with this worry about coercion: "Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate."[66] On his version of that review, the informed consent provisions of the Pennsylvania statute should have fallen, since its informational mandate is likely to be of no actual utility to the decisional process of some-to-most women and its compelled disclosure in the course of the informed consent procedure is, therefore, illegitimate.[67]

Taking a more general view of the issue of legitimacy, Justice Stevens announced the extent of his agreement and disagreement with the O'Connor coalition over the nature of the regulatory scheme the state may legitimately impose in the advancement of its interest in potential life. He begins this

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[62] Id. at 2841-42.

[63] Id. at 2842.

[64] Id. at 2841.

[65] Id. at 2842.

[66] Id. at 2843.

[67] As mentioned previously, I do not pursue in this Essay Justice Stevens' argument from utility.

section of his analysis by agreeing with the coalition that the state may express a preference for childbirth, that the state may "take steps to ensure that a woman's choice" is "'thoughtful and informed'" and that "'States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.'" But he interposed objections grounded in decisional autonomy—the foremost of his concerns —to state efforts to "persuade," "sway or direct," or even to "influence" the woman's choice, either by limiting the information available to her or by requiring the disclosure of information designed with suasion as its purpose.

Finally, he offered an elegant re-statement of the coalition's undue burden/substantial obstacle test: "A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification." Applying this formulation in conjunction with his arguments from autonomy, historic discrimination, equality, and coercion, he underscored his earlier conclusions of unconstitutionality as a "correct application" of the coalition's own standard of review.[68]

Travelling at a level of analysis both broader and deeper than any of the other opinions in *Casey*, Justice Stevens' partial concurrence and dissent poses the challenge of melding political theory to constitutional doctrine within the framework of detailed justificatory argument. But the opinion may be too terse to meet this challenge fully. There are gaps in the argument and unanswered questions to which it gives rise.[69] These seem less the fault of the ambitions of the method than of the close confines within which it unfolds.

To test this hypothesis and to draw as much out of Justice Stevens' effort as seems necessary to an adequate defense of deliberative autonomy, I have appropriated from his argument four of the main concerns of his argument, but I have altered his approach to their use. Thus, in parts III and IV of what follows, I pursue first the issue of historic injustice (part III) and then the three objections to deliberative interventionism that Justice

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[68] Casey, 112 S. Ct. at 2842–43.

[69] Some of these difficulties suggest gaps in practical reasoning. How can the state express a "preference" for childbirth, id. at 2840, without managing to "influence," id. at 2841, if not "persuade," id. at 2840, a woman of the undesirability of abortion? Why is the state not free to claim that a brief waiting period is simply a part of its "reasonable framework," id., for the woman's decision? How can the premise that abortion is "presumptively wrong," id. at 2842, be illegitimate if the state's "preference" for childbirth, id. at 2840, is legitimate?

Other questions are more abstract. How can an equal treatment argument based on a comparison between birth-oriented and abortion-oriented women justify any regulation of abortion at all? Having argued that the state's interest in potential life does not, without more, justify pre-viability intervention, what grounds Justice Stevens' ultimate agreement with the O'Connor coalition on the types of state intervention he approves?

Stevens grounds in contemporary political morality: autonomy, coercion, and equality (part IV). It is only after pursuing these as separate lines of inquiry that I return to their practical application to such regulatory issues as the Court confronted in *Casey*.

III. DELIBERATIVE INTERVENTIONISM: THE OBJECTION FROM HISTORY

A. Lengthening the Telescope of History and Widening Its Lens

Justice Stevens centers his analysis of Pennsylvania's mandatory waiting period on its reflection of "outmoded and unacceptable assumptions about the decision-making capacity of women."[70] He concludes, "Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, so we must reject the notion that a woman is less capable of deciding matters of gravity."[71]

Though he applied his broad objection from history to just one of the Pennsylvania statute's provisions, Justice Stevens' concern may be treated as an holistic objection to state impositions on deliberative autonomy in regard to abortion. At a minimum, the ancient pedigree of doubts about women as moral agents and the instrumental deployment of those doubts within the past and present history of abortion law should promote skepticism about the legitimacy of the latest thrust toward deliberative interventionism. Indeed, it is the burden of this part to demonstrate what a painfully familiar circumstance is this latest rejection of public trust in the autonomy of women, a circumstance already observable at the dawn of Western culture. To be sure, the attitudes and actions involving women's moral agency that we shall revisit in briefest compass here have served different goals, some necessarily conjectural, at different times. This fact lends color to the possibility that we are not truly observing a single phenomenon—the doubt and distrust of women—but instead, a congeries of aspects of our social history that has had little or nothing to do with the contemporary regulation of abortion. Alternatively, it may be argued that *some* doubts about moral agents are justifiably entertained under *some* circumstances, and that abortion decision making is one circumstance that justifies a doubting stance. Rather than attempt to refute these claims in the

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[70] Casey, 112 S. Ct. at 2842.

[71] Id.

abstract, I intend to let my interpretive offers from history do some of the necessary work in subsections B through E and to let my concluding observations, in subsection F, do yet more. But neither the history of women nor the history of abortion law need stand alone as a basis for skepticism about the legitimacy of deliberative interventionism. The subjects of part IV intend to further the concerns I raise here, as do the arguments with which I conclude in part V. History serves, then, as the preparatory basis for a critique of deliberative interventionism, one that insists on a long view of the public mistrust of women.

B. History in the Long View

Because of its length of service both as originating metaphor and as early justification for patriarchal Western culture, but more particularly because of its striking resemblance to nineteenth-century characterizations of women in the campaign to reform abortion law, I begin with the story of Adam and Eve.[72] This Old Testament story accounts for the ejection of mythic "Man" and "Woman" from the simple ease of womb-like Eden into the pain-filled, non-idyllic world of human circumstance. Like so much of the Bible, it has proved a fertile site for interpretive activity. One interpretation in particular has enjoyed an instrumental role within secular culture. I emphasize its normative features in the re-telling that follows:

God placed his newly-devised human creations, Adam and Eve, in the Garden of Eden, where He allowed them to eat all fruit save that of the Tree of Knowledge. This, they were explicitly commanded not to eat, on pain of death. The Serpent, the first in a long line of opportunists we shall meet in this part, announces to Eve that godliness—the knowledge of good

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[72] For the sake of accuracy, I should indicate that *Genesis*, the chapter of the Old Testament which contains the Adam and Eve story, offers two accounts of it. Compare Genesis 1:26–31 (the creation account *simpliciter*) with Genesis 2:8–24 and 3:1–24 (the disobedience account). Like other versions of the creation myth extant during the formative early periods of Judaism and Christianity, the first of these accounts is unconcerned with human agency. See, e.g., The Creation of Man (Mandean Gnostic creation account), in The Other Bible 134 (Willis Barnstone ed., 1984). It is only in the second of the accounts in *Genesis* that there appear attributions of blameworthiness capable of patriarchal interpretive potency.

For a contemporary pre-feminist reinterpretation of *Genesis* 2 and 3, see Phyllis Trible, If the Bible's So Patriarchal, How Come I Love It?, Bible Rev., Oct. 1992, at 44, 55. For an analysis that presents the development of the more conventional position on Christian dogma, see Marina Warner, Alone of All Her Sex: The Myth and Cult of the Virgin Mary 50–67 (1976).

I have not sought to reference creation stories outside the Judeo-Christian tradition, as these appear to have played no role in the development of American policy and doctrine regarding abortion, the sole development I am pursuing here.

and evil—not death, would result from eating the fruit of this Tree.

It is Eve's surrender to the seductive serpent that is the proximate cause of her failure to follow the path of rectitude—obedience to God's will. In the instrumental account of the story, it is the *cause* of this disobedience, not the act itself or its consequences, that is central. Eve's disobedience is a sign. It is the manifestation of certain innate character flaws, most prominently a lack of ability to resist the triple appetites of curiosity, non-spiritual nourishment, and willfulness. Moreover, like the Serpent, Eve is seductive. It is Eve's successful temptation of Adam that causes him to deviate from righteousness by eating the apple, too.

Like the actions of any garden-variety tortfeasors, this conduct gives rise to human responsibility for the damages that God metes out, beginning with the ejection of our progenitors from the Garden.[73] Adam's further punishment, and therefore that of all men, is that he must toil in order to survive.[74] In the case of Eve and, as a matter of vicarious liability, her half of the species, there are additional impositions, made necessary by her apparently characterological incapacity for moral self-rule. Thus, on account of Eve's transgression, there is to be, ever after, pain in childbirth; while on account of her ungovernable tendency toward transgression, there must be husbands who "shall rule over you."[75] Yet, despite the pain and subjugation that are to be the fate of women in the hands of men, women are to be chained for the rest of time to the rock of desire—ironically, it would seem—the desire for a husband.[76]

The story of Eve is in no sense the template for the other Old Testament portions that feature women.[77] It is in the New Testament that the necessary subordination of women, which is central to the story of Eve, begins to develop wings. More specifically, the subordination of women gets treated as a matter of ethical necessity, though with deep inconsistency,[78] as a partial rendering of the necessity of a hierarchical structure

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[73] Genesis 3:23-24.

[74] Id. at 3:16-17.

[75] Id. at 3:16.

[76] Id. But see Adrien Janis Bledstein, Was Eve Cursed?, Bible Rev. Feb. 1993, at 42-45.

[77] The Old Testament is replete with independent, wise, and morally commendable women—among them Esther, Hannah, Ruth, and Deborah—whose stories have come to resonate throughout our cultural history in an interpretively noncontroversial manner. For their stories, see, respectively, The Book of Esther, The First Book of Samuel, The Book of Ruth, and The Book of Judges.

Yet for the power of her influence on our secular culture, it would be difficult to claim that any Old Testament woman compares with Eve.

[78] Within some of its texts, for example, the New Testament can be taken to insist that the hierarchical nature of man's relationship to God should be reinforced by the

of belief. This chain of being places Woman below Man and Man below Christ—Himself below God. To this instrumental depiction, the early Christian church added into dogma a misogynistic reading of Eve-as-Woman. Here is an example:

> Do you not believe that you are [each] an Eve? The sentence of God on this sex of yours lives on in our times and so it is necessary that the guilt should live on, also. You are the one who opened the door to the Devil, you are the one who first plucked the fruit of the forbidden tree, you are the first who deserted the divine law; you are the one who persuaded him whom the Devil was not strong enough to attack. All too easily, you destroyed the image of God, man. Because of your desert, that is, death, even the Son of God had to die.[79]

This became the instrumental account of the creation myth that began to propel itself forward through Western culture.

C. The Early Modern Period: England and the Continent

The misogynistic strand of early Christian theology provided England and the Continent with both an excuse and an explanation for the twinned development of patriarchy in politics and law. Thus, the early Church's model of hierarchy was first adapted to both the descriptive and normative needs of feudalism[80] and later, to the needs of absolute monarchy.[81] In

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structure of all known relationships. As expressed in this Pauline formulation, the ineluctable chain of being iterates hierarchy thusly: "But I want you to understand that Christ is the head of every man, and the husband is the head of his wife, and God is the head of Christ." 1 Corinthians 11:3. This articulation does not necessarily relate back to creationist ideology, though Paul adds, "Neither was man created for the sake of woman, but woman for the sake of man." 1 Corinthians 11:9.

Moreover, Christian dogma would seem to depend more heavily on the purity and goodness of Mary, the mother of Jesus, than on any reliance, borrowed from the species-wide creation myth, of the badness of Eve. It is interesting to compare the contemporary scholarship of two Christian feminists on this matter. Compare Warner, supra note 72, passim with Mary Daly, Beyond God the Father: Toward a Philosophy of Women's Liberation 44-68 (1973).

At least as significantly, all promises of equality before God—of sexually nondiscriminatory belief and redemption and the evocation of such redemption in the parables of fallen women raised up by Jesus—are strongly suggestive of a form of patriarchy not obviously dependent upon misogyny. For examples of model New Testament Christian women, see Acts 18:1-3, 26; Luke 2:36-38; Mark 16.

[79] Tertullian, Disciplinary, Moral and Ascetical Works 117-18 (Rudolph Arbesmann et al. trans., 1959).

[80] An early example of these reinforcing ideologies of church and state is to be found in a play called the Jeu d'Adam (Play of Adam). Its characters are Adam, Eve, God (good), and Satan (evil). As several social historians have observed, the structure

both instances, the placement of women below men on the chain of being offered instrumental value. The necessary linearity of hierarchy was thereby reinforced, along with its static nature. At the same time, the newly secularized authorization to ordinary men of dominion over their wives granted them a form of solace for life's greater inequities, while the grant itself reinforced the status of secular authority. Lastly, the practice of female subordination may well have exercised a stabilizing influence on early modern society by fostering a sense of identification among male power holders with greater and lesser claims to wealth and influence on all links of the chain.

As neatly as the idea of female subjugation in marriage served the feudal ideal of religious and social stasis through hierarchy, it also proved highly adaptable to one of the most transformative developments of the twelfth through the seventeenth centuries: the private concentration and transmission of wealth, through the use within the social and economic elites, of arranged marriage, primogeniture, and a highly elaborate system of kinship rules and customs. Although each of these methods of social control and wealth transmission eventually collapsed, their combined force permitted wealth to concentrate in relatively few hands. The elimination of females from the potential cohort of the wealthy greatly aided this concentration.[82]

These vast projects were substantially aided by three infusions of authoritative energy during the early modern period. One such infusion came from the developing realm of medical science—specifically, physiology—in the form of an empirical justification for patriarchy. A second came from the developing realm of Protestant denominationalism in the form of renewed encouragement for patriarchy within the family. The third contribution was made by the developing realm of law. It included the increasing elaboration of enforceable rules that gave practical meaning to patriarchy, and the issuance of influential commentaries on the law that insisted on male dominance as a governing norm.

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of relationship among the characters and the action seem designed to reinforce the nature and demands of feudalism and male-dominated marriage, and to link the two as the highest forms of representation of God's will. See Georges Duby, The Knight, The Lady and The Priest: The Making of Modern Marriage in Medieval France, and sources cited therein, 213 (Barbara Bray trans., 1983); see also infra note 81.

[81] For a succinct discussion of the relationship between hierarchy within Christian dogma and the claims of absolute monarchy that traces the linkage of monarchy to patriarchal marriage, see Lawrence Stone, The Family, Sex and Marriage in England 1500-1800, at 152-54, 667-68 (1977).

[82] I have found three studies especially useful for overviews of these developments. Duby, supra note 80; Pearl Hogrefe, Tudor Women: Commoners and Queens (1975); Stone, supra note 81.

From physiology came the evidence that female disorderliness of the sort that Eve had demonstrated was a very different matter from male disorderliness. In the male, disorderliness was attributed to conditions in the world such as ignorance and poverty, while in the female, the problem resided not in the world, but in her nature.[83] By the sixteenth century, physiologists had determined that, as one historian has summarized the findings,

> The female was composed of cold and wet humors (the male was hot and dry), and coldness and wetness meant a changeable, deceptive, and tricky temperament. Her womb was like a hungry animal; when not amply fed by sexual intercourse or reproduction, it was likely to wander about in her body, overpowering her speech and senses. If the Virgin Mary was free of such a weakness, it was because she was the blessed vessel of the Lord. But no other woman had been immaculately conceived, and even the well-born lady could fall victim to a fit of the "mother," as the uterus was called.[84]

By the late seventeenth century, the basis for this view had changed. "Humors" within the body were no longer the foundation of theories of behavior, having been replaced, in the dominant conception, by notions of "animal spirits."[85] But the latter hypothesis brought about no underlying change, only a modest revision in the theory of woman's nature.[86] This theory continued to hold the uterus responsible for woman's sickly and unreliable temperament, hence, the new name for one of Woman's nature-driven maladies: hysteria.[87] This amended diagnosis proved remarkably enduring.[88] It was to become familiar to the state legislators of nineteenth-

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[83] For a discussion of gender-biased sixteenth-century physiology, see Natalie Zemon Davis, Society and Culture in Early Modern France 125–51 (1975).

[84] Id. at 124.

