Michigan Journal of Gender & Law

Volume 23 | Issue 1

2016

Missed Opportunities: The Unrealized Equal Protection Framework in *Maher v. Roe* and *Harris v. McRae*

Amelia Bailey
University of Michigan School of Law

Follow this and additional works at: https://repository.law.umich.edu/mjgl

Part of the Fourteenth Amendment Commons, Law and Economics Commons, Law and Gender Commons, and the Supreme Court of the United States Commons

Recommended Citation
Amelia Bailey, *Missed Opportunities: The Unrealized Equal Protection Framework in Maher v. Roe and Harris v. McRae*, 23 MICH. J. GENDER & L. 247 (2016).
Available at: https://repository.law.umich.edu/mjgl/vol23/iss1/5

This Note is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MISSED OPPORTUNITIES: THE UNREALIZED EQUAL PROTECTION FRAMEWORK IN *MAHER V. ROE* AND *HARRIS V. MCRAE*

Amelia Bailey

Abstract

This Note focuses on two cases, Maher v. Roe *and* Harris v. McRae*, and argues that they represent watershed moments in the reproductive rights movement because they positioned abortion as a fundamental right in name only. In both cases, the Supreme Court sanctioned severe funding restrictions and refused to grant poor women the right to state and federal assistance for elective and "non-therapeutic" abortions. "Non-therapeutic abortion" refers to those abortions performed or induced when the life of the mother is not endangered if the fetus is carried to term or when the pregnancy of the mother is not the result of rape or incest reported to a law enforcement agency.*

This Note contends that by articulating the abortion right as stemming from the "right to privacy," the Court effectively ruled out the possibility of public assistance for abortions. In contrast, a better approach to this issue would be to use an equality framework grounded in the Equal Protection Clause. This approach would instruct courts to invalidate state abortion restrictions that either 1) impose a burden on the reproductive choices of women when there is no equivalent restriction placed on men; or 2) have a disparate impact on indigent women. These missed opportunities to reorient the Court's reproductive rights jurisprudence under the Equal Protection Clause continue to have lasting effects on women's access to abortion, as the Court continues to weaken the Due Process standard articulated in Roe*, enabling it to uphold increasingly prohibitive state restrictions on abortion.*

Table of Contents

Abstract • 247
Table of Contents • 247
Introduction • 248
I. A History of the Court's Reproductive Justice Jurisprudence Before 1977 • 250

A. *The Two Pillars of the "Right to Privacy":* Griswold *and* Roe • 250
B. *The Equal Rights Amendment and the Fight for Sex Equality* • 251
C. *Framing Reproductive Rights as a Necessary Condition to Equality: Missed Opportunities* • 254
D. *Reproductive Rights and Sex Discrimination Doctrine: 1973–1977* • 257
II. *Maher v. Roe* and *Harris v. McRae* Should Have Been Understood as Challenges to Sex Discrimination • 258
A. *The Inevitable Failures of the "Right to Privacy"* • 258
B. *The Promising Potential of a Sex Equality Analysis* • 260
III. *Maher* and *Harris* are also Properly Understood as Challenges to Discrimination on the Basis of Economic Status • 262
IV. Assuaging Doubts: An Equal Protection Framework Would Provide Stronger Protection for Reproductive Rights • 264
V. Conclusion • 266

Introduction

It is no secret that access to a safe and effective abortion has become a privilege rather than a right. Congress has banned Medicaid insurance from covering almost all abortions and 29 states have enacted additional restrictions on insurance coverage of abortion.[1] This means the women who will see the greatest negative impact from an unwanted pregnancy are the same women who are the least likely to be able to obtain an abortion.[2] In fact, a

