UCLA LAW REVIEW DISCOURSE

Equality Arguments for Abortion Rights

Neil S. Siegel
Reva B. Siegel

ABSTRACT

Roe v. Wade grounds constitutional protections for women's decision whether to end a pregnancy in the Due Process Clauses. But in the forty years since *Roe*, the U.S. Supreme Court has come to understand the abortion right as an equality right, as well as a liberty right. In this Essay, we describe some distinctive features of equality arguments for abortion rights. We then show how, over time, equality arguments have appeared in the opinions of the Court and of the justices. Finally, we explain why there may be independent political significance in grounding abortion rights in equality values.

AUTHORS

Neil S. Siegel is Professor of Law and Political Science, Co-Director, Program in Public Law, Duke Law School.

Reva B. Siegel is Nicholas deB. Katzenbach Professor of Law, Yale University.

60 UCLA L. Rev. Disc. 160 (2013)

TABLE OF CONTENTS

INTRODUCTION

Roe v. Wade grounds constitutional protections for women's decision whether to end a pregnancy in the Due Process Clauses.[1] But in the four decades since *Roe*, the U.S. Supreme Court has come to recognize the abortion right as an equality right as well as a liberty right. In this Essay, we describe some distinctive features of equality arguments for abortion rights. We then show how, over time, the Court and individual Justices have begun to employ equality arguments in analyzing the constitutionality of abortion restrictions. These arguments first appear inside of substantive due process case law, and then as claims on the Equal Protection Clause. Finally, we explain why there may be independent political significance in grounding abortion rights in equality values.

Before proceeding, we offer two important caveats. First, in this brief Essay we discuss equality arguments that Supreme Court justices have recognized—not arguments that social movement activists made in the years before *Roe*, that academics made in their wake, or that ordinary Americans might have made then or might make now. Second, we address, separately, arguments based on the Due Process Clauses and the Equal Protection Clause. In most respects but one,[2] however, we emphasize that a constitutional interpreter's attention to the social organization of reproduction could play a more important role in determining the permissibility of various abortion-restrictive regulations than the particular constitutional clause on which an argument is based.

I. EQUALITY ARGUMENTS FOR ABORTION RIGHTS

Equality arguments for abortion rights range widely but share certain core concerns.[3] Sex equality arguments ask whether abortion restrictions are shaped

1. Roe v. Wade, 410 U.S. 113 (1973).
2. *See infra* Part III on the political authority of the Equal Protection Clause.
3. For examples of work in the equality tradition that emerged in the years before *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1353–59 (2d ed. 1990); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) [hereinafter Siegel, *Reasoning From the Body*]; and Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992). For more recent sex equality work, see, for example, WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS

solely by the state's interest in protecting potential life, or whether such laws might also reflect constitutionally suspect judgments about women. For example, does the state act consistently to protect potential life outside the abortion context, including by offering prenatal care and job protections to women who want to become mothers? Or is the state selective in protecting potential life? If so, might abortion restrictions reflect traditional sex-role stereotypes about sex, caregiving, or decision-making around motherhood?[4]

Equality arguments are also concerned about the gendered impact of abortion restrictions. Sex equality arguments observe that abortion restrictions deprive women of control over the timing of motherhood and so predictably exacerbate the inequalities in educational, economic, and political life engendered by childbearing and childrearing. Sex equality arguments ask whether, in protecting unborn life, the state has taken steps to ameliorate the effects of compelled motherhood on women, or whether the state has proceeded with indifference to the impact of its actions on women.[5] Liberty arguments focus less on these gendered biases and burdens on women.

To be clear, equality arguments do not suppose that restrictions on abortion are *only* about women. Rather, equality arguments are premised on the view that restrictions on abortion may be about *both* women *and* the unborn—*both and*. Instead of assuming that restrictions on abortion are entirely benign or entirely invidious, equality analysis entertains the possibility that gender stereotypes may shape how the state pursues otherwise benign ends. The state may protect unborn life in ways it would not, but for stereotypical assumptions about women's sexual or maternal roles.

For example, the state's bona fide interest in protecting potential life does not suffice to explain the traditional form of criminal abortion statutes in America. Such statutes impose the entire burden of coerced childbirth on pregnant women and provide little or no material support for new mothers. In this way, abortion restrictions reflect views about how it is "natural" and appropriate for a woman to respond to a pregnancy. If abortion restrictions were not premised on these views, legislatures that sought to coerce childbirth in the name of protecting life would bend over backwards to provide material support for the women who are required to bear—too often alone—the awesome physical,

---

REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (sex equality opinions by Jack Balkin, Reva Siegel, and Robin West); and Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 833–34 (2007) [hereinafter Siegel, *Sex Equality Arguments for Reproductive Rights*] (surveying equality arguments after *Casey*).