[85] Id. at 125.

[86] Folk wisdom and popular culture had meanwhile developed the same set of premises, most likely, independent of medical "science." Thus, the old French adage framed woman as "[u]ne beste imparfaicte, sans foy, sans loy, sans craincte, sans constance." Id. at 124. The phrase translates: "An imperfect beast, knowing neither faith, nor law, nor fear, nor fortitude." I am indebted to Rusty Park for this translation.

[87] Id. "Hysteria" is the ancient Greek word for "uterus."

[88] For the later sophistication of the neurosis "hysteria," see Josef Breuer & Sigmund Freud, Studies on Hysteria (1893–1895), in 2 The Standard Edition of the Complete Psychological Works of Sigmund Freud (James Strachey trans., 1955) [hereinafter The Standard Edition]. The only patients Freud treated for hysteria were women. Although he referred, in a lecture, to the possibility of male hysteria, his case studies of female hysterics may have been taken as evidence of the dominant view that certainly prevailed in his time: Hysteria was a gender-specific malady. I owe both the

century America, to whom it was served up as a central justification for abortion law reform.[89]

The new Protestant denominations, together with the disaffiliated Church of England, reinforced the subjugation of wives through marriage in powerful, though somewhat inconsistent ways.[90] The theological source most commonly cited for the necessity of patriarchy is thoroughly familiar to us by now: "'[S]he who first drew man into sin should now be subject to him, lest by the like womanish weakness she fall again.'"[91]

Legal developments provided powerful reinforcement for patriarchy, elaborating as the derivative rights of men and their concomitant obligations to the social order, detailed prescriptions which would have been practically impossible to elaborate under the broad precepts of theology.[92] The most

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reference and the observations about Freud's work to Stephen J. Morse.

[89] See discussion infra note 138 and references cited therein; see also infra text accompanying note 143.

[90] Within some denominations, husbands were entreated, if a wife were "'not obedient and helpful to him,'" to "'beat the fear of God into her head . . . that thereby she may be compelled to learn her duty and do it.'" Stone, supra note 81, at 197 (quoting 1 Peter 3 (Matthew's Bible (1537)). The more temperate Church of England required, by order of the Crown as of 1562, that the Homily on Marriage be read to parishioners every Sunday. While it intoned that "'the woman is a weak creature not embued with . . . constancy of mind . . . [and] prone to all weak affections and dispositions of mind,'" the Homily also advised husbands not to beat their wives, as was their right, but to grant due regard to the fact that woman is "'the weaker vessel.'" Id. at 198.

[91] Id. at 197 (quoting William Gouge, Of Domesticall Duties (1622, 1634)).

[92] These legal developments included the rule that by virtue of a woman's incapacity as her husband's ward—the same effective status as her children—a wife's sole property came under the control and absolute ownership of her husband. So did the custody, control, beneficial rights, services, and earnings of her children. By virtue of her non-status, a wife could not enter into an enforceable contract. She had only limited testamentary rights and no power to make gifts. Moreover, "control" of children under the common law included the rights of fathers to contract to marry off their daughters *in futuro* and to arrange such marriages by will. See Hogrefe, supra note 82, at 18. A succinct and useful summary of the common law's treatment of married women is contained in Lee Holcombe, Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England 18–36 (1983). For two valuable accounts of the treatment of wives at early American common law, see Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York 15–112 (1982); Marylynn Salmon, Women and the Law of Property in Early America 14–57 (1986).

Most notoriously, because of the unity of personhood and the fiction of her blanket consent through the marriage vow to sexual availability, monogamy, and obedience, the law recognized a marital "exception" to the crime of rape. The law has not yet completely repudiated this exception, although some courts and legislatures have. See, e.g., Warren v. State, 336 S.E.2d 221 (Ga. 1985); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984), cert. denied, 471 U.S. 1020 (1985); Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev. 1255

expansive of the common law's contributions to the practical implications of marriage was the notion of unity of person during "coverture."[93] Upon marriage, women were taken to surrender such legal personhood as they had had and to enter a "unity" of personhood, becoming, thereafter, a creature unrecognized as a subject of law, whose husband functioned as her "head."[94] By this sweeping device, the married woman was deprived of the status of a legal person—the status that unmarried women of full age enjoyed.[95]

D. Patriarchy's Internal Decline

Between the mid-sixteenth and the mid-nineteenth centuries, two of the ideological and social forces that had most strongly reinforced patriarchy in its old-style pervasive form became entangled in other commitments. These were Protestant Christianity and the English common law. Indeed, it might be said that both the logic of their other commitments and their responses to social experience caused religion and law to subvert patriarchy, despite their ongoing efforts to reinforce it.[96]

(1986).

To all of this, Blackstone contributed, on what authority it is unclear, the characterization of a wife's killing her husband as petty treason—a concept that tracks the overarching view that the authority of kings and that of husbands were linked by scriptural authority and the natural law of hierarchy. No less magisterially, he opined that the practice of wife beating, the "ancient privilege" of husbands, exists only in the "lower ranks," although the "rule of thumb"—the husband's use of a rod no thicker than his thumb for the "chastisement" of his wife—was inferentially revived through his *Commentaries*. See Basch, supra, at 52.

[93] The English cognate for "coverture" is "cover." What the term literally signified is not altogether clear. Citing a reference in the Year Books to "'ele fut covert de baron,'" Maitland maintained, "This term, rarely found in the law Latin but common in the law French . . . seems to point at least primarily to the sexual union, and does not imply protection." 2 Frederick Pollock & Fredric W. Maitland, The History of English Law 407 n.1 (S.F.C. Wilson ed., 1968). "Coverture" was eventually Anglicized. It came to signify the denial of legal personhood to married women.

[94] 1 William Blackstone, Commentaries on the Laws of England 430 (1765-69). This idea, imported whole from the Christian sacrament of marriage, alternates in early legal doctrine with a second, in which marriage is taken to be a form of guardianship.

[95] This legal personhood did not extend, however, to the right to vote, to participate on juries, or to achieve other important elements of citizenship. 2 Id. at 213-16, 498.

[96] In addition to such preachings as the Homily on Marriage, the Protestant clergy shouldered the burden of outraged disapproval at the excesses of religiously-inspired vengeance on the part of Mary I, a Catholic, and of more subdued dismay during the reign of her successor, Elizabeth I, who refused marriage and, therefore, subjugation to a husband. See Karen Newman, Portia's Ring: Unruly Women and Structures of

The situation of patriarchy became only more grim when Enlightenment and post-Enlightenment thought jolted the popular response to female subjugation. In 1790, Judith Sargent Stevens Murray, writing under the pseudonym Constantia—a retort to the old French maxim that women are *sans constance*[97]—published a pair of essays entitled *On the Equality of the Sexes*.[98] In England, John Locke, a century earlier than Murray, Mary Wollstonecraft contemporaneously, and John Mill a half-century later published ringing declarations, all of them much read and passionately debated, of the need for sexual equality and women's rights.[99]

Exchange in *The Merchant of Venice*, in 38 Shakespeare Q. 19, 29-30 (quoting John Knox, The First Blast of the Trumpet Against the Monstrous Regiment of Women, Sermon in London (1558)); see also Stone, supra note 81, at 196 (quoting Bishop Aylmer, Sermon).

The focus within Christianity on the possibility of change proved more dominant, however, than the insistence on subservience. The commitment of Christian doctrine to the equality of all believers, including their equal opportunity for redemption, represented one seed of destruction for patriarchy, but one whose germination within the social structure from ancient times through the early modern period had been able, without independent nurture, to be suppressed. By the Elizabethan period, however, the sectarian divisions that would give rise to voyages of escape to the New World, where new conditions themselves promoted change, were underway. Shortly thereafter, the English Civil War allowed women to play important roles as doctrinal interpreters in some of the independent churches. Within the American colonies, moreover, women such as Anne Hutchinson achieved prominence for religious leadership as early as the mid-seventeenth century.

In law, Blackstone and the other early commentators ignored the motive force of anomalies within the increasing proliferation of the rules that detailed patriarchy, if, indeed, they observed these anomalies, in order to further its basic premises. For an indication of Blackstone's stunning influence on pre-Revolutionary America, see Basch, supra note 92, at 43; see also Edward S. Corwin, The "Higher Law" Background of American Constitutional Law (pt. 2), 42 Harv. L. Rev. 365 (1929).

As it evolved in response to the particularities of need, however, the English common law and its alternative, equity, came to invent responses to the situated circumstances of married women that undermined the grip of patriarchy, even while engaged in its furtherance. Thus were trusts concocted at the behest of suspicious fathers to protect daughters from the marital property rights of their spendthrift husbands. Similarly, the law developed evidentiary rules designed to thwart the possibility of real property transfers not freely consented to by wives. And the law created entailments as to real property to forfend against the financial embarrassment of widows for whom protection, rather than bereavement, offered the only true solace. These developments are usefully detailed in Holcombe, supra note 92, at 18-36. Their earlier English development is documented in 2 Pollock & Maitland, supra note 93, at 418-19.

[97] See supra note 86.

[98] Excerpts from both essays appear in Up from the Pedestal: Selected Writings in the History of American Feminism 30-39 (Aileen S. Kraditor ed., 1968).

[99] See John Locke, Two Treatises of Government (1698); John Stuart Mill, On the Subjection of Women (1869); Mary Wollstonecraft, A Vindication of the Rights of Woman (1792).

Wollstonecraft addressed herself forcefully (critics charged hysterically) to inequality within marriage. Mill argued powerfully for equal education; Locke helped women campaign for educational reform. These arguments were not hermetically related to marriage or to the status of women. It was the Enlightenment's and liberalism's claims about the contractual nature of citizenship and the limited, contractually defined nature of government that, in the first instance, spawned the theory of sexual equality. As Mary Astell put the overarching question in 1706:

> If absolute sovereignty be not necessary in a state, how comes it to be so in a family, or if in a family, why not in a state? . . . Is it not then partial in men to the last degree to contend for and practice that arbitrary dominion in their families which they abhor and exclaim against in the state? . . . If all men are born free, how is it that all women are born slaves?[100]

By the early- to mid-nineteenth century, patriarchy was being ravaged on several additional fronts. In the United States, property reform in the nature of Married Women's Separate Property Acts was accomplished in a succession of states.[101] Among the lower classes in both England and America, married as well as single women took paid employment outside the home.[102] Thanks to several ugly but highly publicized cases, England enacted child custody reforms favorable to women.[103] More quietly, so

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[100] Stone, supra note 81, at 240 (quoting Mary Astell, Reflections on Marriage (London, 1730)). Astell's remarks emblematize the claim that the ideology, if not always the reality, of seventeenth-century marriage created for wives a status akin to slavery. This view was far from uniquely hers during the period. Indeed, several famous works of fiction, together with the political treatises of Locke and others, were bringing this claim to widespread attention. By the time the American abolitionist movement arose, therefore, its assertion of the demand for racial equality owed a debt to preexistent feminism, just as later, nineteenth-century feminism owed a debt to abolitionism.

This is the partial backdrop against which the conservative movement to deprive women of control over reproduction took place, a movement that gained its greatest momentum during and after the Civil War.

[101] See Basch and Salmon, supra note 92, for studies focusing on the development of these statutes. Basch, who provides a close examination of the reform effort as it proceeded over time in the state of New York, is far more critical of the outcome, relative to then-available alternatives, than is Salmon, whose work provides a more general and somewhat blander overview.

Canada quickly followed suit in the adoption of separate property acts for married women, and then so did England. Holcombe's study, supra note 92, offers compelling glimpses of the social and political bases for the English reforms.

[102] By 1861, approximately one-quarter of all married women were so employed, and the census figures that accounted for this statistic failed to include wives who were employed in their husband's businesses. Holcombe, supra note 92, at 161.

[103] Id. at 102–08.

did many American states.[104]

In the United States, a new religion was founded by a woman;[105] other women gained prominence on account of their religious leadership;[106] for still others, religious faith, through its emphasis on liberty of conscience and equality of spirit, became the foundation for social activism in the name of women's freedom.[107] By the mid-nineteenth century, both religious institutions and individual philanthropists had founded seminaries and colleges dedicated to the higher education of women.[108] As early as 1847, Lucy Stone, a committed social feminist, graduated from Oberlin College. By 1855, she had joined other women in public efforts on behalf of the abolition movement, a movement that helped to reinforce American feminism—by then, a social and political movement itself[109]—in its collective attempts to obtain equal opportunity for women,[110] symbolized,

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[104] This circumstance came into being most prominently through the creation of the "tender years" presumption that first favored custody in the mothers of nursing-age children, but was later broadened until, eventually, it swallowed any age-based distinctions among children. See Andre Derdeyn, Child Custody Contests in Historical Perspective, 133 Am. J. Psychiatry 1369 (1976); see also Henry H. Foster, Jr. & Doris Jonas Freed, Child Custody (pt. 1), 39 N.Y.U. L. Rev. 423 (1964).

The later erosion of the maternal preference in custody cases in favor of equality-based norms is problematized and criticized in Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making, 101 Harv. L. Rev. 727 (1988). For the most recent call for a full-blown return to maternal preference, see Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. Cal. Rev. L. & Women's Stud. 133 (1992).

[105] Mary Baker Eddy founded The First Church of Christ, Scientist in 1879.

[106] Among these women were Ann Lee, who led the movement to bring the Shaker religion to America, and Ellen White, a founder of the Seventh Day Adventist Church.

[107] For a brief, insightful account of the relationship between women and religion during the period that witnessed the rise of the feminist movement, see Elizabeth B. Clark, Women and Religion in America, 1780–1870, in Church and State in America, A Bibliographical Guide: The Colonial and Early National Periods 365–413 (John F. Wilson ed., 1986).

[108] By 1870, 29 formerly all-male collegiate institutions invited the matriculation of women. As Barbara Miller Solomon has shown, between 1850 and 1870, several types of higher educational facilities became available to women, including several private colleges and seminaries founded for women. See Barbara Miller Solomon, In the Company of Educated Women: A History of Women and Higher Education in America (1985); see also Women and Higher Education in American History: Essays from the Mount Holyoke College Sesquicentennial Symposia (John M. Faragher & Florence Howe eds., 1988).

[109] See Declaration of Sentiments and Resolutions adopted by the Seneca Falls Convention of 1848, in William L. O'Neill, The Woman Movement: Feminism in the United States and England 112–13 (1969). For its useful comparative focus on feminism in both countries, see id. at 13–70.

[110] For excerpts from her speech of 1855 denouncing a separate, domestic sphere for women, see Kraditor, Up from the Pedestal, supra note 98, at 71–73.

most prominently, by the vote,[111] but symbolized, with considerable additional prominence, by equality within marriage[112] and, among some feminists, a campaign to abolish marriage altogether.[113]

E. American Medicine Constructs an Anti-Abortion Crusade . . . and a Defense of Patriarchy

For all of these indications that women were both imagining freedom and beginning to be freed from the multiplicitous forms of subjugation that patriarchy had enforced, there were contrary indications throughout the nineteenth century that patriarchy would and could defend itself. Unlike law and religion, which had become as much the problem as the solution to the attack on patriarchy, the nineteenth-century American medical establishment would energetically mount a defense. The nature of this defense was to be a campaign for the reform of abortion law in America.

Viewed in this context, organized medicine's decades long campaign

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[111] The materials currently available on the women's suffrage movement are voluminous. For a one-volume treatment based on documentary materials that demonstrate the extraordinary leadership of Susan B. Anthony, Elizabeth Cady Stanton, and Lucy Stone, among others, see Mari Jo Buhle & Paul Buhle, The Concise History of Woman Suffrage: Selections from the Classic Work of Stanton, Anthony, Gage, and Harper (1978). The documentary approach employed here suppresses the conflict and disagreements among the suffragists, as well as the vast difficulties their cause sustained over the six solid decades of its existence, allowing one to focus—at the expense of a fuller understanding—on the simple strength of these claims to equality and on their exposition.

[112] For a defiant statement, vow, and protest over inequality in marriage, see Lucy Stone, Marriage of Lucy Stone Under Protest, in O'Neill, supra note 109, at 12–13.