1. Saria Gupta, *Abortion Should Be a Right for Working Women – Not a Privilege*, Time (Sept. 22, 2015), http://time.com/4034008/women-reproductive-health-care-options/.
2. Unintended pregnancies can negatively impact educational attainment for mothers. Additionally, unplanned births are detrimental to a woman's economic status and income and can reduce the probability of participation in the labor-force by as much as 25 percent. When a woman falls below the poverty line prior to her unintended birth, the negative impact on her education, employment, and economic status will be that much more dire. Adam Thomas, *Policy Solutions for Preventing Unplanned*

woman who seeks an abortion but is unable to get one is three times more likely to fall into poverty than a women who is able to terminate her pregnancy.[3]

The Supreme Court sanctioned these funding restrictions and refused to grant poor women the right to state and federal assistance for elective and "non-therapeutic" abortions in *Maher v. Roe*[4] and *Harris v. McRae*.[5] "Non-therapeutic abortion" refers to those abortions performed or induced when the life of the mother is not endangered if the fetus is carried to term or when the pregnancy of the mother is not the result of rape or incest reported to a law enforcement agency. This Note contends that by articulating the abortion right as stemming from the "right to privacy" the Court effectively ruled out the possibility of public assistance for abortions. The privacy doctrine in this context, first articulated in *Griswold v. Connecticut,*[6] and later fully fleshed out in *Roe v. Wade*,[7] instructs the Court to balance the interest of a woman in obtaining an abortion against the government's interest in protecting the life of a fetus.

In contrast, this Note argues that a sex-equality framework, grounded in the Equal Protection Clause, would provide a much better approach to this issue. This approach would instruct courts to invalidate state abortion restrictions that impose a burden on the reproductive choices of women when there is no equivalent restriction placed on men, thereby invalidating the laws at issue in *Maher* and *Harris*.

In addition, the challenged legislation in *Maher* and *Harris* raise issues of equal protection centered on income inequality in that they have a disparate impact on indigent women. Both laws should have been invalidated on these grounds. The Court should have taken the opportunity in either *Maher* or *Harris* to reorient its reproductive rights jurisprudence under an equal protection framework, rather than continuing to ground its analysis in the Due Process Clause of the Fourteenth Amendment. These missed op-

---

Pregnancy, BROOKINGS INSTITUTION (March 2012), http://www.brookings.edu/research/reports///; ANA NUEVO CHIQUERO, THE LABOR FORCE EFFECTS OF UNPLANNED CHILDBEARING (2010), http://www.unavarra.es/digitalAssets/141/141311_100000Paper_Ana_Nuevo_Chiquero.pdf; *See also* Stanley K. Henshaw, Theodore J. Joyce, Amanda Dennis, Lawrence B. Finer & Kelly Blanchard, *Restrictions on Medicaid Funding for Abortions: A Literature Review*, GUTTMACHER INSTITUTE, (June 2009), https://www.guttmacher.org/pubs/MedicaidLitReview.pdf ("Approximately one-fourth of women who would have Medicaid-funded abortions instead give birth when this funding is unavailable.").

3. Gupta, *supra* note 1.
4. 432 U.S. 464 (1977).
5. 448 U.S. 297 (1980).
6. 381 U.S. 479 (1965).
7. 410 U.S. 113 (1973).

portunities continue to have lasting effects on women's access to abortion, as the Court continues to weaken the due process standard articulated in *Roe,* enabling it to uphold increasingly prohibitive state restrictions on abortion.

I. A History of the Court's Reproductive Justice Jurisprudence Before 1977

Since 1965, the Supreme Court has justified its protection of reproductive rights, including a woman's right to terminate a pregnancy, by reference to the Due Process Clause of the Fourteenth Amendment.[8] There are several explanations for why the Court chose this doctrinal framework over one grounded in ideas of equal protection and sex equality. These include the timing of the Court's first reproductive rights case in relation to the development of its sex discrimination doctrine, the arguments advanced by plaintiffs in various reproductive rights cases, and the fight for the Equal Rights Amendment.

