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ESSAY

SOME THOUGHTS ON AUTONOMY AND EQUALITY IN RELATION TO *ROE V. WADE*†

RUTH BADER GINSBURG‡

The 1973 United States Supreme Court decision in Roe v. Wade sparked a legal and political controversy that continues to this day. Judge Ginsburg suggests that the Roe opinion would have been more acceptable if it had not gone beyond a ruling on the extreme statute involved in the case. She agrees with commentary maintaining that the Court should have adverted specifically to sex equality considerations. Such an approach might have muted the criticism of the Roe decision. The breadth and detail of the Roe opinion ironically may have stimulated, rather than discouraged, antiabortion measures, particularly with respect to public funding of abortion.

These remarks contrast two related areas of constitutional adjudication: gender-based classification and reproductive autonomy. In both areas, the Burger Court, in contrast to the Warren Court, has been uncommonly active. The two areas are intimately related in this practical sense: the law's response to questions subsumed under these headings bears pervasively on the situation of women in society. Inevitably, the shape of the law on gender-based classification and reproductive autonomy indicates and influences the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life.¹

Doctrine in the two areas, however, has evolved in discrete compartments. The High Court has analyzed classification by gender under an equal

† This Essay was delivered as the William T. Joyner Lecture on Constitutional Law at the University of North Carolina School of Law on April 6, 1984.

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1. See Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977). In composing this presentation, I have been stimulated, particularly, by the more encompassing and trenchant work of Professor Sylvia Law of New York University Law School, *Law, Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984), and Professor Wendy Williams of Georgetown University Law Center, *W. Williams, Equality Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate* (Mar. 1984) (unpublished manuscript); *W. Williams, Pregnancy: Special Treatment vs. Equal Treatment* (Mar. 7, 1982) (unpublished manuscript); *W. Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism* (1982) (unpublished manuscript). I owe both of them special appreciation for sharing their draft manuscripts and ideas with me. For the vulnerabilities readers find in this discussion of tense issues, however, I bear sole responsibility.

protection/sex discrimination rubric; it has treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women. The Court's gender classification decisions overturning state and federal legislation, in the main, have not provoked large controversy; the Court's initial 1973 abortion decision, *Roe v. Wade*,² on the other hand, became and remains a storm center. *Roe v. Wade* sparked public opposition and academic criticism,³ in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action. I will attempt to explain these twin perspectives on *Roe* later in this Essay.

Preliminarily, I will relate why an invitation to speak at Chapel Hill on any topic relating to constitutional law led me to think about gender-based classification coupled with *Roe* and its aftermath. In 1971, just before the Supreme Court's turning-point gender-classification decision in *Reed v. Reed*,⁴ and over a year before *Roe v. Wade*, I visited a neighboring institution to participate in a conference on women and the law. I spoke then of the utility of litigation attacking official line-drawing by sex. My comments focused on the chance in the 1970s that courts, through constitutional adjudication, would aid in evening out the rights, responsibilities, and opportunities of women and men.⁵ I did not mention the abortion cases then on the dockets of several lower courts—I was not at that time or any other time thereafter personally engaged in reproductive-autonomy litigation. Nonetheless, the most heated questions I received concerned abortion.

The questions were pressed by black men. The suggestion, not thinly veiled, was that legislative reform and litigation regarding abortion might have less to do with individual autonomy or discrimination against women than with restricting population growth among oppressed minorities.⁶ The

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

3. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

4. 404 U.S. 71 (1971) (statutory preference for males as estate administrators held unconstitutional).

5. See Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347 (1971) (presenting text of October 1, 1971 remarks made at the Southern Regional Conference of the National Conference of Law Women, held at Duke University Law School).