[113] Some of the leading nineteenth-century feminists held to the view that the institution of marriage was so fundamentally toxic to sex equality, through its insistences on economic domination, "legalized prostitution," and "compulsory maternity" that it ought to be abolished. Feminists were divided on this matter, with proponents of marital abolitionism in the minority, however prominently the view was advanced.

Feminists were not the only group in the mid- to late-nineteenth century to have attacked the status quo of conventional marriage. Various new-born religions and sectarian groups attacked conventional marriage through other means that included polygamy and collective marriage.

The anti-abortion campaign can be seen as a measure to quell the rebellion of conventional Protestant middle-class women that proceeded in the midst of other attempts to defend or attack sectarian positions on matters deemed crucial to social, economic, or religious stability. Not infrequently, these other attempts involved militarism. Besides the obvious example of the Civil War, they included the United States government's military maneuvers against the fundamentalist Mormons, which formed the subtext of the coordinate legal response. See Reynolds v. United States, 98 U.S. 145 (1879).

to deprive women of legal abortion becomes not only an impressively powerful defense—indeed, an offense—on behalf of the decline of patriarchy, but a possible displacement of the cultural angst that must have been generated by the onslaught of change in the relations between men and women and in the increasingly destabilized conditions of such social institutions as religion, education, and marriage.[114] Other factors, including the waves of immigration of thousands of non-English speaking Europeans during portions of the nineteenth century, added to the social instabilities to which the physicians' anti-abortion campaign sought, with its pro-nativist bias, to respond.[115]

The legal and practical baseline from which the physicians' campaign to criminalize abortion departed was that, prior to the "quickening" of the fetus—between the fourth and fifth month of pregnancy—abortion was not prohibited at common law.[116] Moreover, women were not required to

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[114] I mean to mobilize, here, the psychoanalytic concept of displacement—the detachment of an intense interest or concern from its unconscious source onto some other interest or concern which becomes linked to it by association. See Sigmund Freud, The Interpretation of Dreams, in 4–5 The Standard Edition, supra note 88 at 176–82, 307–08, 463–67, 561–64, 595–97.

[115] See my further references to these factors, infra text accompanying notes 122–24, 141–42, 144.

[116] In the legal and historical scholarship pertinent to the history of abortion law, recent attempts to characterize the legal status of the pre-quick fetus prior to the legislative sweep that began in the 1840s have generated acrimonious debate. The debate was sparked by Justice Blackmun's lengthy review of this history in *Roe v. Wade* which, in the view of his history-minded critics, failed to observe several features of the legal landscape, among them, the existence of some statutory and common law efforts to criminalize abortion and the true purpose of these efforts, which, it is claimed, was fetal protection. Compare Roe v. Wade, 410 U.S. 113, 130–51 (1973) with Joseph Dellapenna, Abortion and the Law: Blackmun's Distortion of the Historical Record, in Abortion and the Constitution: Reversing *Roe v. Wade* Through the Courts (Dennis Horan et al. eds., 1987) [hereinafter Dellapenna, Abortion and the Law]. After *Roe* and in light of an early rush of criticism, the Ford and Rockefeller Foundations commissioned an historian to study early American abortion law and its nineteenth-century development. This study proved supportive of the positions that Justice Blackmun had taken, most notably, that pre-quick abortion was, with rare exception, a liberty women exercised at common law and that the later criminalization campaign was not primarily based on fetal protection. See James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900 (1978). Justice Blackmun's, and now Professor Mohr's, chief critic, Joseph Dellapenna, was among those who responded. See Joseph Dellapenna, The History of Abortion: Technology, Morality, and Law, 40 U. Pitt. L. Rev. 359 (1979) [hereinafter Dellapenna, The History of Abortion]; see also James S. Witherspoon, Reexamining *Roe*: Nineteenth Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29 (1985).

This controversy has flared even higher more recently. In Webster v. Reproductive Health Services, 492 U.S. 490 (1989), James Mohr signed the brief submitted as amici curiae by 281 American historians supporting the appellees (Reproductive Health

obtain the permission of any man before obtaining an abortion. Lastly, abortions were widely available. They were performed by midwives, most

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Services). The brief, which contains numerous citations to Mohr's book, steps outside its careful fact-gathering about the exceptional nature of early abortion prohibition to assert that, for much of the nineteenth century, pre-quick abortion was legal across America, while a policy of fetal protection did not emerge until this century. Professor Mohr has apparently sought to defend the inconsistencies between his scholarly study and the positions taken in the brief as justified by the difference between the role of a "scholar" and the "political document" of a "citizen." For a scathing attack on the brief and this defense see Gerard V. Bradley, Academic Integrity Betrayed, First Things, Aug./Sept. 1990, at 10–12. For a biting review of Professor Laurence Tribe's use of Supreme Court briefs and other partisan source materials, see Michael McConnell, How Not to Promote Serious Deliberation About Abortion, 58 U. Chi. L. Rev. 1181, 1183 (1991) (reviewing Laurence Tribe, Abortion: The Clash of Absolutes (1990)).

The frictions I have described, carrying, as they do, the charge that the integrity of history has been repeatedly betrayed by pro-choice historians and legal scholars, has obvious bite for anyone following afterward, not excepting the author of the present modest Essay. Accordingly, I offer these comments as glosses on the text of this section of the Essay and the problems of historiography that it obvious sits astride.

First, I have read a sampling of both the statutory and the common law of abortion in each of the relevant periods, that is, before 1840; during the early period of change, 1840–1860; and during the late period, 1860 through the 1880s. I do not pretend to have conducted an exhaustive study of my subject based on a close examination of all extant primary sources. My conclusions are, therefore, impressionistic.

Second, on the basis above-described, I have reached the following conclusions: (a) legislation concerning abortion was scarce before the 1840s, though not unheard of, and (b) the law of abortion in this early period consisted of prosecutions for the crime of common law homicide. Prosecutions based on the death of the fetus practically did not occur prior to quickening and even afterward were rare; such prosecutions as did occur were brought on account of the death of the pregnant woman. Even these rare prosecutions had outcomes that included acquittal. (c) Even after the enactment of criminal prohibitions during and after the 1840s, prosecutions seem still to have been rare, though I could find no definitive evidence concerning their frequency. (d) It is clear, however, that pregnant women were almost never held criminally responsible for their efforts to obtain abortion or to self-abort. (e) The legislative drive that began in the 1840s extended for more than 40 years in two approximate waves, producing even a relative uniformity of treatment only at its end. Throughout much of this period, one-third of the states enacted no abortion legislation. (f) I have found it impossible to conclude that nineteenth-century abortion legislation was enacted in order to protect women or in order to protect fetuses or for any other single purpose. Indeed, the reasons for its passage appear opaque but seem likely to have been multiple. There is, however, greater evidence of the nature of the lobbying campaign mounted, formally and informally, to secure the passage of such legislation than there is clear evidence concerning the reasons for its passage. As my text aims to demonstrate, that campaign was multi-causal. As far as I have been able to tell, all the authors of secondary source materials on this subject *impute* one or more of the explicit goals of the physicians' campaign to the legislatures. Although I am uncomfortable with any such ascription, I have allowed my text to behave similarly.

Except for this final matter, legislative purpose, there seems remarkably little disagreement about the other factual matters. The heat seems generated far less by fact than by the interpretive spin that pro-life and pro-choice scholars place on these facts.

of whom were female; abortion practitioners untrained in medicine, both male and female; homeopathic physicians of both sexes; and physicians who had attended one of America's few medical colleges, the vast majority of whom were male.

As a general matter, these circumstances persisted in America until approximately 1840, although between 1820 and 1840 eight states enacted criminal abortion prohibitions incident to the codification of their laws. During this time there were also some states that treated abortion as a common law crime. Prosecutions under these laws seem to have been uncommon, and not all resulted in convictions. The reasons for the generally liberal treatment of abortion in America before the mid-nineteenth century can only be conjectural.[117]

Largely unhelpful to women or, for that matter, to men in either their efforts or their perceived need to control childbirth,[118] physicians went on, as the century progressed, to become openly hostile to the wishes of their female patients to terminate their pregnancies. This hostile stance was first fostered by individual doctors.[119] Then it was promoted by their

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[117] Perhaps this fact is not curious at all but was, rather, the product of a genderless consensus about the need for unmarried women to forfend against the deep prejudices that illegitimacy engendered and for husbands and wives to protect themselves and their children against penury. This is not to say that some women did not obtain abortions for lesser reasons. The likelihood that the long-unregulated status quo—from the colonial period to the mid-nineteenth century—existed to support abortion on frivolous grounds seems entirely implausible, however.

[118] Even into the nineteenth century, birth control was more a matter of serendipity than reliability. Medical knowledge proved less than useless in that regard, since one of its most popular theories of conception was based on a reversal of fact. Analogizing human ovulatory cycles to those of other mammals, doctors counseled that mid-cycle was the "safe" period for natural contraception. For a discussion of nineteenth- to twentieth-century medical conceptions of the reproductive cycles of women, see Thomas Laqueur, Orgasm, Generation, and the Politics of Reproductive Biology, 14 Representations 1, 25-31 (1986). For a contemporaneous (nineteenth-century) view, see Augustus K. Gardner, Conjugal Sins Against the Laws of Life and Health and Their Effects upon the Father, Mother, and Child (1870).

[119] To a remarkable degree, the physicians' campaign to criminalize all abortions, save only those subject to a "therapeutic" exception that was theirs to police, was both ignited and driven by a single doctor, Horatio R. Storer. Storer's two monographs, Why Not? A Book for Every Woman (1868) [hereinafter Storer, Why Not?] and Is It I? A Book for Every Man (1868) [hereinafter Storer, Is It I?], reprinted in A Proper Bostonian on Sex and Birth Control (Arno Press, Charles Rosenberg & Carroll Smith-Rosenberg eds., 1974) served as the basis of position papers for new or young medical societies, for academic medical departments, and as study aids for state legislators seeking to understand the medical, social, and psychological ramifications of abortion. Since these were inextricably bound together in Storer's accounts and since there was little else committed to print, outside the tabloid press, for any serious student of the subject to read, the power of Storer's prose is not to be underestimated. Additionally, Storer devoted large amounts of his time to lecturing to legislators in different states

local professional groups.[120] Finally, it was adopted as the official position of the nascent American Medical Association.[121] Moreover, this hostility broadened to include all women who sought abortion for any reason. Linked to such broad aims as the physicians' stated, nakedly racist desire to reverse the decline in non-immigrant birth rates;[122] the collective intention to drive commercial abortionists and other "irregulars" from their newly professionalizing ranks;[123] their interest in expunging women

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and even to drafting model legislation. His effort, over a period of several decades, to deny virtually all access to legal abortion to virtually all women was a genuine personal crusade. At least, that is how the matter has appeared to historians and other researchers of the nineteenth-century anti-abortion movement. See, e.g., Mohr, supra note 116, at 148-59, 169-70, 190, 201, 203, 206; see also Carroll Smith-Rosenberg, Disorderly Conduct: Visions of Gender in Victorian America 221-24, 234, 236-42 (Oxford Univ. Press 1986).

The other indefatigable figure on the scene for much of the same period was Anthony Comstock; inspirer of the Comstock Law passed by Congress in 1873. Comstock equated articles advertising either abortion purveyors or contraceptive devices with "obscene" art and literature. His eponymous law made it a federal crime to send any such items through the mails. As a destroyer of such materials and persecutor of both abortionists and birth control advocates, Comstock remained active as a "special agent" of the federal government for half a century. See Mohr, supra note 116, at 196-99.

[120] Storer helped to form and consolidate local and state medical societies by pressing his anti-abortion project on them. See Mohr, supra note 116, at 147, and state medical society reports and proceedings, id. app. at 324-28.

[121] The American Medical Association was founded in 1847. Its participation in the anti-abortion campaign from virtually the year of its founding until the end of the century had a galvanic effect not only on the criminalization campaign but on the idea and ideal of medical professionalism as encompassing a social vision as well as action on behalf of that vision in the everyday world. See Mohr, supra note 116, at 147-70.

[122] The link between falling birth rates, a phenomenon that overtook the prior century's reverse trend, and the anti-abortion campaign was the belief, widely announced by members of the "regular" medical profession, that abortion was the increasingly-used weapon of selfish white Protestant middle- and upper-class women. Their further claim—ignoring even their own knowledge of the practices of both abortion and infanticide—was that America's recent immigrant populations bred without limit. See, e.g., Storer, Why Not?, supra note 119, at 85.

For an excellent discussion of the place of this argument in the physicians' anti-abortion campaign, see Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 297-300 (1992).

[123] In the absence of licensing laws, self-styled, "regular" physicians—those who took their training in the young republic's few prestigious medical schools—competed for patients against self-taught folk doctors, lay healers, patent medicine men, male and female midwives, graduates of cheap and easy proprietary medical schools, and the continental tradition of homeopathic treatment.

When the more talented of these "irregulars" did well by their abortion clients, the grateful women sometimes took their entire families to them for healing, never returning to the "regular's" fold. The anti-abortion campaign that was spearheaded

from the practice of medicine and from entrance into the profession;[124]

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from the 1840s through the rest of the century by "regular" physicians was but a component—a well-organized, highly visible, and extremely effective component—of their campaign to organize and professionalize the practice of medicine, thereby achieving a professional monopoly by driving all forms of "irregular" medicine beyond the legal, social, and economic pale. The results of their efforts, where pregnant women were concerned, were paradoxical. By achieving the virtually total criminalization of abortion by the end of the nineteenth century, "regular" physicians drove millions of desperate women into the hands of unskilled, untrained abortionists, once reasonably-skilled practitioners such as midwives were driven from the field; yet, the "regulars" campaigned against the free market in abortion partly out of a concern for women's safety in the hands of the worst irregulars, of whom there were many. Given their simultaneously self-interested motives—both their interest in recapturing a well-paying patient population, once deprived of alternative caregivers, and their drive toward professionalization, their racist pro-natalism, and their hostility to women's motives and needs, it is difficult to strongly credit the criminalization campaign, unless one is prepared to allow for the possibility that the regulars' concern for fetal life outweighed the other announced and apparent motives for their actions.

Two historians who have not been so prepared are Mohr, supra note 116, at 30–45, 119–70 and Smith-Rosenberg, supra note 119, at 217–44. A third, Cyril C. Means, Jr., read the historical record, particularly as it related to the New York criminal code revisions of 1848, as essentially having been based on the desire to save women from radically unsafe abortions. See Cyril C. Means, Jr., The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (pt. 1), 14 N.Y. L.F. 411 (1968). This became the basis for his argument, repeatedly cited in *Roe v. Wade*, to the effect that nineteenth-century abortion restrictions should be deprived of legal validation, once medically safe abortions have become widely available. Mohr is critical of Means' research, supra, 28–31, but not nearly so critical as abortion's history-minded pro-life critics. See, e.g., Dellapenna, The History of Abortion, supra note 116.

[124] The "regular" physicians who headed the anti-abortion campaign, viewed "irregular" midwives, most of whom were women, as a threat and a nuisance. By affixing their misogynistic rhetoric to these women as well as to practicing female physicians and female medical school applicants, they succeeded in driving women out of the legal practice of medicine, whether their basis of affiliation had been "regular" or "irregular."

A tract co-authored by the seemingly indefatigable H.R. Storer puts the case against women doctors thusly:

> [T]hey still are and must be subject to the periodical infirmity of their sex; which for the time . . . unfits them for any responsible effort of mind, and in many cases, body also . . . . We could hardly allow to a female physician convicted of criminal abortion the plea that the act was committed during her menstruation; and yet at such times a woman is undoubtedly more prone than men to commit any unusual or outrageous act.

Horatio R. Storer & Franklin F. Heard, Criminal Abortion: Its Nature, Its Evidence, and Its Law 100 n.2 (1868).