A. The Two Pillars of the "Right to Privacy": Griswold *and* Roe

Despite the fact that *Roe* is often cited as the moment when arguments in favor of reproductive rights and those in favor of sex equality began to diverge,[9] the Court had already grounded its reproductive jurisprudence in the Due Process Clause of the Fourteenth Amendment prior to 1973. The Supreme Court's due process analysis of reproductive rights began with *Griswold v. Connecticut.*[10] In a landmark opinion, the Court held that a law forbidding the use of contraceptives violated married couples' constitutional "right to privacy."[11] Privacy, as the Court used it, was a form of freedom from the intrusion of the state. *Griswold* launched the Court's use of the Due Process Clause of the Fourteenth Amendment to protect fundamental rights.[12] The case undoubtedly laid the groundwork for a series of Supreme

8. *See, e.g.*, *Roe*, 410 U.S. 113 (1973); *Griswold*, 381 U.S. 479 (1965).
9. *See* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 Emory L.J. 815, 828 (2007) (stating that "the doctrinal separation of abortion and equal protection began with the court's decisions in *Roe*, *Frontiero*, and *Geduldig*."). *See also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 985 (1984) ("Since 1973, literally hundreds of legal challenges to restrictive abortion laws have been brought, and only a very few have argued that the restrictions violated sex equality norms.").
10. 381 U.S. 479 (1965).
11. *See Griswold*, 381 U.S. at 486.
12. *See, e.g.*, Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 33 (1999) ("*Griswold* was the birth of this controversial constitutional right [to privacy].").

Court opinions striking down other state restrictions on contraception, including *Eisenstadt v. Baird*[13] and *Carey v. Population Services International, Inc.*[14], which invalidated anti-contraception laws as applied to unmarried individuals and minors, respectively.

Griswold also laid a solid foundation for *Roe.* On January 23, 1973, the Court held in *Roe v. Wade*[15] that the constitutional right to privacy protects the right of women and their physicians to determine whether or not to terminate a pregnancy.[16] Despite the decision's overwhelming importance to women, it was grounded on the principles of due process and individual liberty, rather than the principle of sex equality.[17] The plaintiffs had not challenged the Texas law as an example of sex discrimination,[18] and therefore the Supreme Court did not rely upon the sex-specific impact of abortion restrictions. There was no mention of discrimination against women or the impact that an unintended pregnancy has on a woman's independence, productivity, or self-fulfillment.

B. The Equal Rights Amendment and the Fight for Sex Equality

Although *Griswold* set the stage for *Roe*, placing reproductive rights firmly in the Due Process doctrinal framework, there were several other factors that contributed to the complete absence of equal protection language in *Roe*.

First, in 1972, the Equal Rights Amendment (ERA) was submitted to the states for ratification after lengthy hearings in Congress.[19] At the time, a *Yale Journal* article[20]—"written by several feminist legal scholars and

13. 405 U.S. 438 (1972).
14. 431 U.S. 678 (1977).
15. 410 U.S. 113 (1973).
16. *Roe*, 410 U.S. at 154.
17. *Roe*, 410 U.S. at 153–54.
18. The Texas statute challenged in *Roe v. Wade*, 410 U.S. 113 (1973), criminalized abortion unless undertaken to save the life of the mother. The plaintiffs argued that a woman's constitutional right to privacy was being unduly burdened by the statute. Additionally, the plaintiffs asserted a physician's right to administer health care without arbitrary interference. *See Roe*, 410 U.S. at 120–22.
19. S. REP. NO. 92-689 (1972); H.R. REP. NO. 92-359 (1971). For congressional hearings in 1970–72, see *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. On the Judiciary*, 91st Cong. (1970); *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. On Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong. (1970); *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208 and Related Bills & H.R. 916 and Related Bills Before Subcomm No. 4 of the House Comm. on the Judiciary*, 92d Cong. (1971).
20. Barbara A. Brown, et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

Thomas Emerson, one of the nation's leading scholars on constitutional civil rights and liberties"—was seen as highly dispositive of the intended meaning of the amendment,[21] yet "made no mention of laws restricting access to abortion."[22] This seems to indicate that the strongest proponents of the amendment either did not consider access to abortion a pillar of sex equality or felt that the issue was so controversial it could derail the passage of the amendment.