6. Law journal commentary around that time discussed population control measures that the government might order. See, e.g., Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856 (1971). Some commentators explicitly noted links between the abortion and population explosion issues. See, e.g., Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647, 652 (1966) ("[T]he subject of abortion is riding the wave of the grand dialogue over the population explosion and the need for birth control programs."); Note, *Abortion Reform: History, Status, and Prognosis*, 21 CASE W. RES. L. REV. 521, 523 (1970) ("[T]hose countries that have sanctioned abortion on demand have been rewarded with consequent alleviation of dire overpopulation . . ."); see also *Survey Finds 50% Back Liberalization of Abortion Policy*, N.Y. Times, Oct. 28, 1971, at A1, col. 1 ("General concern over population growth has become so intense . . . that half the public now favors liberalization of restrictions on abortion."). As the text indicates, blacks—and in particular, black men—also noted the coincidence of rising population with the liberalization of abortion laws, and sometimes were strongly suspicious of the implications. See, e.g., *City Blacks Get Most Abortions*, N.Y. Times, Dec. 6, 1973, at 94, col. 3 (remarking upon "[t]raditional

strong word "genocide" was uttered more than once. It is a notable irony that, as constitutional law in this domain has unfolded, women who are not poor have achieved access to abortion with relative ease; for poor women, however, a group in which minorities are disproportionately represented, access to abortion is not markedly different from what it was in pre-*Roe* days.

I will summarize first the Supreme Court's performance in cases challenging explicit gender-based classification—a development that has encountered no significant backlash—and then turn to the far more turbulent reproductive autonomy area.

The Warren Court uncabined the equal protection guarantee in diverse settings,⁷ but line drawing by sex was a quarter in which no change occurred in the 1950s and 1960s. From the 1860s until 1971, the record remained unbroken: the Supreme Court rejected virtually every effort to overturn sex-based classification by law. Without offense to the Constitution, for example, women could be kept off juries⁸ and could be barred from occupations ranging from lawyer to bartender.⁹

In the 1970s overt sex-based classification fell prey to the Burger Court's intervention. Men could not be preferred to women for estate administration purposes, the Court declared in the pivotal *Reed v. Reed*¹⁰ decision. Married women in the military could not be denied fringe benefits—family housing and health care allowances—accorded married men in military service, the High Court held in *Frontiero v. Richardson*.¹¹ Social security benefits, welfare assistance, and workers' compensation secured by a male's employment must be secured, to the same extent, by a female's employment, the Supreme Court ruled in a progression of cases: *Weinberger v. Wiesenfeld*,¹² *Califano v. Goldfarb*,¹³ *Califano v. Westcott*,¹⁴ and *Wengler v. Druggists Mutual Insurance Co.*¹⁵ Girls are entitled to the same parental support as boys, the Supreme Court stated in *Stanton v. Stanton*.¹⁶ Evidencing its neutrality, the Court declared in

. . . black male resistance to abortion" and the view of the "militant [black] movement" that abortion is "genocide").

7. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Levy v. Louisiana*, 391 U.S. 68 (1968) (discrimination on the basis of out-of-wedlock birth); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (access to ballot); *Reynolds v. Sims*, 377 U.S. 533 (1964) (apportionment); *Griffin v. Illinois*, 351 U.S. 12 (1956) (access to court); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (race discrimination).

8. See *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding state statute requiring that, to serve on juries, women, but not men, must volunteer affirmatively for service); *Fay v. New York*, 332 U.S. 261 (1947) (upholding state's "blue ribbon" jury scheme despite gross disparity between numbers of women and men selected to serve); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (stating in dictum that states may "confine [juror] selection to males").

9. See *Goesaert v. Cleary*, 335 U.S. 464 (1948) (bartender) (decision "disapproved" in *Craig v. Boren*, 429 U.S. 190, 210 (1976)); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (lawyer). See generally Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 451-57 (1978).

10. 404 U.S. 71 (1971).

11. 411 U.S. 677 (1973).

12. 420 U.S. 636 (1975) (social security).

13. 430 U.S. 199 (1977) (social security).

14. 443 U.S. 76 (1979) (aid to families with dependent children).

15. 446 U.S. 142 (1980) (workers' compensation).

16. 421 U.S. 7 (1975).