Siegel painstakingly notes that in the 1859 edition of this work, Storer and Heard denied that the purpose of these remarks was to deny midwives and female physicians the right to practice. In the 1868 edition, however, Storer admitted to this purpose, claiming his personal experience with female physicians supported his belief in their unfitness. See Siegel, supra note 122, at 301; see also Mohr, supra note 116, at

and their effort to increase their own prestige as social policy-makers,[125] physicians became a special-interest lobbying group, and by that means pressed state legislatures into making existing abortion legislation more strict or, where no legislation existed, to effectuate its passage.

These efforts were spectacularly successful. As of 1840, only eight states had criminalized abortion, although narrower bans, such as a prohibition of the use of toxic abortifacients, after a fetus was "quick," had been enacted in a few.[126] Between 1840 and 1860, about two-thirds of the remaining states passed some sort of statute criminalizing abortion, almost always after quickening, leaving pre-quick abortion immunity in place. These statutes were quite varied in their specifics. During this period, abortion prosecutions were still not common and convictions remained rare.[127]

The physicians' campaign against abortion, against "irregulars" of all varieties who performed abortions, and against women who for any reason sought to obtain abortions, became energized in 1857. By the time the campaign ran out of impetus, around 1900, all states but one had passed anti-abortion legislation of a very restrictive kind.[128] While some states retained categorical distinctions between pre-quick abortions, which they treated as a misdemeanor, and later abortions, considered a felony, almost all laws passed after about 1860 preserved only a narrow "therapeutic" exception—risk to the life of the pregnant woman—or set of exceptions, such as "serious and bodily injury" to the pregnant woman. Because the most common aim, in light of the goals of "regular" medicine, was to criminalize the work of "irregular" abortionists, the states did not tend to criminalize either self-abortion or the efforts of women to obtain abor-

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168-69.

[125] On this subject, see generally Mohr, supra note 116, at 163-64.

[126] Connecticut's legislation, passed in 1821, was the first in the United States. Conn. Stat. tit. 22 § 14 (1821); see also id. §16, entitled "Concealment of death of bastard infant," which served as an attempt to punish infanticide.

Horatio Storer and other members of the physicians' campaign of a slightly later generation than this statute believed that abortion was the primary resort of middle-class women, while infanticide, being essentially costless, was the parallel crime resorted to by poor single women. See Storer, Why Not?, supra note 119, at 67-68; see also Siegel, supra note 122, at 285 n.85.

[127] Mohr documents the 1840-1860 developments, which he concludes were "limited and cautious." Mohr, supra note 116, at 46-146. Not everyone agrees with Mohr's survey, let alone his analysis. See, e.g., Dellapenna, The History of Abortion, supra note 116, at 389-95.

[128] Kentucky relied, instead, on a common law prohibition. See Mohr, supra note 116, at 229-30 (citing Peoples v. Commonwealth, Reports of Civil and Criminal Cases Decided by the Court of Appeals of Kentucky V (Edward W. Hines Reporter, 1889)).

tion.[129] This implicit exoneration of pregnant women's involvement in abortion coincided, perhaps unaccidentally, with one of the two contradictory positions with regard to women which the physician's movement had doggedly and over several decades asserted.

As earlier asserted, the instrumental account of Eve[130] depicted Woman in a singularly essentialist manner. Wayward, disobedient, seductive, too weak to remain righteous, yet overbearing of her Man, Woman would require intermittent doses of birth pain and constant subjugation by a Husband guided by God's will in order to maintain her rightfully diminished place after the Fall. By the time the physicians launched their anti-abortion campaign, the Victorian Age was in the process of sugar-coating this bitter and moldy pill by rolling Woman into a Domestic Sphere.[131] Within that Sphere, husbands would worship at the feet of their wives, so long as wives managed to balance everyday chores, unfailing placidity, and responsibility for the regeneration of mankind, while remaining adroitly perched on a pedestal only large enough to hold the bourgeois household and its children. Nineteenth-century feminists were deeply and publicly engaged in the rejection of this ploy to rationalize the continued economic subordination of women and the denial of the vote.[132] For various reasons, their attention stayed diverted from the

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[129] The physicians' campaign and its results are examined in Mohr, supra note 116, at 147–70. An invaluable source for study of the statutory texts that were enacted up until the time of *Roe v. Wade* is Eugene Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L.J. 395, 447–538 (1961).

[130] See supra text accompanying notes 72–76, 78–79.

[131] For a baseline view of attitudes toward women and their proper social roles in the era that preceded the Victorian development of "separate spheres" ideology, see Mary B. Norton, Eighteenth-Century American Women in Peace and War: The Case of the Loyalists, in A Heritage of Her Own: Toward a New Social History of American Women 136, 136–61 (Nancy F. Cott et al. eds., 1979). Although quite anachronistic by the time of its rendering, Justice Bradley's now infamous theistic description of the Domestic Sphere in his concurrence in Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring), has become the *locus classicus*, within feminist jurisprudence, of this ideology. For an historian's more complete account, see Linda Welter, The Cult of True Womanhood: 1820–1860, 18 Am. Q. 151 (1966). For a careful treatment of the sexual norms that attended life inside woman's separate sphere during this period, see Nancy F. Cott, Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790–1850, in A Heritage of Her Own, supra, 162, 162–81.

[132] See supra notes 109–13; see also Siegel, supra note 122, at 305–06 and sources cited therein; Elisabeth Griffith, In Her Own Right: The Life of Elizabeth Cady Stanton (1984), but not without reading Martha Minow's illuminating review of this work, which goes well beyond it in articulating the ideas that motivated Stanton and Stanton's not uncomplicated personal responses to the ideas that motivated the feminists of her time. See Martha Minow, Rights of Her Own, 98 Harv. L. Rev. 1084 (1985) (book review).

decades-long legislative campaign through which organized medicine left available, in an era of unavailable or unreliable contraception, relentless child bearing for many women and unsafe, illegal abortion for others.[133]

To accomplish the radical effects of its "reforms," the inspired authors of organized medicine's campaign amended the undying Eve story in one strong particular. They split Eve's identity into that of two female personae, while implicitly maintaining the essentialist character of each. In so doing, they were able to account for the existence of the two types of women who made claims on the conscience of nineteenth-century America, so far as abortion was concerned.

One version of Woman was unmarried, young, ignorant in the ways of conception, and too marginal, financially, to be able to support an illegitimate child. Understood to be weak-minded and, therefore, unable to sort the claims of a higher morality, she was a pawn of whichever male had taken sexual advantage of her. It was he who advocated for an abortion and it was he who would pay for it, even at the extortionist prices that many abortionists charged. He was adamant, however, that he would not pay upkeep for poor, young Woman and for the child.[134]

The other version of Woman was married, financially empowered, and selfish. Either she was experienced in pregnancy and childbirth, since she already had had other children and had the temerity to want to reject having more, or she despised the idea of ever having children so that she could enjoy a life of rich indulgence with her husband.[135] Since the husbands

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[133] The reasons for the early feminists' reticence on the subject of abortion seem various. One reason was a defensive attempt to lie low with respect to an issue that physicians active in the anti-abortion campaign were blaming on all the radicalizing social movements of the period. Also, many of the most prominent feminists were reluctant, because of their religious beliefs or activism, to endorse abortion, though they vigorously espoused the norm of "voluntary motherhood" and the practice of contraception. For further discussion, see Smith-Rosenberg, supra note 119, at 238; see also Mohr, supra note 116, at 106.

[134] See Mohr, supra note 116, at 44, 86–88, 96, 102.

[135] Horatio R. Storer's portrayal of his married patients in this light constituted indictments that must have been incendiary in their time. See Storer, Why Not?, supra note 119, at 85. But Storer was not alone in offering such portrayals. See sources cited in Smith-Rosenberg, supra note 119, at 340–41 nn.60–64; discussion in Mohr, supra note 116, at 88–94, 104–10. As Mohr's descriptive account indicates, the physicians active in the mid-nineteenth century anti-abortion campaign wrote prolifically about the increasing employment of abortion, after 1840, by married, Protestant, middle- and upper-middle-class women. Given that there was no possibility of an accurate demographics of abortion at that time, it is impossible to know whether abortion was literally on the rise or was only being portrayed that way to incite public antipathy; whether its use by the richer elements of society was greater, in either an absolute or proportional way, than its employment by the poor; and whether the literate, policy-minded "regular" physicians who threw themselves into the anti-abortion campaign

of these women either shared the fear of more mouths to feed—support was solely their responsibility, after all—or participated in the fantasy of pleasure-driven uxoriousness, they could no more be counted on than could Adam to obey the higher law.[136]

Having found that its old ally in patriarchy, the Protestant ministry, was reticent about participating in the anti-abortion campaign[137] and that law, its other venerable ally, needed to be led by the nose,[138] medicine was free to rely on its own expertise to promote its goals. Part of this expertise consisted, as previously noted, of medicine's claimed clinical knowledge of the fated character of women. First developed in the sixteenth century, this knowledge was old news, but the physicians' campaign reawakened interest in it, with fresh empirical claims about female hysteria.[139] To it, the nineteenth century added knowledge about the fetus, just then being gleaned from the developing field of embryology.[140] Arranging these aspects of science inside a more safely

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were seriously interested in abortion demographics or were only concerned to fix public attention on the demand for abortion among the well-off, so as to curdle such public tolerance as had developed toward the practice of abortion among the economically disadvantaged.

[136] See Smith-Rosenberg, supra note 119, at 224–25.

[137] The physicians' characterization of middle- and upper-class white Protestant women, abetted by their husbands, as the chief miscreants practicing abortion, cast the Protestant ministry in an obvious loyalty contest, since accusers as well as the accused were likely to be parishioners. No wonder many ministers chose to avoid the conflict. Some, however, did not. "Regular" medicine complained of insufficient aid from the Protestant ministry, but the ministry was not wholly unsupportive. See, e.g., Reverend John Todd, Serpents in the Dove's Nest (1867).

[138] For a direct indication of the physicians' frustration with their colleagues in the ministry and the law, see D.A. O'Donnell & W.L. Atlee, Report of the Committee on Criminal Abortion, 22 Transactions Am. Med. Ass'n 239, 256 (1871).

[139] For examples of the often anecdotal writings used to resuscitate claims about hysteria and to foment other concerns about health failures that both contraception and abortion were thought to induce, see, e.g., Gardner, supra note 118, passim; works cited in Siegel, supra note 122, at nn.121–26; Storer, Is It I?, supra note 119, at 115–16.

[140] The field of embryology, while in its embryonic stage, as it were, contributed both scientific and unscientific understandings of fetal development to the anti-abortion campaign. Chief among the former was the knowledge that fetal development is continuous and does not depend, as Christian dogma had maintained, on ensoulment or any other staged process. Chief among the latter was the notion that, from earliest embryo to most mature fetus, human life in its earliest phase of development was essentially autonomous, so that the pregnant woman simply had to afford it shelter, a matter which she should in every instance gladly undertake, since this was no more than a gesture of goodwill on her part.

On such matters, at least among the most politically and professionally active of the later nineteenth century's anti-abortion physicians, there seems to have been no disagreement. See, e.g., J. Boring, Foeticide, 2 Atlanta Med. & Surgical J. 257, 259

traditional theological mold, here is how the various pieces were fitted together.

On the matter of Woman's place:

> God's first commandment to Adam and Eve in the garden of Eden was, to increase and multiply . . . . [A]nd so solicitous was he in carrying out his divine object, that certain impresses were stamped on the character of both male and female . . . and to purify that union and to render intact and without reproach the parents and their offspring, the institution of matrimony was established. God's solicitude for his favorite creatures did not stop here; he has taught them those duties, those obligations which they owe to him, and which they owe one another . . . .
>
> And woman . . . . who ought to be the appropriate representative of a refined age, a model of purity, the centre of honor and affection—she descends from her high position . . . and becomes a participant in the destruction of her own offspring. She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures but shrinks from the pains and responsibilities of maternity; and . . . resigns herself, body and soul, into the hands of these unscrupulous and wicked men.[141]

On the function of white middle- and upper-middle-class women:

> All the fruitfulness of the present generation, tasked to its utmost, can hardly fill the gaps in our population that have late been made by disease and the sword, while the great territories of the far West . . . offer homes for countless millions yet unborn. Shall they be filled by our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation.[142]

On the health of women:

> It is generally supposed, not merely that a woman can willfully throw off the product of conception without guilt or moral harm, but that she can do it with positive or comparative impunity as regards her own health. This is a very grievous and most fatal error . . . . [A]ny infringement of [nature's laws regarding

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(1857); O'Donnell & Atlee, supra note 138, at 248–51; Siegel, supra note 122, at 288–91; Storer & Heard, supra note 124, at 10–11.

[141] O'Donnell & Atlee, supra note 138, at 240–41.

[142] Storer, Why Not?, supra note 119, at 85.

> pregnancy and childbirth] must necessarily cause derangement, disaster, or ruin.[143]

On the psychological and sociological nature of the problem:

> Is it not arrant laziness, sheer, craven, culpable cowardice, which is at the bottom of this base act? . . . Have you the right to choose an indolent, selfish life, neglecting the work God has appointed you to perform?[144]

On the continuous development of fetal life:

> It was generally supposed that the foetus becomes animated at the period of quickening; but this idea is exploded. Physiology considers the foetus as much a living being immediately after conception as at any other time before delivery, and its future progress but as the development and increase of those constitutent principles which it then received.[145]

On the supervening obligations of the medical establishment:

> The members of the profession should form themselves into a special police to watch, and to detect, and bring to justice . . . these monsters of iniquity [abortionists] . . . .
>
> *Resolved*, That it becomes the duty of every physician in the United States . . . to resort to every honorable and legal means in his power to crush out from among us this pest of society; and, in doing so, he but elevates himself and his profession to that eminence and moral standard for which God has designed it, and which an honorable and high-toned public sentiment must expect at the hands of its members.[146]

The legislatures of all thirty-six states and the District of Columbia received written reports containing these and similar importunings from individual doctors, medical societies, and eventually, from the American Medical Association, from 1857 through the 1880s.[147] Seldom, if ever, were legislators exposed to any other systematic views. Unmarried, young, impecunious pregnant women did not come forward to offer their opinions on the necessity of abortion. Emotionally overburdened, economically

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[143] Id. at 36–37.

[144] Gardner, supra note 118, at 225.

[145] O'Donnell & Atlee, supra note 138, at 250 (citing Archbold's Criminal Practice and Pleadings 2d vol., at 96).

[146] Id. at 257–58.

[147] See Mohr, supra note 116, at 147–70. This was the period Mohr identifies as the apogee of the physicians' anti-abortion campaign. There were both earlier and later aspects to the campaign and these appear to have been energetic in their own right. See id. at 119–46, 226–45.

fragile married couples did not expose their private miseries in the legislative arena. Backroom abortionists, however prominently they advertised in the public press, did not plead for a more ecumenical view of abortion. Neither feminists nor the clergy stirred any debate. Apart from their own ideas or experiences—and they would hardly have cared to present the latter—state legislators had little basis for resisting the policy-making function—and sometimes the drafting responsibilities as well—that the medical profession assumed.

Little wonder then, that most of the abortion statutes with which the century ended, treated pregnant women as objects, not as subjects; criminalized the performance of abortion at all stages of pregnancy; immunized pregnant women from prosecution, on account of their higher-order deficiencies; and left, as the only excuses for abortion, medical excuses verifiable only by "regular" physicians.[148] These excuses were based on a woman's need to demonstrate her utter victimization by her pregnancy.[149]

These outcomes, designed to quell the century's movement toward limited social emancipation, at least for more advantaged women, were created by a limited fusion of law and medicine charged by the energy of theocentric morality; racist, pro-natalist sentiment; the drive toward medical professionalism; and the well-tailored adaptation of old-time misogyny. The outcomes, however, left untied a few of the moral threads of that same fabric of Western culture with which we began. One such thread involved the claims to conscience of unmarried girls, their lives capable of ruin on account of childbirth. Another involved the claims of married couples overburdened by their children. A third involved the severe forms of taxation, such as disability and death, to the health of women during a time when mortality was seriously risked by childbirth.[150] The morality of all

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[148] For a sampling of these excuses, see Quay, supra note 129, app. at 447-538.