Further, the political opposition to the ERA used abortion as a weapon to discourage and diminish support for ratification.[23] According to Yale Law School Professor and noted feminist scholar Reva Seigel, "Phyllis Schlafly's first published attack on the ERA in February of 1972—a year before *Roe* was handed down—characterized the women's movement as 'anti-family, anti-children, and pro-abortion,"[24] and "mobilized opposition by framing abortion and homosexuality as potent symbols of the new family form that ERA would promote."[25] Following the decision in *Roe*, anti-ERA activists argued that the ERA, despite the absence of any language even implicitly referencing abortion, would constitutionalize the abortion right.[26] Advocates of the ERA were forced to separate reproductive rights from their advocacy for sex equality, "seeking to avoid sex equality reasoning for the right during litigation of the abortion funding cases and through hearings on the extension and reintroduction of the ERA."[27]

Second, the Court's precedent on equal protection was probably too limited and underdeveloped at the time of *Roe* to reach reproductive rights, as the idea of constitutionally mandated sex equality had just begun to take hold. The Supreme Court did not apply the Fourteenth Amendment's guarantee of equality to sex classifications until 1971, when in *Reed v. Reed* they struck down an Idaho law that gave men a blanket preference over women as administrators of estates.[28] The unanimous decision in *Reed* signified that reviewing courts would treat classifications based on sex less deferentially, but the opinion did not explain why or how this would look.[29]

That same year, the Court decided *Eisenstadt*, which was grounded in equal protection doctrine, but not sex-based equal protection. The challenged law in that case, prohibiting the distribution of contraceptives except

---

21. Law, *supra* note 9, at 975–76.
22. *Id.* at 977.
23. Siegel, *supra* note 9, at 827.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 828.
28. 404 U.S. 71 (1971).
29. Law, *supra* note 9, at 974–75.

by doctors to married people, was based on the distinction between married and unmarried people, which the Court held violated the Equal Protection Clause of the Fourteenth Amendment.[30] The Court missed a valuable opportunity to reorient its reproductive rights jurisprudence in sex equality doctrine, which would have provided a stronger basis for the decision.[31] As noted constitutional law scholar Sylvia Law explained:

> Even assuming that both parents bear equal responsibility for the child after birth, only women are confronted with the choice of obtaining an abortion or enduring the physical burdens of pregnancy. A more forceful decision in *Eisenstadt*, based on the sex equality principle, could have accepted the legitimacy of the state interest in discouraging sex outside of marriage, yet still concluded that, despite this interest, denying women access to contraception 'prescribes pregnancy and the birth of an unwanted child as punishment for fornication.' The unwanted pregnancy is not simply a burden women must, in the nature of things, bear. Where the state denies access to contraception, it is a burden the state imposes.[32]

Two years later, in the same term as *Roe*, the court addressed the sex-equality issue again. In *Frontiero v. Richardson*, ACLU counsel Ruth Bader Ginsberg challenged a military practice that automatically allowed the wives of male officers to be considered as dependents and thus receive the rights of dependents, but required female officers to actually prove their husbands were dependent on them in order to receive these same benefits.[33] Plaintiff's brief incorporated themes of historical oppression, the value of individuality, and the irrationality of sex-based stereotypes:

> First, historically women have been subjugated, their essential humanity denied, and the pedestal upon which they have been placed has all too often been a cage. Second, women seek to be judged on their individual merits; the stereotypes of married women as economically dependent are inaccurate generally and particularly as applied to the Frontieros. And third, sex is an immutable characteristic that frequently bears no relation to the ability to perform or contribute.[34]

30. Eisenstadt v. Baird, 405 U.S. 438 (1971).
31. Law, *supra* note 9, at 977–78.
32. Law, *supra* note 9, at 978 (citing *Eisenstadt*, 405 U.S. at 448).
33. 411 U.S. 677 (1973).
34. Law, *supra* note 9, at 979-80.