*Craig v. Boren*¹⁷ that boys must be permitted to buy 3.2 percent beer at the same age as girls and, in *Orr v. Orr*,¹⁸ that alimony could not be retained as a one-way street: a state could compel able men to make payments to women in need only if it also held women of means accountable for payments to men unable to fend for themselves. Louisiana's rule, derived from Napoleon's Civil Code, designating husband head and master of the household, was held in *Kirchberg v. Feenstra*¹⁹ to be offensive to the evolving sex equality principle.

However sensible—and noncontroversial—these results, the decisions had a spectacular aspect. The race cases that trooped before the Warren Court could be viewed as moving the federal judiciary onto the course set by the Reconstruction Congress a century earlier in the post-Civil War amendments. No similar foundation, set deliberately by actors in the political arena, can account for the Burger Court sex discrimination decisions.²⁰ Perhaps for that reason, the Court has proceeded cautiously. It has taken no giant step. In its most recent decision, *Mississippi University for Women v. Hogan*,²¹ the High Court recognized the right of men to a nursing school education at an institution maintained by the state for women only. But it earlier had declined to condemn a state property tax advantage reserved for widows,²² a state statutory rape law penalizing males but not females,²³ and draft registration limited to males.²⁴ It has formally reserved judgment on the question whether, absent ratification of an equal rights amendment, sex, like race, should rank as a suspect classification.²⁵

The Court's gender-based classification precedent impelled acknowledgment of a middle-tier equal protection standard of review, a level of judicial scrutiny demanding more than minimal rationality but less than a near-perfect fit between legislative ends and means. This movement away from the empty-cupboard interpretation of the equal protection principle in relation to sex equality claims largely trailed and mirrored changing patterns in society—most conspicuously, the emergence of the two-career family. The Court's decisions provoked no outraged opposition in legislative chambers. On the contrary, in a key area in which the Court rejected claims of impermissible sex-

17. 429 U.S. 190 (1976).

18. 440 U.S. 268 (1979).

19. 450 U.S. 455 (1981). The Louisiana legislation at issue provided specifically that a husband had a unilateral right to dispose of jointly owned property without his wife's consent. *Id.* at 456.

20. The Court once observed that the 19th amendment gave women the vote but only that. *See Fay v. New York*, 332 U.S. 261, 290 (1947).

21. 458 U.S. 718 (1982).

22. *Kahn v. Shevin*, 416 U.S. 351 (1974).

23. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

24. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

25. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (Powell, J., concurring).

For a more detailed review of the Burger Court's sex discrimination rulings, see Ginsburg, *The Burger Court's Grapplings with Sex Discrimination, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 132 (V. Blasi ed. 1983) [hereinafter cited as *THE BURGER COURT*].

based classification, Congress indicated a different view, one more sensitive to discrimination against women.

That area, significantly in view of the Court's approach to reproductive choice, was pregnancy. In 1974 the Court decided an issue pressed by pregnant school teachers forced to terminate their employment, or take unpaid maternity leave, months before the anticipated birth date.²⁶ Policies singling out pregnant women for disadvantageous treatment discriminated invidiously on the basis of sex, the teachers argued. The Court bypassed that argument; instead, the Court rested its decision holding mandatory maternity leaves unconstitutional on due process/conclusive presumption reasoning.²⁷ Some weeks later, the Court held that a state-operated disability income protection plan could exclude normal pregnancy without offense to the equal protection principle.²⁸ In a statutory setting as well, under Title VII, the Court later ruled, as it earlier had held in a constitutional context, that women unable to work due to pregnancy or childbirth could be excluded from disability coverage.²⁹ The classifications in these disability cases, according to the Court, were not gender-based on their face, and were not shown to have any sex-discriminatory effect. All "nonpregnant persons," women along with men, the Court pointed out, were treated alike.³⁰

With respect to Title VII, Congress prospectively overruled the Court in 1978. It amended the statute to state explicitly that classification on the basis of sex includes classification on the basis of pregnancy.³¹ That congressional definition is not controlling in constitutional adjudication, but it might stimulate the Court one day to revise its position that regulation governing "pregnant persons" is not sex-based.