[149] This fact might not have appeared so obvious to me had it not been suggested, in a different context, by Professor Joan Mahoney at the Law and Society Association Conference, Amsterdam, June 1991, where I presented an earlier version of this Essay. I am grateful to Professor Mahoney for her insight.

[150] Although many analysts offer positions on the relative risks of abortion and childbirth during various portions of the nineteenth century, the lack of antisepsis for much of the century, the extraordinary variety of persons performing abortions, the lack of reliable mortality causation reporting, partly due to falsification, and the instability of the legality of abortion, which forced women to resort to unsafe, illegal procedures, make me dubious of the likelihood that any conclusions are reliable. It is, however, uncontroversial that throughout the nineteenth century and even into the first part of the twentieth, childbirth carried a high risk of morbidity and mortality. Indeed, it has been established that even as of 1917, childbirth caused more deaths than any health affliction among women other than tuberculosis. See Judy Barrett Litoff, American Midwives 1860 to the Present 53 (1978), cited in Siegel, supra note 122, at 285 n.83.

three refused to stop calling into question the premise that the fact of continuous development conferred on every fetus an unqualified right to develop. A fourth involved the plain and obvious moral incongruity of the denial of agency to women, even as their just demands for equality were taking hold.

Four other problems implicated medical ethics. One involved the difficulties that physicians would have, so long as the "victim-only" excuses remained in place, in forecasting the severity of threats to women's health due to pregnancy. A second involved the development of antisepsis toward the end of the nineteenth century—a development the medical establishment knew would not become generally available within the world of illegal abortion for decades. A third involved the sure knowledge of "regular" medicine that, with or without antisepsis, millions of women would forfeit their lives or their health in unsafe abortions. A fourth involved the tendency of some number of reputable physicians to crack under the legal prohibition of abortion in the face of evident human misery, or, in some cases, their own greed.

Some of those who cracked performed secret abortions out of altruism.[151] Others, less altruistic, serviced the market in abortion for the generous, probably unreported, compensation it provided.[152] Others cracked in a different way: their appreciation of women's right to choose their physical destiny, their recognition of many women's devotion to their families, their agnosticism toward, or belief in, the moral justification of early abortion, or their weariness from the weight of their hegemonic control over the abortion decision—for one or more of these reasons, an overwhelming majority of physicians favored the liberalization of abortion law and policy on an open and well-publicized basis a decade before *Roe v. Wade*.[153]

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[151] The first person reportage of Lawrence Lader, a journalist who helped to found the 1960s abortion law reform movement, includes remarkable accounts of two male physicians who were moved by altruism to perform abortions before *Roe v. Wade* made them legal. Both were prosecuted and jailed. The Supreme Court reversed the conviction of one of them in the dawn before *Roe*. See Lawrence Lader, Abortion II: Making the Revolution 1-17 (1973).

[152] The high-priced, "society" abortionist was a feature of the abortion black market in both the nineteenth and the twentieth centuries. See Mohr, supra note 116, at 96–98. My textual aside about the taxation issue is my own surmise.

[153] According to a survey conducted by the magazine *Modern Medicine*, approximately 87% of American physicians favored some "liberalization of America's anti-abortion policies." See Mohr, supra note 116, at 256, 315 n.17. The executive board of the American Public Health Association went on record to that effect in time to be cited in *Roe*. See Roe v. Wade, 410 U.S. 113, 144–46 (1973). More pointedly, a brief filed in *Roe* on behalf of the prestigious American College of Obstetricians and Gynecologists and joined by other organizations complained:

F. An Epilogue and a New Beginning

Like the borings from within that had damaged the instantiation of patriarchy by both religion and law several centuries earlier, organized medicine was finally showing evidence of the strain of its defensive posture. To be sure, not everyone treated the evidence of strain as problematic. Justice Harry Blackmun's opinion for the Court in *Roe v. Wade* expressed confidence that the constitutional right recognized in *Roe* rested safely with the pregnant woman's physician.[154]

Writing in dissent in *Roe*'s companion case, *Doe v. Bolton*, Justice Byron White adopted a more cynical view, one that treated the pregnant woman and her "medical advisor" as equally undeserving of remaining within the cool and verdant precincts of the public trust.[155] In each of

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> Physicians are unable to agree on the meaning of the [Texas criminal abortion] statute because its words have no medical meaning. Medical standards have been established for treating patients and for terminating pregnancy as part of that treatment. The statute cuts across those standards and requires physicians to apply an unclear legal test which supersedes and may negate their medical treatment.

Amicus Brief for the American College of Obstetricians and Gynecologists et al. at 9, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

My skepticism about polling processes is noted in Jane Maslow Cohen, Comparison-Shopping in the Marketplace of Rights, 98 Yale L.J. 1235, 1251 n.46 (1989). The brief filed in *Roe* on behalf of the American College of Obstetricians and Gynecologists and a host of other medical organizations confirms my own impressions of the period, namely that the 1960s witnessed a sea change among a large and vocal group within the medical establishment regarding the need to legalize abortion. It is not clear to what extent it intended to endorse the specific outcomes of *Roe v. Wade*.

[154] "[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." Roe, 410 U.S. at 163.

[155] This dissent reflects Justice White's dissent in *Roe*. The language that expresses his distrust of women and doctors alike is that with which he begins:

> At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.
>
> The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

these opinions the seed of doubt about women's moral agency germinated once more, however different the reasons for its sowing.

In the *Danforth-Akron-Thornburgh-Casey* progression of challenges,[156] as well as in the Court's most recent abortion funding case, *Rust v. Sullivan*,[157] the redoubled doubts about women and their abortion providers began to bear new fruit. That fruit is state intervention into the decision procedures that accompany abortion. For those who seek to instill deliberative interventionism into abortion regulation, neither women nor their doctors should be trusted, on any view of history or the present, with the confidence of the state in regard to the abortion decision. Thus, there is a sense in which both *Roe*'s majority opinion and one of its two dissents share some measure of the ancient distrust of women's moral agency that continues, in *Casey* and its immediate progenitors, to stalk the abortion right.

But to end this historical recounting on that point would be to fail to take account of the importance of *Roe*'s crucial assertions about the nature, rather than the bare existence or duration, of the abortion right. These assertions are not only that the states may not constitutionally prohibit abortion, but that they may not conceive women in the terms of victimized patients or decisionally-disabled persons. The meaning of Woman's personhood in the abortion context defined by *Roe* is that constitutional autonomy includes full moral agency, at least as to early and mid-term abortion.

From this new beginning in *Roe* until the advent of *Casey* and its divided and divisive acceptance of deliberative interventionism, women enjoyed the right not to be cast in a role now several thousand years old—the discriminatory role of threateningly deficient, judgmentally inadequate Eve.

With all due respect, I dissent.

Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting); see also Roe, 410 U.S. at 167.

[156] See supra part II for my discussion of this progression of cases in respect to deliberative interventionism.

[157] 111 S. Ct. 1759 (1991).

IV. DELIBERATIVE INTERVENTIONISM: THREE OBJECTIONS FROM POLITICAL MORALITY

A. Political Morality as Act and Symbol

In at least one crucial respect, many women in contemporary America lead lives that are identical to their nineteenth-century counterparts: the option of abortion helps them to mediate the pressures of sexuality, intimacy, familism, and social and economic productivity when conflicts among these pressures threaten to alter their personal identities or become otherwise intolerable. Moreover, now, as then, the imperfections of widely available contraceptive techniques and society's recalcitrance about developing or applying approaches to reproductive control that are less invasive than abortion[158] render abortion an option necessary for mediating these conflicts.

In a second, symbolic respect, however, the function of abortion has changed. As the full consequences of a mature commitment to racial and sexual equality become clearer, the need of women to be validated as autonomous moral and social agents achieves concomitant clarity. The fact of gender difference, whatever its origin, leads inevitably to the fact that the terms of women's agency must be different from that of men. The connection, for women, between the validation of autonomy and the existence of a right to abortion has become symbolic of the need for equality and acceptance under conditions of difference.

Whether or not individuals and groups deeply opposed to abortion can ever accept it as an option of autonomous women is a matter of doubt. But that matter stands apart from issues concerning the proper role of the state in relation both to the symbol and the actuality of women's choice, once the existence of a constitutional right to abortion has been recognized.

Using the often-formulaic terms of contemporary constitutional analysis, the Supreme Court decides questions arising out of government

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[158] The refusal of the Reagan and Bush administrations to allow American women access to the implantation antagonist RU 486 is but one example of this point. This particular form of pharmaceutical intervention is useful only in early pregnancies when most pregnancies that are voluntarily terminated are ended. Were such alternatives to abortion both inexpensive and widely available, they would help to promote pregnancy terminations at the earliest possible—and the least controversial—stages. RU 486 has recently been found to be an effective "morning after" contraceptive, as well as a later implantation antagonist. See Beatrice Couzinet et al., Termination of Early Pregnancy by the Progesterone Antagonist RU 486 (Mifepristone), 315 New Eng. J. Med. 1565 (1986); Steven Greenhouse, A New Pill, A Fierce Battle, N.Y. Times, Feb. 12, 1989, §6 (Magazine), at 23. But see Margaret Doris, Abortion Pill Debate Divides Feminists, Boston Herald, July 31, 1992, at 25.

regulation of abortion. Thus, as we have seen in *Casey*, the Rehnquist bloc announces its satisfaction with "rational basis" review,[159] while Justice Blackmun holds out for "strict scrutiny."[160] The O'Connor coalition takes an intermediate position in recognizing the assertion of state interest in the fetus throughout pregnancy and in its new standard for the review of abortion regulation—the "undue burden" test.[161]

In his separate analysis, Justice Stevens restates the O'Connor coalition's test as follows: "A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification."[162] Folding the issue of severity into his analysis, rather than treating it as the fulcrum of burden-balancing,[163] Justice Stevens adopts several concerns from political morality with which to test the rationality and legitimacy of abortion regulation in light of the Court's newly configured response to *Roe*. In so doing, he moves outside the conclusory terms of the standards and rationales much of the rest of the Court insists on.

The first of his concerns—historic discrimination—I examined in part III. There, I observed the deep prejudice against women's capacities for deliberation and judgment that has flowed through Western culture, and the force that prejudice exerted on the nineteenth-century revision of abortion legislation.

In *Casey*, Justice Stevens employs three further features of political morality as templates for the legitimacy and rationality—therefore, the justifiability—of the "burdens" on deliberative autonomy that figure in the Pennsylvania abortion statute and in the O'Connor coalition's announced test for such burdens. These three concerns are equality, autonomy, and coercion. Like the recollection of history, the very use of these criteria

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[159] Casey, 112 S. Ct. at 2855-73 (Rehnquist, C.J., concurring in part, dissenting in part, joined by White, Scalia, and Thomas, JJ.); see also id. at 2873-85 (Scalia, J., concurring in part, dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.).

[160] Id. at 2843-55.

[161] Id. at 2803-33, especially 2817-21.

[162] Id. at 2842-43.

[163] Justice Stevens' search for a set of premises that can shape the matters at issue in conceptually and symbolically appropriate terms and act as levers on the analysis he deems necessary is a part of his larger effort to abjure the trivialization of constitutional analysis through either quibbles over linguistic exactitude or the mechanistic or otherwise insensitive use of history. For evidence of the first of these concerns, see his opinion in Casey, 112 S. Ct. at 2838-43 and, most pointedly, at 2843 n.6. For evidence of the latter, see John Paul Stevens, A Judge's Use of History—Thomas E. Fairchild Inaugural Lecture, 1989 Wis. L. Rev. 223.

performs a symbolic function, even as they aid the search for best outcomes in particular conflicts. Alone and in combination, they remind the arbiter of the seriousness of women's claims to deliberative autonomy, the respect that is due their abortion deliberations, and the common footings of all acts of deliberation that are connected with rights exercise.

B. Equality

To engage in a critique of abortion regulation based on equality is to invite being caught out on two grounds. In formal terms, equality requires that a class of persons which claims unequal treatment demonstrate the validity of its claim by reference to some other class of persons which is both preferentially treated and "similarly" situated. Since no class other than women is "similarly" situated in regard even to the possibility of becoming pregnant, let alone "treatment" during pregnancy or afterwards, demonstrating the existence of a preferentially treated class in regard to abortion regulation is a problem.

Recently, two strategies have been employed to counter the analytic deficiency in order to recuperate the equality concern as a measure of justice for involuntarily pregnant women and, symbolically, for *all* women. One strategy is to argue, explicitly or by implication, for a relaxed definition of "treatment," one that does not insist that the "treatment" of pregnant women be invidious relative to the "treatment" of another class of persons in regard to *pregnancy*. Rather, the idea is to construct an argument toward equality rather than, in the strict sense, from equality, as in this formulation: "Women's access to legal abortion is an attempt to ensure that women and men have more equal control of their reproductive capacities, more equal opportunity to plan their lives and more equal ability to participate fully in society than if legal abortion did not exist."[164] The

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[164] Factum of the Women's Legal Education and Action Fund, ¶ 54 at 17; Borowski v. Attorney General for Canada, S.C.R. 342 (No. 20411) (1989), cited in Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1323 n.182 (1991).

It may be said that, within the recent academic discourse on equality and abortion in the United States, the relaxed concept of "treatment" has a dual pedigree. Within the contributions of a number of scholars, the invidious treatment of women is at least as much a matter involving the distribution of economic resources and legal entitlements as it is a matter of social attitude and the accord of dignitary value. These authors frequently use the term "discrimination" as a substitute for "inequality," perhaps to align the struggle of women with that of the groups against whom discriminatory treatment has occasioned the strictest constitutional scrutiny. See, e.g., Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375, 376-79 (1985); Sylvia A. Law, Rethinking Sex and the Constitu-

criticisms to which this strategy is subject include the position that once the concept of "treatment" is offered as a placeholder for general social conditions, the argument may lose its identity as one based on equality and amalgamate into arguments about justice and fairness. Here, a broad construction of "discrimination," and derivatively, "discriminatory treatment," seeks to perform a saving role. The argument from equality based on this loose concept of "treatment" may be considered more appropriate to pregnancies resulting from male predation than to pregnancies voluntarily begun.

The second strategy is typically mobilized against the background of the first. It is based not on an inter-group comparison, pregnant versus non-pregnant persons; but on an intra-group comparison—namely, the state's treatment of pregnant women willing to carry to term, the preferentially treated group, versus its treatment of women who wish to abort their pregnancies. This strategy has been standardly invoked to criticize the results reached by the Supreme Court in the abortion funding cases.[165] Its criticism is this response: The state should not be obliged to treat two groups of women equally when one group is satisfying the state's goals and the other seeks funding in order to repudiate them. The two groups are not "similarly" situated in regard to the goal of state claims as legitimate.

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tion, 132 U. Pa. L. Rev. 955, 1016-28 (1984); MacKinnon, supra, 1311-21.

The second strand of recent unequal treatment literature lays emphasis, instead, on a formulation of equality that Ronald Dworkin has energetically sought to further, the concept he phrases as "equal concern and respect." In his most recent writing on this subject, he assimilates this aspect of equality to deliberative autonomy in respect to abortion. See Ronald Dworkin, Unenumerated Rights: Whether and How *Roe* Should Be Overruled, 59 U. Chi. L. Rev. 381, 426-27 (1992). For an earlier effort to mold the abortion right as a matter of dignitary accord entailed by constitutional equality, see Kenneth L. Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 53-59 (1977).

[165] See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977). In the first two of these cases, five-Justice majorities upheld the right of government to refuse to pay for abortion services with public funds. Justice Stevens was a member of these bare majorities. In the next two cases, however, he dissented from the government's position that it could constitutionally fund childbirth but refuse to fund therapeutic abortions. Justice Stevens grounded his dissent on an equal protection argument: the government must fund all *necessary* medical services on equal terms, once it decides to fund any for a given class of persons—here, poor ones. Thus, his equality argument rests on an intra-group comparison involving women.

For elaborations of both of these types of comparisons, see Robert W. Bennett, The Burger Court and the Poor, in The Burger Court: The Counter-Revolution That Wasn't 46 (Vincent Blasi ed., 1983); Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330 (1985).