The decision in *Frontiero* was fractured: four Justices ruled that sex-based classifications should receive heightened scrutiny; four concurred in the result but thought it sufficient to invalidate the classification as unreasonable, without addressing the appropriate constitutional standard for sex-based classifications.[35]

Frontiero is a prime example of the "assimilationist vision" of sex equality, which minimizes the significance of biological differences between the sexes.[36] Those with the most power to influence the Court's constitutional doctrine of sex-based equality, namely the ACLU and proponents of the ERA, adopted this theory whole-heartedly.[37] Simultaneously, those responsible for petitioning the Court in support of reproductive rights "emphasized rights of privacy, physician discretion, and the vagueness and uncertainty of the criminal laws prohibiting abortions."[38] According to Law, the decision to move the fight for reproductive rights out of the framework of sex equality reflected a belief that privacy was a less controversial, and therefore stronger, constitutional argument.[39] This belief was no doubt driven by the fact that "the right to privacy" applied to both women and their male physicians, whereas sex equality under the Equal Protection Clause would have a more obvious and direct effect on women only.

C. Framing Reproductive Rights as a Necessary Condition to Equality: Missed Opportunities

Despite this history, there were some feminist scholars and activists who pushed the Court to consider a sex equality argument in relation to reproductive rights before and during the course of deciding *Roe*. In 1971, the Court decided *United States v. Vuitch*, where plaintiffs challenged a District of Columbia law banning abortion except when necessary for the health or life of the mother as unconstitutionally vague.[40] An *amicus* brief filed by Human Rights for Women, Inc. argued that the anti-abortion statute denied women, as a class, the equal protection of the law guaranteed by

---

35. *Frontiero*, 411 U.S. 677 (1973).
36. Law, *supra* note 9, at 963 ("The assimilationist ideal posits that some characteristics – race, sex, eye color – do not describe differences that should ever be allowed to matter in any significant way. . . . The assimilationist vision asserts that it is unjust to distribute rights or responsibilities on the basis of distinctions that do not ever describe relevant differences – sex, race, or eye color. The vision is best developed in relation to race. The assimilationist view of sex equality is attractive to constitutional lawyers because it builds upon analogies between race- and sex-based discrimination.").
37. *Id.* at 981.
38. *Id.*
39. *Id.* at 981–82.
40. 402 U.S. 62 (1971).

the Fifth Amendment.[41] The brief contended that the abortion ban restricted opportunities for women, including the opportunity to pursue higher education, to earn a living through purposeful employment, and, in general, to decide their own future, as men are so permitted.[42]

> The effect of the abortion statute is to penalize women in areas of their lives which have nothing to do with their childbearing role. An accident of biology – the fact that women conceive and men do not – is used as an excuse to discriminate against women in jobs, admission to schools, fellowships and research grants, and so on.[43]

Another *amicus* brief filed by the Joint Washington Office for Social Concern raised the argument that abortion bans have a disparate impact on poor women.[44] The brief argued that when women are forced to seek out illegal abortions, those with fewer monetary resources will procure cheaper and more dangerous procedures, thereby subjecting themselves to an increased risk of complications:

> If social caste cannot be identified by the clothes women wear it can be identified by the kind of abortions they buy. With money, abortions may easily be obtained – even in the shadow of legislative halls where they were banned. The degree of legality is measured by the money the women can pay. The price paid by the poor is often death – always blood, sweat and tears. . . . No matter what the intent of Congress may have been when the statute was passed these are the conditions which it preserves: not the life and health of women. . . . It degrades and discriminates against women by reason of their economic status and denies them the right of choice as free people.[45]

---

41. Brief for Human Rights for Women, Inc. as Amicus Curiae at 11-12, United States v. Vuitch, 402 U.S. 62 (1971) (No. 84), 1970 WL 136420 [hereinafter Amicus Brief for Human Rights for Women].
42. *Id.*
43. *Id.*
44. Brief for the Joint Washington Office for Social Concern, Representing the American Ethical Union, American Humanist Association and the Unitarian Universalist Association and for the Unitarian Universalist Women's Federation as Amicus Curiae at 11, United States v. Vuitch, 402 U.S. 62 (1971) (No. 84), 1970 WL 136422.
45. *Id.*