Roe v. Wade, in contrast to decisions involving explicit male/female classification, has occasioned searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun (the author of the opinion), annual proposals for overruling *Roe* by constitutional amendment,³² and a variety of measures in Congress and state legislatures to contain or curtail the decision.³³ In 1973, when *Roe* issued, abortion law was in a state of change across the nation. There was a distinct trend in the states,

26. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

27. *Id.* at 639-50. The irrebuttable or conclusive presumption mode of analysis has lost favor with the Court in other contexts. See *Weinberger v. Salfi*, 422 U.S. 749, 771-72 (1975).

28. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

29. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

30. *Id.* at 135.

31. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e (1976)).

32. See, e.g., Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1319-25 (1975) (discussing proposed amendments).

33. See, e.g., Hyde, *The Human Life Bill: Some Issues and Answers*, 27 N.Y.L. SCH. L. REV. 1077 (1982) (congressional response); Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637 (1976) (state response); Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974) (state response); see also *infra* notes 50-52 and accompanying text.

noted by the Court, "toward liberalization of abortion statutes."³⁴ Several states had adopted the American Law Institute's Model Penal Code approach setting out grounds on which abortion could be justified at any stage of pregnancy; most significantly, the Code included as a permissible ground preservation of the woman's physical or mental health.³⁵ Four states—New York, Washington, Alaska, and Hawaii—permitted physicians to perform first-trimester abortions with virtually no restrictions. This movement in legislative arenas bore some resemblance to the law revision activity that eventually swept through the states establishing no-fault divorce as the national pattern.³⁶

The Texas law at issue in *Roe* made it a crime to "procure an abortion" except "by medical advice for the purpose of saving the life of the mother."³⁷ It was the most extreme prohibition extant. The Court had in close view two pathmarking opinions on reproductive autonomy: first, a 1965 precedent, *Griswold v. Connecticut*,³⁸ holding inconsistent with personal privacy, somehow sheltered by due process, a state ban on the use of contraceptives even by married couples; second, a 1972 decision, *Eisenstadt v. Baird*,³⁹ extending *Griswold* to strike down a state prohibition on sales of contraceptives except to married persons by prescription. The Court had already decided *Reed v. Reed*,⁴⁰ recognizing the arbitrariness in the 1970s of a once traditional gender-based classification, but it did not further pursue that avenue in *Roe*.

The decision in *Roe* appeared to be a stunning victory for the plaintiffs. The Court declared that a woman, guided by the medical judgment of her physician, had a "fundamental"⁴¹ right to abort a pregnancy, a right the Court

34. *Roe*, 410 U.S. at 140; see also *infra* note 81.

35. MODEL PENAL CODE § 230.3 (1980).

36. On the transition from fault to no-fault divorce, see Raphael, Frank & Wilder, *Divorce in America: The Erosion of Fault*, 81 DICK. L. REV. 719, 728 (1976-1977) ("For the past three decades there has been a strong trend away from the traditional notion that one spouse must be guilty of some injury to the other before a divorce may be granted."); Note, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649 (1972). Long before no-fault divorce legislation became the norm in this country, persons with the financial resources to do so could travel to certain states or outside the country to end their marriages. See, e.g., Friedman & Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 68 (1976) (before the sudden burst of no-fault divorce legislation in early 1970s, "divorce on demand had been available in many states, but at a stiff price"); Wash. Post, Feb. 1, 1972, at A18, col. 1 ("[S]omething is wrong when people who have \$400 and a plane ticket can get quickie divorces and those who don't can't."), quoted in Zuckman, *Recent Developments in American Divorce Legislation*, 35 JURIST 6, 12 (1975). Similarly, before *Roe*, women of means could end their pregnancies by traveling to states or foreign nations with less restrictive abortion laws. See Burt, *The Burger Court and the Family*, THE BURGER COURT, *supra* note 25, at 92, 107-08 (for practical purposes, the availability of abortions in some states undermined the more restrictive regimes); Karst, *supra* note 1, at 59 ("Even before *Roe v. Wade*, wealthy women . . . could obtain abortions by traveling."); *Abortion for Whom*, NEW REPUBLIC, Oct. 25, 1969, at 12 ("The rich have always been able to get abortions by going abroad. The poor cannot travel . . ."). For example, in 1971, the second year New York's liberalized abortion law was in effect, 60% of the women having abortions in New York were nonresidents. See *Light on Abortion*, N.Y. Times, Sept. 4, 1972, at A14, col. 2.