Moreover, the "difference" that is argued for is a voluntary status, not the invidious and involuntary status that is the paradigm of wrongful treatment. Once again, this criticism can be taken to have greater force in the case of truly voluntary pregnancy than in any other.

Without lending detail or supportive rationale to his argument in *Casey*, Justice Stevens asserts concerns based on equality in a manner that is consistent with each of the two strategies mentioned above.[166] As a consequence, his equality-based arguments are subject to the criticisms I have noted. Each of those criticisms is itself subject to criticism; the scholarly literatures on equality and on abortion both contain lively debate.[167] Rather than mining the responsive criticism for defenses of Justice Stevens' positions, I shall instead embark on a more exploratory venture—one more closely tailored to the nature of this extended meditation on deliberative autonomy and abortion.

For this purpose, let us adopt a perspective that will enable us to consider deliberative autonomy in respect to the holders of constitutionally recognized rights other than abortion rights. First, we shall scan some rights that are both held and exercised by men and women with no apparent difference based on gender. Then, we shall pause to consider the one constitutional right other than abortion which belonged, as a matter of history, to only one gender—in this case, men—and continues to be exercised more greatly by and identified more strongly with them. This gender-identified non-abortion right is the right to bear arms.[168]

Without intending to elide crucial distinctions as to the nature of our various personal rights or the histories that have legitimated or de-legiti-

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[166] Casey, 112 S. Ct. at 2838, 2842.

[167] See, e.g., sources cited supra notes 164-65. Recent work on equality within both the philosophical and legal literatures has sharpened critical understandings. The briefest bibliography of recent work must include the various separately-published essays by Ronald Dworkin on equality—segments of his book, Life's Dominion (forthcoming 1993); Thomas Nagel, Equality and Partiality (1991); Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982).

[168] Whether the Second Amendment is read as having embodied a right, *ab origine*, belonging to "all citizens" or only to those male citizens capable of serving in a state militia, contemporary scholarship assumes its original cast excluded women and that the Amendment, to be granted any ongoing normative significance, needs to be purged (somehow) of its "sexism and violence." See David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551, 552, 558 (1991); see also Wendy Brown, Guns, Cowboys, Philadelphia Mayors and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale L.J. 661, 663-66 (1989) (book review); Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989). As of the time of its first modern Second Amendment case, the Supreme Court read the Second Amendment from an originalist, gender-based perspective. See United States v. Miller, 307 U.S. 174, 179 (1939).

mated state encroachments on them, there is still the fact that in observing the structure of personal constitutional rights outside the abortion context, one encounters broad evidence of non-interventionism by the state. Taken individually, the rights we shall survey suggest different reasons for the deliberative autonomy that characterizes them; nevertheless, they are all elementally characterized by the presence of deliberative autonomy.

Thus, the basis for non-interference with religious choice is the toleration formally required by the religion clauses. It appears to render absolute an individual's autonomy of deliberation with regard to religious choice. Moreover, the individual's right to choose to have no religion is equally absolute. On a different front, the basis for non-interference with the right of voters to deliberate about their voting preferences may be widespread trust in the private and public mechanisms that encourage active deliberation on the part of voters, the general availability of information relevant to voter choice, or trust that voter equality, universal suffrage, and the voluntariness of voter participation combine to encourage satisfactory outcomes. Thus, consequentialism may drive toward voter autonomy. Then, too, pragmatism may make a contribution: state deliberative interventionism is rendered unnecessary by the right of incumbents to campaign for re-election and futile by the command over expenditures on voter deliberation exercised by party-based politics. But surely the most satisfactory explanation for voter autonomy is deontological: if democratic government is a good, then voter autonomy is a good—perhaps, the primary good—on which democratic government depends.

Let us now consider two of the rights whose textual pedigree is less obvious. The right to marry requires for its exercise a mature rights-holder,[169] as do our other established rights; and its exercise is not subject to unfettered autonomy. Still, the two modern cases that represent the most intrusive challenges to autonomous marital choice failed constitutional inspection.[170] Lastly, the right to choose contraceptive methods of family planning had to generate almost as much controversy as the abortion right, once subjected to state interventionism, before achieving a constitutional safe harbor.[171] Yet, despite the myriad challenges to the abortion right,

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[169] We treat age as a proxy for the necessary degree of maturity in the case of rights-holders, absent other disabilities. A liberty-based claim on behalf of mature adolescents was found unpersuasive for an age restriction challenge involving the right to marry. See Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982).

[170] See Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

[171] Compare Poe v. Ullman, 367 U.S. 497, 509-22 (1961) (Douglas, J., dissenting), 522-55 (Harlan, J., dissenting), 555 (Stewart, J., dissenting) with Griswold v. Connecticut, 381 U.S. 479 (1965). While *Griswold*'s status remains undisturbed,

that result has remained undisturbed.

Taking into account the reasons that apply idiosyncratically to the various rights we have inspected, a norm of deliberative non-interventionism by the state is what continues to emerge. Moreover, once rooted in any specific right, the existence of the norm of deliberative autonomy might itself be seen to foster the toleration or trust of rights exercise, a circumstance that should be a hallmark of democratic existence and, therefore, as I shall argue in section C, an active goal of the democratic state.

We turn now to the right to bear arms, a right, like the abortion right, with a history of gender specificity, and one which has acquired an overwhelmingly secure iconic status—a right firmly identified with men,[172] though no longer exclusive to them. Before we can proceed, however, I should be clear about a matter that is notably—even notoriously—unclear: the nature of the Second Amendment's guarantee of a right to bear arms. In essence, there are three views,[173] only one of which, and it is sharply

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there are still criticisms of it. Nevertheless, from disappointed Supreme Court nominee Robert Bork to former Solicitor General Charles Fried, persons whose jurisprudential philosophies would not seem readily accommodated to *Griswold* have found reasons to effectuate accommodation.

[172] I assume that the clearest support for this position resides in the observation of our general culture, most easily noted in all manifestations of the media. A small example that makes the point is a recent, local cultural artifact, including both the event and the reportage that marked the event. Immediately following the widely-publicized weeks-long siege of Randall Weaver and his gun-laden companions in a mountain outpost, a Massachusetts man barricaded himself and his wife in a hotel suite and held off the police for 19 hours by means of an assault rifle, two other guns, and 2,600 rounds of ammunition. The police had arrived on the scene to settle what they believed was an incident of domestic abuse perpetrated by the husband.

After he was arrested, his wife decried the police response and supported her husband's right to protest their attempts—indeed, any attempts—at gun control. "'He's very adamant about gun-bearing rights,' she said. 'He just likes guns. He likes to play with them,' she said, recalling the saying, 'The difference between men and boys is the price of their toys.'" Judy Rakowsky, Wife Faults Hotel in Man's Standoff, Boston Globe, Sept. 4, 1992, at 17.

If any reader can get this story to play, plausibly, in his or her head on a gender-reversed basis, I'll take back my point about the continued popular identification of the right to bear arms with men.

[173] First, the Second Amendment's warrant has been commandingly viewed as an aspect of state sovereignty. See, e.g., Laurence H. Tribe, American Constitutional Law § 5-2, at 299 n.6 (2d ed. 1988). The other position maintained by legal scholars is that the Second Amendment guarantees a right to participate in the defense of the common through the right to bear arms. For a discussion of this, see the exchange among Brown, Levinson, and Williams, supra note 168. The third and final position—that the right runs to individuals who are entitled to a constitutional guarantee whether or not to fulfill a public purpose—is asserted by Don B. Kates, Jr., The Second Amendment: A Dialogue, 49 Law & Contemp. Probs. 143 (1986); see also Robert Cottrol & Raymond Diamond, Second Amendment Cannot Be Ignored, Legal Times,

contested, regards as a valid interpretation of the Amendment a right belonging to individuals for the satisfaction of their personal pursuits. Along with gender specificity, then, here is a right with an unstable interpretive history which positively attracts debate and resistance—a second basis for its similarity to the abortion right.

But that is where the similarity ends. However much legal scholars may assert that the Second Amendment is properly interpreted only as a warrant to the states, with no application to private conduct, the American public cherishes the opposite view. Americans tenaciously read the clause as addressing, for the benefit of individual citizens, "the right to bear arms responsibly, the right to self-defense and the defense of one's family;"[174] and always, without question, the right to hunt animals.

The number of guns and rifles in private hands in the United States is often estimated to be in the many millions,[175] but there is a wide lack of confidence in these estimates due to the large black market that services the traffic in weapons. Four statistical matters are not considered shaky, however. One is that the homicide rate in this country is the highest homicide rate in any country in the world for which this statistic is kept—and that, by a wide margin.[176] The second is that murder is the leading cause of death among young black males in America.[177] The third is that homicides and other crimes of violence are frequently committed by persons who know each other; many are the outgrowths of domestic violence.[178] The fourth is that the presence of handguns in the home directly correlates with the incidence of suicide, which is rising.[179]

May 27, 1991, at 24.

[174] House Comm. on the Judiciary, Omnibus Crime Control Act of 1991, H.R. Rep. No. 242, 102d Cong., 1st Sess., pt. 1, at 405 (1991).

[175] The civilian gun supply is currently estimated to be in the neighborhood of 200 million. In each of the last several years, approximately 4 million new guns, including 2 million new handguns, were added to the supply. See Erik Eckholm, Ailing Gun Industry Confronts Outrage over Glut of Violence (first in a series entitled 200 Million Guns), N.Y. Times, Mar. 8, 1992, at A1.

[176] See R.C. Longworth, U.N. Data Offers Disturbing Views of U.S., Chi. Trib., Apr. 24, 1992, at 1; see also table entitled Guns & Deadly Violence in 10 Countries, in Erik Eckholm, Thorny Issues in Gun Control: Curbing Responsible Owners (last in a series entitled 200 Million Guns), N.Y. Times, Apr. 3, 1992 at A1.

[177] See Daniel Goleman, Black Scientists Study the 'Pose' of the Inner City, N.Y. Times, Apr. 21, 1992, at C1.

[178] See Philip J. Hilts, More Teen-Agers Being Slain by Guns, N.Y. Times, June 10, 1992, at A19; Steve Bates & Paul Duggan, Domestic Violence Fuels Rise in Suburban Slayings: Records Reached in 6 of 9 Jurisdictions, Wash. Post, Jan. 5, 1992, at B1.

[179] See Arthur L. Kellerman et al., Suicide in the Home in Relation to Gun Ownership, 327 New Eng. J. Med. 467 (1992).

While there is avid disagreement among authorities about whether and what sorts of responses to this situation might be worthwhile, a single fact refuses to quit clamoring for attention. It is that neither the deaths nor the injuries nor, added to these, the rising fear of vast numbers of Americans has been able to prompt the enactment of any significant regulatory initiatives in response. Indeed, the signal nature of this protracted failing is stark. Since the assassinations of John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr., gun control legislation has been a nominal part of the national political agenda. At times, usually surrounding assassination attempts directed at major political figures, the pressure on Congress or the states to take meaningful action mounts. But then it subsides.

A prominent feature of the efforts that have gained momentum is that most of them appear disarmingly modest in relation to the scope of the problems of illegal gun ownership, illegal gun use, regrettable-if-legal use, and the extreme proliferation of guns, all of which derive from the over-availability of these weapons. One such modest proposal has been for a mandatory twenty-four-hour waiting period before these agents of death and mayhem can be purchased. But powerful criticisms, as well as sustained cries of protest, have repeatedly shelved the enactment of waiting periods.[180]

Held up alongside the twenty-four-hour waiting period that was involved in *Planned Parenthood v. Casey*,[181] however, it is fast apparent that the intended function of each of these waiting periods is different. Whereas the abortion-related waiting period is designed to encourage *deliberation* about whether or not to exercise the abortion right—and, arguably, to discourage its exercise by raising the costs of the procedure—the only function of the gun control measure is to allow for a computerized police check on the would-be purchaser. The absence of a deliberative role for this waiting period bespeaks a wider absence. That is the entire absence of government at all levels to employ its own voice—the suasive voice of the positive state so clearly in evidence in the abortion area—to reach gun owners, swathed as they have remained for two centuries in bold claims of personal autonomy, however dubious the origin of these claims.

This failure of government is all the more striking in view of the

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[180] Congressmen who have voted against this proposal have developed a standard litany—the kiss of death, as it were—which they read into the Congressional Record while setting about to defeat such experiments. The litany goes, "I do share the concerns of many Americans about the magnitude of crime in our country and the role that these weapons play . . . ." See, e.g., H.R. Rep. No. 102-242 (to accompany H.R. 3371, Omnibus Crime Control Act of 1991), Oct. 7, 1991, at 1008 (compare remarks of the Hon. Craig T. James at 1008 with remarks of the Hon. Steve Schiff at 1033).

[181] 18 Pa. Cons. Stat. Ann. § 2105 (1980).

obvious collapse of the reigning paradigm, a paradigm that our representatives in government have been wont to lean on, which bundles into a single straw man, "'drug addicts, felons, mental defectives and the like'"[182]—the sorts of individuals that deliberative interventionism is ill-suited to reach, but that gun control legislation feebly continues to target. The overwhelming evidence that comprises the factual predicate of the rising statistics I quoted earlier is that atrocities involving guns are increasingly likely to involve husbands, wives, neighbors, and kids on the block—the sorts of individuals that deliberative interventionism, if thoughtfully targeted, might just be able to reach.

It is this final point that seems to me to render didactically salient what many will undoubtedly see as a far-fetched analogy. While hardened criminals may be beyond the pale of state-authored suasion and other forms of constraint, the country is replete with ordinary citizens who fail to act wisely once equipped with a death-dealing instrument. Government intervention in their deliberations about the death-dealing attributes of such instruments might just serve the social good in a pragmatic way. What is more, the symbolic value of state efforts to shape deliberative activity in regard to the use of the most powerful symbol of male authority in our culture would lend special significance to the effort to legitimate deliberative activism toward abortion, the only woman-specific right. On a purely normative basis, it would enhance the very idea of the legitimacy of deliberative interventionism in our consistently non-deliberatively-interventionist climate.

The obvious counter to this position is that government is not required to act everywhere in order to act, legitimately, somewhere. On this perfectly conventional and reasonable understanding, there is no reason to doubt the justice of state action either to favor or disfavor any one group because of state inaction with respect to others. It is the case, however, that this relaxed view of state action tightens into a more stringent form of scrutiny when the government's action is a product or a reinforcement of past illegitimate conduct—conduct whose illegitimacy derives from the chronically disadvantageous treatment by government of a group demarcated by its race, ethnicity, or gender. In a context not involving abortion, Justice O'Connor has referenced the analysis required to identify such illegality as follows:

> Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one

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[182] H.R. Rep. No. 99-495, Mar. 14, 1986, at 86 (quoting the Attorney General's Task Force on Violent Crime).

> gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.[183]

Part III began by referencing Justice Stevens' indictment of the Pennsylvania abortion statute's "outmoded and unacceptable assumptions about the decision-making capacity of women."[184] Part III then examined the archaic and stereotypical deficiencies of judgment that our received culture has assigned to women. It exposed the role that these stereotypes played in the enactment of the earlier wave of legislative restrictions that deprived women of their pre-existent access to abortion.

Now, in this part, I have added a concern based in equality. The concern is that a general and pervasive norm of deliberative non-interventionism and concomitant toleration of or trust in the deliberative autonomy of rights holders exists outside the gender-specific case of the abortion right. As a reality check on the construction of rights and statist responses to their exercise, our review turned up only the abortion right as a focus of state-sponsored deliberative interventionism. This check proved the more insulting when special notice was paid to the right to bear arms, the most decisively male-identified right of any in our constitutional tradition. In relation to it, deliberative interventionism plays no role whatsoever, despite the fearful and rising incidence of death-dealing acts stemming from the use and awesome misuse of guns.[185]

But, I need add, equality of treatment between men and women does not presuppose tit-for-tat interventionism in regard to the abortion right, on the one hand, and the right to bear arms, on the other. The comparison I have offered here should simply make it hard for states to disown the accusation that past discrimination is being perpetuated when the *only* target

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[183] Mississippi v. Hogan, 458 U.S. 718, 725 (1982).