Despite these persuasive arguments grounded in both sex and economic equality, the Court upheld the DC abortion ban.[46] Although Justice Douglas wrote a strongly worded dissent, he justified his opinion by reference to the Due Process doctrine employed in *Griswold*, rather than the Equal Protection Clause.[47]

Struck v. Secretary of Defense[48] was another missed opportunity to reorient the Court's reproductive rights jurisprudence in the Equal Protection Clause. The plaintiff, Captain Struck, challenged Air Force rules that required female officers to be discharged if they became pregnant unless they obtained an abortion.[49] Captain Struck argued the rule violated the Equal Protection Clause, as well as the Due Process Clause of the Fifth Amendment.[50] Her challenge was unsuccessful in the lower courts, but on October 24, 1972, less than three months before *Roe* was decided, the Supreme Court granted her petition for certiorari.[51] Once cert was granted, the Air Force retreated from its position and granted Captain Struck a waiver to the regulation, permitting her to continue to serve as an Air Force Officer. As a result, the case was remanded for mootness.[52] Justice Ginsberg contends that the *Struck* case, had it been given proper consideration, would have instructed the Justices sitting on the court at the time "that disadvantageous treatment of [a woman] because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of sex."[53] By providing such a clear-cut example of the inherent entanglement of reproductive rights and equal protection, the case would have surely realigned the abortion discussion under the sex equality doctrine in both the Court and the general public.

Despite the prevalence of sex equality arguments in favor of reproductive rights in 1973, the Court grounded its monumental opinion in *Roe* exclusively on Due Process grounds, never mentioning equal protection or reasoning rooted in sex equality.[54] This is somewhat surprising given the

46. *Vuitch*, 402 U.S. 62 (1971).
47. *Vuitch*, 402 U.S. at 78 (1971) (Douglas, J. dissenting).
48. 409 U.S. 947 (granting certiorari in 460 F.2d 1372 (9th Cir. 1971)), remanded for consideration of mootness, 409 U.S. 1071 (1972).
49. Air Force Regulation 36-12(40), set out in relevant part in Brief for Petitioner at 2–3, Struck v. Sec'y of Def., 409 U.S. 947 (1972) (No. 72-178); *see also* Struck v. Sec'y of Def., 4460 F.2d 1372, 1374 (9th Cir. 1971).
50. Brief for Petitioner at 8, *Struck*, 409 U.S. 947 (No. 72-178).
51. *Struck*, 409 U.S. at 947 (1972).
52. *See* Memorandum for the Respondents Suggesting Mootness (Dec. 1972), Struck v. Sec'y of Def., 409 U.S. 947 (No. 72-178); *Struck*, 409 U.S. at 1071 (remanding for consideration of mootness).
53. Brief for the Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178) 1972 WL 135840 [hereinafter Ginsburg Brief].
54. Roe v. Wade, 410 U.S. 113, 153–54 (1973).

fact that at least one *amicus* brief challenged the Texas statute on sex equality grounds.[55] The brief acknowledged the fact that, at first glance, abortion restrictions do not seem to implicate equal protection concerns because the laws only relate to women.[56] However, the brief argued that the equal protection framework was indeed appropriate, "[f]or the effect of the laws is to force women, against their will, into a position in which they will be subjected to a whole range of *de facto* forms of discrimination based on the status of pregnancy and motherhood."[57]