37. *Roe*, 410 U.S. at 117-18 (citing TEX. PENAL CODE ANN. §§ 1191, 1196 (Vernon 1961)).

38. 381 U.S. 479 (1965). Earlier, in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), the Court had referred to an individual's right to procreate as "a basic liberty."

39. 405 U.S. 438 (1972).

40. 404 U.S. 71 (1971).

41. See *Roe*, 410 U.S. at 152, 155.

anchored to a concept of personal autonomy derived from the due process guarantee. The Court then proceeded to define with precision the state regulation of abortion henceforth permissible. The rulings in *Roe*, and in a companion case decided the same day, *Doe v. Bolton*,⁴² were stunning in this sense: they called into question the criminal abortion statutes of every state, even those with the least restrictive provisions.

Roe announced a trimester approach Professor Archibald Cox has described as "read[ing] like a set of hospital rules and regulations."⁴³ During the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician";⁴⁴ in the next, roughly three-month stage, the state may, if it chooses, require other measures protective of the woman's health.⁴⁵ During the final months, "the stage subsequent to viability," the state also may concern itself with an emerging interest, the "potentiality of human life"; at that stage, the state "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁴⁶

Justice O'Connor, ten years after *Roe*, described the trimester approach as "on a collision course with itself."⁴⁷ Advances in medical technology would continue to move *forward* the point at which regulation could be justified as protective of a woman's health, and to move *backward* the point of viability, when the state could proscribe abortions unnecessary to preserve the patient's life or health. The approach, she thought, impelled legislatures to remain *au courant* with changing medical practices and called upon courts to examine legislative judgments, not as jurists applying "neutral principles," but as "science review boards."⁴⁸

I earlier observed that, in my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend "toward liberalization of abortion statutes" noted in *Roe*,⁴⁹ legislatures adopted measures aimed at minimizing the impact of the 1973 rulings, including notification and consent requirements,⁵⁰

42. 410 U.S. 179 (1973).

43. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976).

44. *Roe*, 410 U.S. at 164.

45. *Id.*

46. *Id.* at 164-65. The Model Penal Code provision, on which several states had patterned abortion legislation reform, see *Special Project, Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 109 & nn.229-31, contained no limitation as to the stage of pregnancy at which an abortion could be obtained. See MODEL PENAL CODE § 230.3(2) (1980).

47. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2507 (1983) (O'Connor, J., dissenting).

48. *Id.*

49. *Roe*, 410 U.S. at 140; see also *infra* note 81.

50. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2497-99 (1983) (parental and court consent); *H.L. v. Matheson*, 450 U.S. 398 (1981) (parental notification); *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-75 (1976) (spousal and parental consent).

prescriptions for the protection of fetal life,⁵¹ and bans on public expenditures for poor women's abortions.⁵²

Professor Paul Freund explained where he thought the Court went astray in *Roe*, and I agree with his statement. The Court properly invalidated the Texas proscriptioin, he indicated, because "[a] law that absolutely made criminal all kinds and forms of abortion could not stand up; it is not a reasonable accommodation of interests."⁵³ If *Roe* had left off at that point and not adopted what Professor Freund called a "medical approach,"⁵⁴ physicians might have been less pleased with the decision, but the legislative trend might have continued in the direction in which it was headed in the early 1970s. "[S]ome of the bitter debate on the issue might have been averted," Professor Freund believed; "[t]he animus against the Court might at least have been diverted to the legislative halls."⁵⁵ Overall, he thought that the *Roe* distinctions turning on trimesters and viability of the fetus illustrated a troublesome tendency of the modern Supreme Court under Chief Justices Burger and Warren "to specify by a kind of legislative code the one alternative pattern that will satisfy the Constitution."⁵⁶