4. *See, e.g.*, Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 3, at 817–22.

5. *See id.* at 819.

emotional, and financial costs of pregnancy, childbirth, and childrearing.[6] Only by viewing pregnancy and motherhood as a part of the natural order can a legislature dismiss these costs as modest in size and private in nature. Nothing about a desire to protect fetal life compels or commends this state of affairs. When abortion restrictions reflect or enforce traditional sex-role stereotypes, equality arguments insist that such restrictions are suspect and may violate the U.S. Constitution.

II. EQUALITY ARGUMENTS IN LEGAL DOCTRINE

While *Roe* locates the abortion right in the Due Process Clauses, the Supreme Court has since come to conceive of it as an equality right as well as a liberty right. The Court's case law now recognizes equality arguments for the abortion right based on the Due Process Clauses. Additionally, a growing number of justices have asserted equality arguments for the abortion right independently based on the Equal Protection Clause.

A. Equality Arguments for Abortion Rights and the Due Process Clauses

The modern Court, in unpacking the meaning of the Due Process Clauses in the areas of gay rights and abortion rights, has continuously appealed to equality values. With respect to gay rights, for example, the Court in *Lawrence v. Texas*[7] wrote that that the petitioners "are entitled to respect for their private lives," and that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[8] Justice Kennedy further wrote for the Court that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[9] Concerns about demeaning, disrespecting, and stigmatizing gay people pervade the Court's interpretation of the Due Process Clause in *Lawrence*.[10]

The Court has also invoked equality concerns to make sense of the Due Process Clauses in the area of abortion rights. The opinion of the Court in

6. *See generally* Siegel, *Reasoning From the Body*, *supra* note 3.
7. 539 U.S. 558 (2003).
8. *Id.* at 578.
9. *Id.* at 575.
10. Thus the Court wrote that the very "continuance" of *Bowers v. Hardwick*, 478 U.S. 186 (1986), "as precedent demeans the lives of homosexual persons." *Lawrence*, 539 U.S. at 575.

Planned Parenthood of Southeastern Pennsylvania v. Casey[11] is shaped to a substantial degree by equality values. At the very moment in *Casey* when the Court reaffirms constitutional protection for abortion rights, the Court explains that a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[12] This emphasis on the role autonomy of the pregnant woman reflects the influence of the equal protection sex discrimination cases, which prohibit the government from enforcing stereotypical roles on women. Likewise, in the stare decisis passages of *Casey*, the Court emphasizes, as a reason to reaffirm *Roe*, that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[13] Here, as elsewhere in *Casey*, the Court is interpreting the Due Process Clause and drawing on equality values in order to make sense of the substance of the right.

The equality reasoning threading through *Casey* is not mere surplusage. Equality values help to identify the kinds of restrictions on abortion that are unconstitutional under *Casey*'s undue burden test. As the joint opinion applies the test, abortion restrictions that deny women's equality impose an undue burden on women's fundamental right to decide whether to become a mother. Thus, the *Casey* Court upheld a twenty-four-hour waiting period, but struck down a spousal notification provision that was eerily reminiscent of the common law's enforcement of a hierarchical relationship between husband and wife. Just as the law of coverture gave husbands absolute dominion over their wives, so "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children."[14] An equality-informed understanding of *Casey*'s undue burden test prohibits government from coercing, manipulating, misleading, or stereotyping pregnant women.

B. Equality Arguments for Abortion Rights and the Equal Protection Clause

The Justices who joined the joint opinion in *Casey* drew on equality values to interpret the Due Process Clause. Justices Blackmun and Stevens agreed, making those parts of *Casey* the opinion of the Court. But Blackmun's separate opinion in *Casey* also appealed directly to the Equal Protection Clause: "By

11. 505 U.S. 833 (1992).
12. *Id.* at 852.
13. *Id.* at 856.
14. *Id.* at 898.

restricting the right to terminate pregnancies," Justice Blackmun wrote, "the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care."[15] And rather than "compensate women for their services," Blackmun wrote, the government "assumes that they owe this duty as a matter of course."[16] Blackmun observed that "[t]his assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."[17]