[184] Casey, 112 S. Ct. at 2842.

[185] As startling as my association of the abortion right with the right to bear arms might seem, I might now reveal that its source is to be found in Chief Justice Rehnquist's opinion in *Casey*, where the Chief Justice utilizes this striking juxtaposition—striking not only because of its juxtaposition of abortion-death with gun-death, but also because of its semantic equation of fetushood with personhood, and equation that, from a constitutional standpoint, no Justice has yet adopted.

> One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. (To look 'at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body').

Casey, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in part, dissenting in part) (citing Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989)).

of their deliberative interventions is the abortion right.

Indeed, it should be obvious that *even if* government were to engage in deliberative interventionism with respect, say, to the right to bear arms, such a shift would not in itself legitimate deliberative interventionism in regard to the abortion right. That is because the government would be seeking to divide the legitimate from the illegitimate exercise of the right, in the case of arms-bearing, whereas its interventions in the case of abortion seem directed at persuading women that *any* exercise of this right is a wrong.[186]

Sections C and D intend a closer examination of this end state—the conversion, individual-by-individual, since the Supreme Court has not yet succumbed, to the position that the abortion right as a matter of individual exercise is a wrong.

C. Autonomy

Regarding the relationship between the legitimacy of state interest in potential life and the burdens a state may impose on the abortion right and, therefore, on women's autonomy in the name of that interest, Justice Stevens asserts three positions which comprise the foundation of his analytic stance. The first is that the state may not displace the "reproductive autonomy"[187] that abortion represents on account of its concern for potential life. Developing organisms are not constitutional persons and, therefore, they have no "right to life." The second is that, however "humanitarian" and "pragmatic" are the state's concerns for potential life, its legitimate interests cannot include the assertion of "theological" or "sectarian" positions:[188] the state's assertion of interest must remain secular. The third is that the woman's constitutional liberty interest in abortion "involves her freedom to decide matters of the highest privacy and the most personal nature."[189] In that abortion is such a decision, "[t]he authority to make [it] is an element of basic human dignity . . . [and] nothing less than a matter of conscience."[190]

From these basic positions, Justice Stevens adopts a dualistic stance toward the kinds of deliberative interventions in which the state may legitimately engage in respect to abortion, although his analysis then takes him to a unitary position in regard to the *Casey* regulations. He accepts as

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[186] See infra text accompanying notes 195-201.

[187] Casey, 112 S. Ct. at 2839.

[188] Id. at 2839-40.

[189] Id. at 2840.

[190] Id.

legitimate the kinds of abortion regulation which the Court upheld in the interval between *Roe* and *Casey*: "efforts to enhance the deliberative quality of [the woman's] decision or . . . neutral regulations on the health aspects of her decision."[191] Among his cited examples of these are the regulations requiring written informed consent, which the Court upheld, as we have noted, in *Danforth*.[192] More broadly, he claims agreement with the O'Connor coalition's assertions that the State may "'express a preference for normal childbirth' . . . and may take steps to ensure that a woman's choice is 'thoughtful and informed.'"[193] Therefore, he agrees that "'[s]tates are free to enact laws to provide a reasonable framework for a woman to make a decision that has such a profound and lasting meaning.'"[194] What he rejects as illegitimate, however, are state attempts to "'persuade the woman to choose childbirth over abortion,'"[195] and any attempts "to sway or direct a woman's choice."[196] He rests the illegitimacy of these acts on the idea that "[d]ecisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best."[197]

Justice Stevens' positions state a coherent set of intuitions in regard to legitimate and illegitimate state conduct but they lack explanatory force. That is, they stop short of offering reasons for his governing distinction between the state's ability to shape a "framework" for women's decision making and to assert its "preference" for childbirth within that framework—both "framework" and "preference" presumably counting as "efforts to enhance" women's deliberations—and the state's constitutional disability in regard to "persuasion" of the correctness of childbirth over abortion.

The legitimacy or illegitimacy of the state's deliberative interventions should be judged by the norms of political morality. That is the gravamen of Justice Stevens' position. Focusing, as does Justice Stevens in the remarks I have quoted above, on the matter of autonomy, the missing piece of his analysis might take the form of what follows.

I shall offer two reasons for the wrongness of state intervention for the purpose of persuading the woman about government's favoritism toward childbirth and opposition to abortion. The first reason is a claim about the

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[191] Id. at 2841.

[192] 428 U.S. 52 (1976). See supra notes 30-36 and accompanying text.

[193] Casey, 112 S. Ct. at 2840.

[194] Id.

[195] Id.

[196] Id. at 2841.

[197] Id. at 2840.

respect that rights are owed; the second, which has several features, is about the respect that is due persons as rights-bearers. It is my foundational assumption that both forms of respect are owed by the government as the representative of our collective will in respect to rights.

For ours to be a government that grants due respect to the rights of individuals, the government's official stance must be the extension of tolerance—indeed, benevolence—toward the general existence of rights, toward the existence of matters granted the express status of a right by the institutions authorized to confer that status, and toward the exercise of their rights by rights-bearing citizens. That is, government cannot both recognize a right and treat it, outside the processes reserved for our authoritative institutional debate over rights, as a wrong. The mean exactions of any other position—for example, a general belief-act distinction that would leave government free to proscribe or inhibit actions based on conscience—may be the necessary outrig of a totalitarian state but cannot represent the conduct of a liberal democratic one.

By this, I mean to make clear that the state is entitled to seek to deny the existence of a right or to lend its resources to the shaping of a right through the political and legal channels that are designed, in part, for that purpose. But if, by design, the function of legislatures and courts is to provide the mechanisms by which these defining and shaping processes are to be accomplished, it should follow that these processes end in those places. Accordingly, it is in no sense a wrong for a government of separated powers to undertake considerations of the wrongness of a right in the appropriate fora. That is what we have witnessed during the past decade of abortion litigation, as not only the several states but the Reagan and Bush administrations have sought to have the Supreme Court repudiate abortion as a constitutional right.[198] The Supreme Court is the final arbiter of whether or not abortion is a matter of right and, therefore, of whether or not abortion as a matter of choice deserves the respect of our institutions of government. Once the Court has spoken, as it did in *Roe v. Wade*,[199] women became the bearers of a right to abortion and their legitimate expectation was, and is entitled to remain, so long as the Court does not repudiate it altogether, government's respect for the existence of that right.

Consonant with that respect, it is a wrong for the state to force the continuation of its argument over abortion into the individual lives of its rights-bearing citizens. The people and the government have available the

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[198] See, e.g., Brief for the United States as Amicus Curiae in Support of Appellants at 22–30 (urging the reversal of Roe v. Wade), Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 and 84-1379).

[199] 410 U.S. 113 (1973).

opportunity for a full adjudication of their conflicting claims. The people subsidize the judicial forum for this purpose. They may not be forced individually to subsidize the government's creation of further fora when it has lost in the courts on an issue of right. To do so is to exact a penalty for the exercise of a right, and this the government may not do as a constitutional matter. Moreover, the extension into individual lives of a forum for argument is but one example of injustice involving rights exercise. It would be similarly unjust for the state to impose a user-tax on women who require police protection to obtain access to an abortion clinic, or to prescribe a public school curriculum that teaches that abortion is wrong. To generalize from these examples, the government's necessary benevolence toward the rights exercises of its rights-bearing citizens involves more than mere non-interference; it may also involve the government's protection of these exercises.

The respect that should be granted rights exercise has at least two other dimensions. One is a demonstration by government that the individual's own beliefs and interests deserve meaningful regard in any personal deliberation about rights exercise. In this way, government offers an accord of dignity to the process of self-respect.[200] This accord is inconsistent with any attempt by the government to persuade the individual of the correct outcome of her rights-based deliberations, for to do so assumes that there can be a correct outcome a priori, before an individual's deliberations have taken place and without meaningful regard having been granted by the rights-holder herself to the beliefs and interests that form her identity as a person.

As we paused to consider in section A, outside the abortion context, we have no present familiarity with government efforts to persuade individual citizens that the exercise of a right is a wrong. That is not the government's response to the right to vote, the right to religious choice, or the right to bear arms, even when, as to arms, the exercise of the right might well lead to a fatal wrong. It is only the government's intended conduct in respect to abortion. But if it existed as to all other personal rights or any, this conduct would be no less or more a wrong. In the deliberations that accompany the legal exercise of a right, it is simply wrong for government to disrespect the individual nature of deliberation by attempting to substitute for it an a priori outcome.

A distinct feature of the grant of respect to rights exercise in a polity committed to pluralism as well as to democracy is that the government must be expected to engage in toleration, fairness, and equality, these being

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[200] For an extensive examination of dignitary theory, see Jerry L. Mashaw, Due Process in the Administrative State 158–253 (1985).

external demonstrations of respect for individual and group difference under pluralism. The government's behavior is didactic behavior. If the government exhibits through its actions toward individuals and lawfully composed groups a disrespect for their lawful conduct, then it cannot, without evident hypocrisy, require the respect of citizens toward the lawful choices of other citizens. Where the conduct of government and individuals is both highly visible and highly symbolic, as it is in the matter of rights exercise, the need for the modeling of appropriate behavior becomes acute.

Moreover, where the rights of citizens have been subjected to government's intolerance, the modeling of government behavior derives even greater significance, as it should hold out the possibility of symbolic remediation. That is why federally-sponsored affirmative action programs are a matter of extreme sensitivity. It is why the Congress should consider with extreme care the matter of reparations for the families of the Japanese citizens who were interned during World War II.

In a special sense, this is why government's suasive interventions into the individual woman's abortion deliberations should be examined with extreme skepticism. When the Supreme Court grants to women the right to make the ultimate determination about abortion versus childbirth, any action by the government that demonstrates disrespect for women as the bearers of this right—here, through distrust of their capacities as deliberators—is *correctly* interpreted as a lack of respect for women's right to deliberative autonomy.

It may be that the abusive confrontations with which the membership of Operation Rescue opposes women who have decided on abortion derive support from state efforts to intervene in the abortion deliberations of individual women. If plausible, this evidence of negative modeling is a special reason for concern. But my argument about the obligation of the state to accord due respect to pregnant women's deliberative autonomy does not mean to rest on such a limited empirical claim. As to the expression of governmental preference for a singular substantive outcome—childbirth—the norms I have called upon in this section are designed to expel such interventionist state action from the private forum of conscience and of each pregnant woman's individual decision procedure as it manifests itself in her social world. Without more, this forum includes any consultations she chooses to have with medical personnel concerning the abortion decision and the procedure itself. Thus, the "private forum" becomes the locus for a woman's autonomous choice, a matter on which Justice Blackmun conferred constitutional significance in *Roe v. Wade*.[201] Thus, understood

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[201] 410 U.S. 113 (1973).

as I believe he intends, Justice Stevens' concern for the violative and, therefore, illegitimate nature of suasive intervention restores to the government's treatment of autonomy respect for the integrity of the private self.

D. Coercion

Since coercion is simply a means by which the state may illegitimately trammel the autonomy of its citizens, and interference with the legitimate exercise of rights may involve coercion, this section involves the same fundamental concerns as did the preceding one. But it is the case that some interventions by the state into rights exercise may be neither coercive nor otherwise illegitimate. Therefore, each intended intervention must be closely examined. This is the procedure that the more careful deliberators on the Supreme Court—all but the Rehnquist bloc—pursued in *Casey*, though the analytic procedures adopted suggest that further development of the examining stance. In this section, I will pursue the examining stance through Justice Stevens' announced concern for coercion,[202] focusing more closely than earlier in this Essay on three of the most troubling features of the current regulatory impulse. In order of presentation, these are "compelled delay," "compelled speaker/compelled audience," and "compelled language."

1. Compelled Delay

In *Casey*, seven Justices of the Supreme Court found constitutional a statutory provision that mandates a twenty-four-hour waiting period before the abortion right can be exercised. The three Justices of the O'Connor coalition found the waiting period "troubling"[203] on the basis of the District Court's findings—found sufficient, there, for a holding of unconstitutionality—that the waiting period created increased cost; fostered a potential for delay longer than the statute's mandatory minimum; did not

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[202] Casey, 112 S. Ct. at 2838–43. Perhaps out of heightened concern for the coercive effects of intervention into conscience that recent abortion statutes mandate, Justice Stevens' analysis, in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), and in Casey, 112 S. Ct. at 2791, have focused on the liberty of conscience to which pregnant women are constitutionally entitled. Justice Blackmun's opinions in these two cases exhibit a more robust concern for the blatantly coercive nature of forced motherhood. See Casey, 112 S. Ct. at 2846–48, 2853; Webster, 492 U.S. at 537–38, 557–60.

[203] 112 S. Ct. at 2825.

further maternal health; and infringed on physician discretion.[204] Nevertheless, the coalition voted to uphold the provision, while inviting an as-applied review[205] in that the District Court's findings had not been made pursuant to the coalition's undue burden test.

The coalition's temporizing may have been due, at least in part, to the unitary analysis that it applied to the mandatory waiting period. But the waiting period does not stand alone in the statute, and it is evident that the legislature did not intend for it to operate alone. Rather, the waiting period is integrated into the informed consent procedure[206] and functions as a necessary and constitutive element of it. Therefore, the inquiry should have centered on the purpose or purposes of the delay and their constitutional warrant in light of the consent procedure taken as a whole.

In the statute at issue in *Casey*, the compelled delay is designed to necessitate two trips to the physician's office, each serving a separate purpose. The first visit, at which an abortion may not take place, must include a verbal exchange between the physician and the patient in which the physician is required to impart certain "information," and other written "information" must be put on offer.[207] Without these requirements being satisfied, the patient's informed consent at the time of the second visit is invalid. Whether or not a conventional doctor-patient consultation can reasonably take place, given the possibly chilling effects of these interventions into the relationship, is a matter of speculation and may depend on the substantive nature of the mandate.

Structured as one device among several which have been designed to shape the complete deliberative process, compelled delay affords an opportunity for unjust impositions on the woman's health and welfare through the exercise of the state's power. This is so for several related reasons. One is that it forces the woman into the role of compelled audience, requiring her to hear the state's message. The second is that it is designed to create a ritualized interval for the experience of last-minute doubt and last-minute reversal, when careful, competent decision making may already have consumed considerable time and have proceeded well in advance of these visits. Moreover, abortion is known to be a source of anxiety and self-doubt, and these emotions are most prevalent as the procedure approaches. To the extent the pregnant woman is in an unusually sensitive condition, the state has created an interval of time in which to prey

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[204] Planned Parenthood v. Casey, 744 F. Supp. 1323, 1378 (E.D. Pa. 1990).

[205] The notion of "invitation" may not leap into the mind of every reader. See Casey, 112 S. Ct. at 2820–21.

[206] For a discussion of "integrated" informed consent, see supra note 30.

[207] See 18 Pa. Cons. Stat. Ann. § 3205(a)(1)–(2) (1990).

on her, gaining control not necessarily because of the value of its message—whether the message is about the value of deliberation or the value to the state of every embryo may remain unclear—but because of her possible vulnerability to influence during this heightened period of anxiety.

Whatever action or inaction follows upon the delay, the state has created a negative incentive for hasty, impulsive judgment. Delay may well foster pain over a judgment the woman may soundly believe she should not alter. It may promote contempt or distrust of government for its involvement. These reasonably plausible responses do not foster the sense that the state's impositions are legitimate. Moreover, no such response is likely to augment the soundness of deliberation or judgment about the abortion decision. Lastly, whether accompanied by a woman's tears or her jeers, the likeliest artifact of the waiting period is its reminder to the pregnant woman that the state's raw power can diminish her status as deliberative and decisional agent and that she is powerless to object—a reincarnation, in miniature, of women's historic role.[208]

2. *Compelled Speaker/Compelled Audience*

Based on improvements to its forerunners,[209] the abortion statute in *Casey* requires the physician, or a "qualified" non-physician,[210] to impart to the pregnant woman certain "information" provided by the state. The "information" in question is to include the "probable gestational age of the unborn child."[211] A medical by-pass provision is included within the relevant terms of the statute. It absolves the physician of the need to comply with the informed consent provision "if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient."[212]

Seven Justices of the Supreme Court were unperturbed, at least on the record presented, by the required information provision of the statute and

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[208] See supra part III for further discussion of this history. For a softer approach to compelled delay, under circumstances removed from the Pennsylvania statute at issue in *Casey* and the approaches to it delineated by the O'Connor coalition and the Rehnquist bloc, see infra part V.