I commented at the outset that I believe the Court presented an incomplete justification for its action. Academic criticism of *Roe*, charging the Court with reading its own values into the due process clause, might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention. Professor Karst's commentary is indicative of the perspective not developed in the High Court's opinion; he solidly linked abortion prohibitions with discrimination against women.⁵⁷ The issue in *Roe*, he wrote, deeply touched and concerned "women's position in society in relation to men."⁵⁸

It is not a sufficient answer to charge it all to women's anatomy—a natural, not man-made, phenomenon. Society, not anatomy, "places a greater stigma on unmarried women who become pregnant than on the men who father their children."⁵⁹ Society expects, but nature does not command, that "women take the major responsibility . . . for child care"⁶⁰ and that they will

51. See *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517, 2521-22 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52, 81-84 (1976).

52. See *Harris v. McRae*, 448 U.S. 297 (1980) ("Hyde Amendment" to Title XIX of Social Security Act); *Maher v. Roe*, 432 U.S. 464 (1977) (state Medicaid regulations).

53. Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983) (adapted from inaugural Harold Leventhal Lecture at Columbia Law School).

54. *Id.*

55. *Id.*; cf. Burt, *supra* note 36, at 107-09 (arguing that *Roe* was "unnecessary" because "majoritarian institutions" were not "unfairly disregard[ing]" interests of "proponents of free abortion"); *infra* note 81.

56. Freund, *supra* note 53, at 1480.

57. Karst, *supra* note 1, at 58; cf. M. CAPPELLETTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 614-15 (1979) (observing that Italian Constitutional Court ruling on abortion statutes also avoided treating the matter as a women's rights issue).

58. Karst, *supra* note 1, at 58.

59. *Id.* at 57.

60. *Id.*

stay with their children, bearing nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring.

I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious. I appreciate the intense divisions of opinion on the moral question and recognize that abortion today cannot fairly be described as nothing more than birth control delayed. The conflict, however, is not simply one between a fetus' interests and a woman's interests, narrowly conceived, nor is the overriding issue state versus private control of a woman's body for a span of nine months.⁶¹ Also in the balance is a woman's autonomous charge of her full life's course—as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.⁶²

On several occasions since *Roe* the Court has confronted legislative responses to the decision. With the notable exception of the public funding cases, the Court typically has applied *Roe* to overturn or limit efforts to impede access to abortion. I will not survey in the brief compass of this Essay the Court's series of opinions addressing: regulation of the abortion decisionmaking process; specifications regarding personnel, facilities, and medical procedures; and parental notification and consent requirements in the case of minors.⁶³ Instead, I will simply highlight the Court's statement last year reaffirming *Roe*'s "basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy."⁶⁴ In *City of Akron v. Akron Center for Reproductive Health, Inc.*,⁶⁵ the Court acknowledged arguments it continues to hear that *Roe* "erred in interpreting the Constitution."⁶⁶ Nonetheless, the Court declared it would adhere to *Roe* because "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."⁶⁷

I turn, finally, to the plight of the woman who lacks resources to finance privately implementation of her personal choice to terminate her pregnancy. The hostile reaction to *Roe* has trained largely on her.

Some observers speculated that the seven-two judgment in *Roe* was motivated at least in part by pragmatic considerations—population control concerns, the specter of coat hanger abortions, and concerns about unwanted children born to impoverished women. I recalled earlier the view that the

61. *But cf.* Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (contending that even when the parent-child relationship is involved our law generally does not require a person to submit to a bodily invasion or the imposition of physical pain to save the life of another).

62. Karst, *supra* note 1, at 57-59.

63. The Court's 1975-1981 decisions are listed in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2487 n.1 (1983).

64. *Id.*

65. 103 S. Ct. 2481 (1983).

66. *Id.* at 2487.