This is now an emergent position on the Court. Writing for four Justices in *Gonzales v. Carhart*,[18] Justice Ginsburg insisted that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[19] Building on *Casey*'s equality-informed understanding of the Due Process Clause, four justices in *Carhart* emphasized that freedom from state-imposed roles is fundamental to equal citizenship. These justices also appealed to key cases interpreting the Equal Protection Clause, including *United States v. Virginia*.[20] Writing for the Court in that case, Justice Ginsburg declared that laws differentiating between the sexes require close judicial scrutiny, but allowed government to acknowledge sex differences on the condition that sex classifications "not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[21]

In *Carhart*, Justice Ginsburg invoked equal protection cases—including *Virginia*—to counter woman-protective arguments for restricting access to abortion, which appear in the majority opinion. Woman-protective arguments are premised on certain judgments about women's nature and decisional competence.[22] But the equal protection precedents that Justice Ginsburg cited are

15. *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
16. *Id.*
17. *Id.*
18. 550 U.S. 124 (2007).
19. *Id.* at 172 (Ginsburg, J., dissenting). For an argument that "equal citizenship stature" is central to Justice Ginsburg's constitutional vision, see generally Neil S. Siegel, *"Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision*, 43 NEW ENG. L. REV. 799 (2009).
20. 518 U.S. 515 (1996).
21. *Id.* at 534.
22. *See generally* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1014–30 (2008); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

responsive both to woman-protective and to fetal-protective anti-abortion arguments. As Justice Blackmun's *Casey* opinion illustrates, equality arguments are concerned that gender assumptions shape abortion restrictions, even when genuine concern about fetal life is present.

C. What About *Geduldig*?

Equality arguments complement liberty arguments, and are likely to travel together. There is therefore little reason to reach the abstract question of whether, if *Roe* and *Casey* were overruled, courts applying existing equal protection doctrine would accord constitutional protection to decisions concerning abortion.

That said, it is worth considering whether current equal protection case law supplies an additional framework for recognizing abortion rights. One commonly cited objection to building an equality framework for abortion rights under the Court's existing equal protection jurisprudence is the Court's 1974 decision in *Geduldig v. Aiello*.[23]

Proponents of equality arguments have long regarded the state's regulation of pregnant women as suspect—as potentially involving problems of sex-role stereotyping. But in one of its early equal protection sex discrimination decisions, the Court reasoned about the regulation of pregnancy in ways not necessarily consistent with this view. In *Geduldig*, the Court upheld a California law that provided workers comprehensive disability insurance for all temporarily disabling conditions that might prevent them from working, except pregnancy. According to the conventional reading of *Geduldig*, the Court held categorically that the regulation of pregnancy is never sex based, so that such regulation warrants very deferential scrutiny from the courts.

The conventional wisdom about *Geduldig*, however, is incorrect. The *Geduldig* Court did not hold that governmental regulation of pregnancy *never* qualifies as a sex classification. Rather, the *Geduldig* Court held that governmental regulation of pregnancy *does not always* qualify as a sex classification.[24] The Court acknowledged that "distinctions involving pregnancy" might inflict "an invidious discrimination against the members of one sex or the other."[25] This reference to invidiousness by the *Geduldig* Court is best understood in the same way that Wendy Williams's brief in *Geduldig* used the term "invidious"—

23. 417 U.S. 484 (1974).
24. *See* Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095, 1111–13 (2009); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1891–97 (2006).
25. *Geduldig*, 417 U.S. at 496–97 n.20.

namely, as referring to traditional sex-role stereotypes.[26] Particularly in light of the Court's recognition in *Nevada Department of Human Resources v. Hibbs*[27] that pregnant women are routinely subject to sex-role stereotyping,[28] *Geduldig* should be read to say what it actually says, not what most commentators and courts have assumed it to say.

Geduldig was decided at the dawn of the Court's sex discrimination case law and at the dawn of the Court's modern substantive due process jurisprudence. The risk of traditional sex-role stereotyping and stereotyping around pregnancy was developed more fully in later cases, including in twenty-five years of litigation over the Pregnancy Discrimination Act.[29] This explains why, when *Hibbs* was decided in 2003, the Court could reason about pregnancy in ways that the *Geduldig* Court contemplated in theory but could not register in fact.

III. THE POLITICAL AUTHORITY OF THE EQUAL PROTECTION CLAUSE

We have thus far considered the distinctive concerns and grounds of equality arguments, which enable them to complement liberty arguments for abortion rights. We close by considering some distinctive forms of political authority that equality arguments confer.