[209] See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[210] 18 Pa. Cons. Stat. Ann. § 3205(a)(2) (1990).

[211] Id. § 3205(a)(1)(ii).

[212] Id. § 3205(c).

its medical by-pass allowance.[213] Nonetheless, there may be substantial issues of basic fairness that both of these requirements raise.

The by-pass procedure is onerous and highly impractical. It requires of the doctor a legal-evidentiary judgment he or she must be willing to defend in reference to a person with whom the doctor is more than likely to have no ongoing professional relationship: given the nearly prohibitive costs of in-hospital abortion procedures and given the public funding problems that engulf abortion, the doctor who performs abortions in the current world of medicine is likeliest to do so at some outpost of a clinic that provides either limited health services or none other than abortion.

The pregnant woman and the doctor are most probably strangers and, if the woman has a written medical record, she is most likely not to have brought it, there being no ordinary reason to do so for the sake of this highly safe out-patient procedure. Under these circumstances, it is only in the rarest instance that the doctor is likely to place himself or herself at the risk of the menacingly worded, legally oriented by-pass provision, which cannot, therefore, perform as a meaningful screen. On this analysis, virtually every woman will be compelled to hear what her physician is compelled to say, with the state authoring the substance of this communication.

As to the speech mandate itself, it may be that the very idea of becoming a compelled speaker may drive some physicians away from the endeavor—an effect the state may mean to encourage, since that is yet another way to achieve outcomes that favor childbirth. Then, too, if the idea itself is not discouraging, the content of the compelled speech might prove to be. *Casey* leaves guidance on the constitutionality of such content elusive.[214]

Moreover, as mentioned earlier, the Court imposed no stricture that the mandated "information" be factual. Yet the received meaning of "information" must depend on selection, presentation, and context. Thus, the line between "information" and propaganda, like the line between persuasion and force, is neither straight nor clear. The fact that the mandated "information" arrives at the behest of the state gives it special force. But whether that condition alone lends it probative value is a more difficult question, one that invites strict rather than lenient judgment, in default of actual knowledge, because "information" is so difficult to police.

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[213] See Casey, 112 S. Ct. at 2822–26; 112 S. Ct. at 2867–68 (Rehnquist, C.J., concurring in part, dissenting in part).

[214] Nowhere, for example, does the joint opinion give even a hint of guidance concerning the potential constitutional status, after *Casey*, of mandated descriptions of fetal characteristics along the lines of the statutory mandate that was rejected in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444 (1983).

In response to First Amendment arguments made on behalf of physicians with respect to the mandates in *Casey*,[215] the O'Connor coalition treated the First Amendment right not to speak as overborne by the state's power to regulate physicians through the licensure requirement.[216] But a fundamental purpose of licensure is to restrict the practice of medicine to well-trained individuals who are willing and able to exercise reasonable medical judgment, in accord with professional and community standards, in the best interest of their patients. To the extent that this purpose and the state's required speech mandate are incompatible, either as a general matter or in a specific case, the speech requirement should fall because it violates the essential undertaking the state has obligated the physician to perform— the exercise of his or her best medical judgment in the interests of each patient, taken as an individual.

The issue of trust, raised earlier, arises again with force in this context. The physician may be speaking, but is he or she exercising reasonable professional judgment while doing so? Or is the doctor playing dummy to the state's ventriloquist? If the source of the speech is the physician-yet-not-truly-the-physician, then the persona of the physician is merely a shell and professional trust is undeserved. The paradox of this situation is that it is just this lack of trust in physicians who perform abortions that now serves to help rationalize the state's intervention.[217] Here, the state creates the monster it seeks, all to the detriment of the pregnant woman who finds herself once again powerless—powerless, relative to all other surgical patients, to receive the benefit of an informed consent procedure tailored to her best interests.

3. Compelled Language

The informed consent provision in *Casey* contains this requirement: at least twenty-four hours in advance of an abortion procedure, the physician must inform the pregnant woman of the "probable gestational age of the unborn child."[218] The statute does not expressly require that doctors use this exact language in fulfilling this portion of the statutory mandate. But a doctor might reasonably assume either that the language in question was a part of the mandate or that, in any event, he or she had better, in the interests of a cautious conservatism, conform to as many statutory details as possible. The language, embedded within a coercive

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[215] 112 S. Ct. at 2824.

[216] Id.

[217] See supra note 155 and accompanying text.

[218] 18 Pa. Cons. Stat. Ann. § 3205(a)(1)(ii) (1990).

frame of reference, therefore stands a reasonable chance of becoming the official language of the transmission from doctor to patient of information regarding gestational age.

For the sake of argument, let us call such a non-mandatory-but-somehow-precatory usage "quasi-compelled language." For purposes of further argument, let us begin with a more extreme paradigm—explicitly compelled language—and, through it, consider both cases. In the paradigmatic instance, the statute would explicitly state that physicians shall use the term "unborn child" whenever, in transmission of the information they are bound to impart, they are called upon to reference the fetus.

The choice of this language is significant. References to the "unborn child," "the unborn," and "innocent life," rather than to the "fetus"; and to the "mother," rather than to the "pregnant woman," are encoded ways of declaring sides in the abortion conflict.[219] They carry evolutionary and ideological significance. The terms "unborn child" and "innocent life" are semantic inscriptions of religious dogma on the status of prenatal existence, while the opposing term, "fetus," derives from the Latin and references in so neutral a way as to be non-species-specific the "unborn young of the viviparous vertebrate."[220] The threshold question is, may a state employ the semantic and conceptual formulae of religious dogma to codify policy preferences as law if language devoid of religious content is equally available?

The Supreme Court's ginger side-step of this issue in *Webster v. Reproductive Health Services*[221] has relieved the pressure momentarily. But its unremarked presence in *Casey* informs us that the issue remains before us. This language cannot easily be taken to have acquired secular significance, as could at least arguably be said of the Christmas tableaux in a recent Establishment Clause case.[222] Moreover, as long as the conflict over abortion remains vivid and its major participants include the institutional arms of organized religion, it is impossible for the state to sanitize the material in question. Its use is inflammatory and sectarian—unavoidably so.

Indeed, the "unborn child" should be treated as having further significance. The appropriation from religious dogma of the view that the oocyte-embryo-fetus is a "child" throughout its prenatal development serves up a challenge to *Roe v. Wade*'s declaration that a fetus is not a person

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[219] For examples of pro-life popular literature, see the essays collected in Abortion and the Constitution: Reversing *Roe v. Wade* Through the Courts, supra note 116. I have noted this circumstance once before. See Cohen, supra note 153.

[220] See, e.g., "fetus" in The American Heritage Dictionary 675 (1992).

[221] 492 U.S. 490 (1989).

[222] See Lynch v. Donnelly, 465 U.S. 668 (1984).

under the Constitution and, at least until viability, does not, therefore, have constitutionally protectable interests in life and liberty, as does a pregnant woman.[223] The legislature's attempt to press the "interests" of the "unborn child" on its reluctant "mother," through its strong symbolic presence in statute and its unbidden presence within the doctor-patient relationship, seeks to elide the person/non-person dichotomy that is foundational to *Roe*. In so doing, it drafts both a compelled audience and a compelled actor into a religious drama of secular significance: the pregnant woman and her doctor are forced to promulgate and even, as in the sacrament of the Eucharist, to absorb this metaphor for the religious experience.

For at least some doctors and their patients, such forced participation in a religiously inspired ritual must violate matters of conscience,[224] requiring an exaction the Constitution should not be willing to tolerate. For pregnant women, the phenomenon may be the psychic analog of referred pain from physical trauma, for the pain of this violation of conscience may echo the violation that many women would experience if required to bear an unwanted child. The substitution of one form of pain and violation for another should not be within the discretion of the state as a matter of social justice, even without reference to the Constitution.

As to what I have earlier termed "quasi-compelled language," it might seem appropriate to base an examination of this closer question on a close reading of the text of any challenged statute. However, such a reading could, at best, speak only to the question of probability—the likelihood or unlikelihood that the language at issue would be likely to infiltrate the doctor-patient relationship. But because the deep challenge to the legislative use of such language is premised on its nature as a wrong, no assignment of probability, however low, can cure the defect, which, as I view the terms of debate, is fatal.

The concerns I have raised about compelled delay, compelled speaker and audience, and compelled language obviously mean to portray these as strong and direct forms of state interventionism. Whether or not such interventions are capable of authoring substantive outcomes in individual

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[223] Roe v. Wade, 410 U.S. 113, 159 (1973).

[224] To a fuller extent than in *Casey*, Justice Stevens has concerned himself with the relationship between the abortion decision, individual conscience, and the constitutional requirements of state secularism. See Webster v. Reproductive Health Servs., 492 U.S. 490, 563–72 (1989) (Stevens, J., concurring). For a still more extended treatment of this subject, see Dworkin, supra note 164. The article is a precursor to Dworkin's book on rights involving life and death. Dworkin, supra note 167.

cases, their basic design, once integrated into a mandatory informed consent procedure, treat the pregnant woman and her physician as vessels to be filled with the state's message.

It would be difficult for the state to separate its message about abortion from the message about state power that is inherent in the form of its delivery. These exercises of power seem intolerable representations of coercion toward women who, as we have observed in part III, were long treated as vessels of ideology. Therefore, there is good reason to consider such incursions on the abortion right to be illegitimate on the part of the state.

V. A JURISPRUDENCE OF DOUBT RE-VISITED: UNITING THE STRANDS OF ARGUMENT

Stepping back from the various strands of analysis I locate in Justice Stevens' opinion, it seems clear that, unlike the pieces of a puzzle, there is no single way to align them. Instead, they offer approaches to policy and doctrine that satisfy the conditions of justice they enable us to appreciate.

Refracting the legitimacy of deliberative interventionism in the abortion context through the lens of political morality, these approaches require that the state treat seriously the idea that deliberative autonomy is both a good and a right; that government is not free to engage in conduct that treats a constitutional right as a wrong; that process-based end-runs around this proscription deserve skeptical treatment; and that the appropriate analysis of structural incursions on the abortion right necessarily involves the careful examination of social and legal history for evidence of any patterned deprivation of women's autonomy.

The jurisprudence of doubt that is framed by the Supreme Court's most recent abortion cases, *Planned Parenthood v. Casey* and its immediate progenitors, seems lost to this examination of history. In *Casey*, seven members of the Court either wrote or subscribed to views about the constitutionality of abortion regulation that treat *Roe v. Wade* as history's furthest horizon. These views represent an attempt to free contemporary abortion regulation from the burden of its past. While it is not inconceivable for the O'Connor coalition's "undue burden" test, or for the Rehnquist bloc's mere rational basis test, to take account of the prejudicial stereotyping of women's deliberative capacities that mark Western law in general and the pre-*Roe* history of abortion law in particular, these tests seem clearly pointed in the opposite direction. They look forward, not backward, in order to accommodate state interest in "potential life."

It is the character of recent state efforts to accommodate this interest, however, that requires a confrontation with the past treatment of women.

The deliberative interventionist mode of abortion regulation, held up for constitutional review in *Casey* and its predecessors, is predicated on doubts either about the abortion right itself or on doubts about women's unmediated capacity to exercise such a right. It is this second doubt, laden with age-old prejudice about women's judgmental capacities, that saturated the prior century's campaign to relieve women of deliberative and decisional autonomy over abortion—liberty that had belonged to them under the full legal reign of patriarchy.

The strong form of this objection from history should bar the state from asserting any defense of its interests in potential life that takes the form of deliberative interventionism. On this version of history, the state's concern to preserve potential life cannot be treated as the felicitous trump over an entire history of disadvantage such that the state becomes entitled thereby to reinstill that disadvantage.

A second strong form of objection to deliberative interventionism emerges, even if the objection from history is taken to be weaker than would amount to a regulatory prophylaxis. This second strong objection arises when the history of past discrimination is married to the objection from coercion. From this vantage, it is the nature of the state's efforts to overbear the pregnant woman's conscience and her faculties of judgment that awakens the injury of past prejudice. Thus, it is the compelled circumstances of delay, passivity, and intended doubt that reinforce the message that the integrity of women's decision making deserves to be overborne when exercised in regard to a matter of stipulated importance in the social sphere.

The third strong objection restores a different aspect of history to view and couples it to the objections from autonomy and equality. Here, it is not their deliberative deficiencies but the fundamental badness of Eve's daughters—that fundamental trait which the nineteenth-century physicians' campaign referenced in accusing all women who sought abortions of selfish, wayward, unacceptable, and even unpatriotic behavior—that underlies the need to wrest the abortion right away. The preferred means of accomplishing that goal would be, of course, the total repudiation of the abortion right through the overruling of *Roe v. Wade*. In an imperfect world, the state's arrogation to itself of an opportunity to "persuade" each pregnant woman that the exercise of her abortion right is a wrong, becomes a second-best alternative, one that gets to draw on the cultural subtext: Woman is bad if she refuses to accede to the authority-based norm of the good. Yet, ours is a political system that treats the exercise of no other constitutional right as a wrong.

The reinvocation of woman's status as bad social actor, as unequal being, constitutes a grave and unwarranted penalty on the exercise of the abortion right. On a symbolic level, moreover, it reminds even non-pregnant women that it is legally and morally apt to treat women as both weak deliberators and wrongful decision makers. When deliberative interventionism assumes powerful forms, it disables autonomy even as it disequilibrates equality. I take these powerful forms to include direct intervention into the pregnant woman's decision procedure for the purpose of persuading her not to terminate her pregnancy.

But what if the state is willing to abandon direct efforts at persuasion and go less far toward introducing its concerns? Viewing the matter strongly, as we have been doing, the objections from political morality with which we have been engaged would likely bar all interventions. But outside the context of direct efforts at persuasion, one might reasonably adopt a less stringent view.

If it could actually be demonstrated, for example, that a minimal waiting period, unadorned by suasive interventions, were likely to improve women's decision procedures—with the state put to the proof of demonstrating a likelihood of this improvement empirically, to counter the past prejudice that might otherwise be presumed—such a waiting period might be found acceptable. The likelihood of this outcome, moreover, might deservedly be enhanced if autonomy were not deeply affected by such a waiting period—for instance, if a wait of several hours were imposed, rather than a full day, so that the costs of overnight stays in distant places were not imposed on poor pregnant women.

Moreover, if the state were to publish written literature descriptive of abortion alternatives that were both factual and fair, with no direct intervention into the doctor-patient relationship, it would not seem an offense against autonomy, equality, or the historically sensitized present treatment of women to require the distribution of such literature by facilities that serve as abortion providers. If, in addition to, or in substitution for, such information, the state wished to advance underlying reasons for its interest in potential life that were content-neutral, from a religious standpoint, while meeting the broader concerns of political morality, these, too, might be entitled to advancement in non-confrontational, non-coercive forms.[225]

In sum, the objections from political morality that we have examined might grant legitimacy to deliberative interventions of some kinds, provided sufficient sensitivity and concern toward women could be demonstrated in

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[225] The O'Connor coalition invites this possibility in Casey, 112 S. Ct. at 2818, although no "philosophic arguments," as such, are advanced in the text or directives of current legislation.

their design and implementation. There would then be greater reason to trust in the shape and semantics of whatever constitutional test were to be applied to such interventions.

This, we might take to be the legacy of Justice Stevens' effort in *Casey*: a reasoned basis for skepticism toward a jurisprudence that resurrects doubt about women's deliberative sufficiency and, under cover of accommodation toward an independent state interest, permits the regulatory rebirth of that doubt. In substitution for this, Justice Stevens supplies an appropriate framework of analysis by which to measure the legitimacy of abortion regulation, one which lends doubt to the purposes and actions of the state rather than to the exercise of their abortion right by women.