67. *Id.*

demand for open access to abortions had as its real purpose suppressing minorities.⁶⁸ In a set of 1977 decisions, however, the Court upheld state denial of medical expense reimbursement or hospital facilities for abortions sought by indigent women.⁶⁹ Moreover, in a 1980 decision, *Harris v. McRae*,⁷⁰ the Court found no constitutional infirmity in the Hyde Amendment, which excluded even medically necessary abortions from Medicaid coverage.⁷¹ After these decisions, the Court was accused of sensitivity only to the Justices' own social milieu—"of creating a middle-class right to abortion."⁷²

The argument for constitutionally mandated public assistance to effectuate the poor woman's choice ran along these lines. Accepting that our Constitution's Bill of Rights places restraints, not affirmative obligations, on government,⁷³ counsel for the impoverished women stressed that childbirth was publicly subsidized. As long as the government paid for childbirth, the argument proceeded, public funding could not be denied for abortion, often a safer and always a far less expensive course, short and long run. By paying for childbirth but not abortion, the complainants maintained, government increased spending and intruded upon or steered a choice *Roe* had ranked as a woman's "fundamental" right.⁷⁴

The Court responded that, like other individual rights secured by the Constitution, the right to abortion is indeed a negative right. Government could not intervene by blocking a woman's utilization of her own resources to effectuate her decision. It could not "impose its will by force of law."⁷⁵ But *Roe* did not demand government neutrality, the Court reasoned; it left room for substantive government control to this extent: Action "deemed in the public interest"⁷⁶—in this instance, protection of the potential life of the fetus—could be promoted by encouraging childbirth in preference to abortion.⁷⁷

Financial need alone, under the Court's jurisprudence, does not identify a class of persons whose complaints of disadvantageous treatment attract close scrutiny.⁷⁸ Generally, constitutional claims to government benefits on behalf

68. See *supra* text accompanying notes 5-6.

69. *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam) (equal protection clause does not require public hospitals to perform abortions simply because they provide publicly financed hospital services for childbirth); *Maheer v. Roe*, 432 U.S. 464 (1977) (equal protection clause does not require state participating in Medicaid program to pay expenses incident to nontherapeutic abortions for indigent women simply because it pays expenses incident to childbirth); *Beal v. Doe*, 432 U.S. 438 (1977) (same ruling under Social Security Act).

70. 448 U.S. 297 (1980).

71. *Id.* at 326-27. But see *Fischer v. Department of Pub. Welfare*, 475 A.2d 873 (Pa. Commw. Ct. 1984) (state denial of Medical Assistance funds to indigent women seeking medically necessary abortions violates equal protection clause of, and equal rights amendment to, state constitution).

72. Shapiro, *Fathers and Sons: The Court, The Commentators, and the Search for Values*, THE BURGER COURT, *supra* note 25, at 218, 229; see Karst, *supra* note 1, at 59.

73. See Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582 (1981); Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 403 (1979).

74. See *Harris*, 448 U.S. at 329 (Brennan, J., dissenting).

75. *Id.* at 315 (quoting *Maheer v. Roe*, 432 U.S. 464, 476 (1977)).

76. *Id.*

77. *Id.*

78. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

of the poor have prevailed only when tied to another bark—a right to travel interstate, discrimination because of out-of-wedlock birth, or gender-based discrimination.⁷⁹ If the Court had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have seen the public assistance cases as instances in which, borrowing a phrase from Justice Stevens, the sovereign had violated its "duty to govern impartially."⁸⁰

I have tried to discuss some features of constitutional adjudication concerning sex equality, in relation to the autonomy and equal-regard values involved in cases on abortion. I have done so tentatively and with trepidation. *Roe v. Wade* is a decision I approached gingerly in prior comment; until now I have limited my remarks to a brief description of what others have said. While I claim no original contribution, I have endeavored here to state my own reflections and concerns.

Roe, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting.⁸¹ Heavy-handed judicial intervention was difficult to justify and

79. See Bennett, *The Burger Court and the Poor*, THE BURGER COURT, *supra* note 25, at 46, 52-53.

80. *Harris*, 448 U.S. at 357 (Stevens, J., dissenting).