Some critics pejoratively refer to certain of the Court's Due Process decisions as recognizing "unenumerated" constitutional rights. Although there are two Due Process Clauses in the Constitution, these interpreters regard decisions

26. *See* Brief for Appellees at 38, *Geduldig*, 417 U.S. 484 (No. 73-640), 1974 WL 185752, at *38 ("The issue for courts is not whether pregnancy is, in the abstract, sui generis, but whether the legal treatment of pregnancy in various contexts is justified or invidious. The 'gross, stereotypical distinctions between the sexes' . . . are at the root of many laws and regulations relating to pregnancy." (quoting Frontiero v. Richardson, 411 U.S. 677, 685 (1973))).

27. 538 U.S. 721 (2003).

28. *Id.* at 731 (majority opinion of Rehnquist, C.J.) (asserting that differential workplace leave policies for fathers and mothers "were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work"); *id.* at 736 (quoting Congress's finding that the "prevailing ideology about women's roles has . . . justified discrimination against women when they are mothers or mothers-to-be" (citation omitted) (internal quotation marks omitted)).

29. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ."). Concerns about sex-role stereotyping played a significant part in Congress's decision to amend Title VII. *See, e.g.*, H.R. REP. NO. 95-948, at 3 (1978) ("[T]he assumption that women will become [pregnant] and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.").

like *Roe*, *Casey*, and *Lawrence*, which recognize substantive rather than procedural due process rights, as lacking a basis in the text of the Constitution, hence as recognizing "unenumerated rights."

The pejorative "unenumerated rights" is often deployed against *Roe* and *Lawrence* in an ad hoc manner, without clarification of whether the critic of unenumerated rights is prepared to abandon all bodies of law that have similar roots or structure. For example, those who use the objection from unenumerated rights to attack *Roe* and *Lawrence* generally assume that the First Amendment limits state governments; but of course, incorporation of the Bill of Rights against the states is also a feature of the Court's substantive due process doctrine.[30] Other "unenumerated rights" to which most critics of *Roe* and *Lawrence* are committed include the applicability of equal protection principles to the conduct of the federal government.[31] And this view cannot readily distinguish other "unenumerated" rights of unquestioned authority, such as the rights to travel (or not),[32] marry (or not),[33] procreate (or not),[34] and use contraceptives (or not).[35] At their Supreme Court confirmation hearings, Chief Justice Roberts and Justice Alito learned from the experience of Judge Robert Bork by swearing allegiance to *Griswold*.

But even if the pejorative term "unenumerated" is deployed selectively and inconsistently, it has frequently been deployed in such a way as to affect popular perceptions of *Roe*'s authority. Accordingly, in light of criticism of the abortion right as "unenumerated," it is worth asking whether grounding the right in the

30. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'" This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it." (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994))).

31. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that de jure school segregation in Washington, D.C. violates the equal protection component of the Due Process Clause of the Fifth Amendment); *see also, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, *the equal protection principle* reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." (emphasis added)).

32. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel as a fundamental right).

33. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry as a fundamental right); Loving v. Virginia, 388 U.S. 1 (1967) (same).

34. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate as a fundamental right).

35. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to contraception for all individuals as a fundamental right); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraception for married couples as a fundamental right).

Equal Protection Clause, as well as the Due Process Clauses, can enhance the political authority of the right.

Adding claims on the Equal Protection Clause to the due process basis for abortion rights can strengthen the case for those rights in constitutional politics as well as constitutional law. The Equal Protection Clause is a widely venerated constitutional text to which Americans across the political spectrum have long laid claim. And crucially, once the Supreme Court recognizes that people have a right to engage in certain conduct by virtue of equal citizenship, Americans do not count stripping them of this right as an increase in constitutional legitimacy. We cannot think of a precedent for this dynamic. And so: If the Court were to recognize the abortion right as an equality right, a future Court might be less likely to take this right away.

CONCLUSION

As we have shown, equality arguments for abortion rights identify a variety of constitutional concerns raised by abortion restrictions that liberty arguments may not. Equality arguments focus on "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[36]

This understanding has increasingly come to shape constitutional law. We have documented the Supreme Court's equality-informed understanding of the Due Process Clause in *Lawrence* and *Casey*. We have also identified the growing number of justices who view the Equal Protection Clause as an independent source of authority for abortion rights. We view this reading of the substantive due process and equal protection cases as contributing to a synthetic understanding of the constitutional basis of the abortion right—as grounded in both liberty and equality values. For a variety of reasons this Essay has explored, the synthetic reading leaves abortions right on stronger legal and political footing than a liberty analysis alone.

36. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).