81. See, e.g., *Abortion Backers Hopeful of Gains*, N.Y. Times, Oct. 9, 1972, at A9, col. 1 ("Pro-abortion forces believe they are on the verge of major victories that will soon make abortion on request available throughout much of the country."); *Abortion Laws Gaining Favor as New Statutes Spur Debate*, N.Y. Times, Nov. 29, 1970, at A13, col. 2 ("Senator Robert W. Packwood, Republican of Oregon, predicted . . . that most states would abolish laws against abortion within the next 'one to three years.'"). Polls taken prior to the 1970s indicated that substantial majorities of Americans had opposed liberalization of abortion laws. See *Survey Finds 50% Back Liberalization of Abortion Policy*, *supra* note 6, at A1, col. 1 (1965—91% oppose liberalized abortion policy; 1968—85%; 1969—79%; 1971—50%); see also *Survey Finds Majority, In Shift, Now Favors Liberalized Laws*, N.Y. Times, Aug. 25, 1972, at A1, col. 3 (noting same statistics, and adding to them a 1972 poll revealing that 64% of public believe abortion decision should be left to woman and her doctor).

Testifying to the "superiority of the legislative solution," Second Circuit Judge Henry J. Friendly described what happened in 1970 when New York reformed its law:

I can speak with feeling because I was to have presided over a three-judge court before which the constitutionality of the old law was being challenged. Although we had not yet heard argument, I could perceive not merely how soul wrenching but how politically disturbing—and I use "politically" in the highest sense—decision either way would be. If we upheld the old law, we would be disappointing the expectations of many high-minded citizens, deeply concerned over the human misery it was creating, its discriminatory effects, its consequences for the population explosion, and the hopes of the least privileged elements in the community. These people would never understand that if we held the law constitutional, we would not be finding it good. Indeed, some opponents of reform would have claimed we had done precisely that. If we were to decide the other way, many adherents of a deeply respected religion would consider we had taken unto ourselves a role that belonged to their elected representatives and that we had done what the latter, after full consideration, had refused. If they asked what specific provision of the Constitution was violated by this law of more than a century's standing, we would have had to concede that there was none and that we were drawing on what the Supreme Court has euphemistically termed "penumbras" to construct a new "fundamental" right. How much better that the issue was settled by the legislature! I do not mean that every-one is happy; presumably those who opposed the reform have not changed their views.

appears to have provoked, not resolved, conflict.⁸²

The public funding of abortion decisions appear incongruous following so soon after the intrepid 1973 rulings. The Court did not adequately explain why the "fundamental" choice principle and trimester approach embraced in *Roe* did not bar the sovereign, at least at the previability stage of pregnancy, from taking sides.⁸³

Overall, the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective. I understand the view that for political reasons the reproductive autonomy controversy should be isolated from the general debate on equal rights, responsibilities, and opportunities for women and men. I expect, however, that organized and determined opposing efforts to inform and persuade the public on the abortion issue will continue through the 1980s. In that process there will be opportunities for elaborating in public forums the equal-regard conception of women's claims to reproductive choice uncoerced and unsteered by government.

But the result is acceptable in the sense that it was reached by the democratic process and thus will be accepted, even though many will not regard it as right.

H. Friendly, *Some Equal Protection Problems of the 1970's* 14-15 (NYU School of Law 1970) (available at North Carolina Law Review office).

82. See Burt, *supra* note 36, at 107-09; cf. Blasi, *The Rootless Activism of the Burger Court*, *THE BURGER COURT*, *supra* note 25, at 198, 212. (*Roe* was "[g]rounded not on principle," but on an "ad hoc comparison of . . . interests"). One pair of commentators observed:

In many respects the abortion controversy of the 1970s is similar to the busing disputes of the late 1960s and early 1970s. Both the pro-life and anti-busing movements began in reaction to decisions of the Supreme Court. Both activated many people who previously had been at the periphery of . . . politics. The two movements each caught on quickly and developed a strong national base.

Uslaner & Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the Roe and Doe Decisions*, 77 MICH. L. REV. 1772, 1787-88 (1979); see also *id.* at 1785.

83. Cf. Bennett, *supra* note 79, at 52 (arguing that *Harris* (upholding denial of Medicaid funds for abortion) is inconsistent with *Shapiro v. Thompson*, 394 U.S. 618 (1969) (declaring inconsistent with equal protection denial of welfare benefits to new residents)).