D. Reproductive Rights and Sex Discrimination Doctrine: 1973–1977

Following *Roe*, the Court continued to apply the Due Process framework to reproductive rights cases, grounding its decisions to strike down abortion restrictions in the "right to privacy," while upholding state regulations limiting access to abortion by citing a state's compelling interest in protecting the life of the fetus. In 1975, the Court decided *Connecticut v. Menillo,* which upheld a state statute requiring that only physicians provide abortions.[58] In *Planned Parenthood of Central Missouri v. Danforth*, plaintiffs challenged a Missouri statute that required prior written consent for an abortion from a parent (in the case of a minor) or a spouse (in the case of a married woman).[59] The Court invalidated the state requirement on the basis that the spousal and parental consent requirements gave third parties an absolute veto power over a woman's constitutionally mandated right to have an abortion that even the state itself did not possess.[60]

In the same time period, the Court cabined its sex-equality doctrine, limiting its extension to issues of employment and education. In 1974, the Court decided *Geduldig v. Aiello*, ruling that the denial of insurance benefits for work loss resulting from normal pregnancy was not sex discrimination in violation of the Fourteenth Amendment.[61] The Court rejected arguments that laws discriminating against pregnant women reflected sex stereotyping[62] and held that discrimination on the basis of pregnancy did not violate

55. *See* Brief Amicus Curiae on Behalf of New Women Lawyers, et al. at 24–25, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-40) 1971 WL 134283.
56. Brief Amicus Curiae at 27, *Roe*, 410 U.S. 113 (No. 70-40).
57. Brief Amicus Curiae at 27, *Roe*, 410 U.S. 113 (No. 70-40).
58. Connecticut v. Menillo, 423 U.S. 9 (1975).
59. 428 U.S. 52 (1976).
60. 428 U.S. at 52.
61. 417 U.S. 484 (1974).
62. See Ginsburg Brief, *supra* note 53, for an early brief arguing that discrimination on the basis of pregnancy violates equal protection (arguing involuntary discharge from the Air Force due to pregnancy is presumptively unconstitutional because it enforces sex stereotypes in violation of equal protection).

the Equal Protection Clause as it was not inescapably the same as sex discrimination.[63]

II. *Maher v. Roe* and *Harris v. McRae* Should Have Been Understood as Challenges to Sex Discrimination

The Supreme Court should have taken the opportunity in *Maher v. Roe* and *Harris v. McRae* to re-categorize state abortion restrictions as sex-based state actions prohibited by the Equal Protection Clause of the Fourteenth Amendment.

A. The Inevitable Failures of "the Right to Privacy"

By 1977, the "right to privacy" established in *Griswold* and cemented in *Roe* framed the legal conversation around abortion.[64] In that year, the Court in *Maher v. Roe* again analyzed challenges to abortion restrictions through the due process lens.[65] In *Maher*, indigent women challenged a Connecticut statute prohibiting the state from funding abortions that were not medically necessary.[66] The district court held that the regulation was unconstitutional because it denied equal protection:

> The state may not justify its refusal to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money. To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right.[67]

The Supreme Court, however, reversed and held that the Equal Protection Clause did not require a state participating in the Medicaid program

---

63. The Court ruled that discrimination against pregnant women is not necessarily discrimination on the basis of sex while leaving open the possibility that some types of classifications based on pregnancy might be unconstitutional sex discrimination. *See Geduldig*, 417 U.S. at 497 n.20 ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*. . . .").

64. Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy*, 1991 Duke L.J. 324, 355–56 ("In the fifteen years that followed [*Roe*, 410 U.S. 113], the Court applied this framework to invalidate nearly all restrictions against abortion.").

65. 432 U.S. 464 (1977).

66. 432 U.S. 464.

67. Roe v. Norton, 408 F. Supp. 660, 664 (D. Conn. 1975), *rev'd*, 432 U.S. 464 (1977).

to pay the expenses incident to nontherapeutic abortions for indigent women simply because it had made a policy choice to pay expenses incident to childbirth.[68] The Court stated that there was no "constitutional right to an abortion," but rather, only a constitutional right to have the government not unreasonably interfere with a woman's decision to have an abortion.[69] According to the Court, the right identified in *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[70]

The case is instructive on the limitations of the Due Process framework, for the Court was able to justify its decision by citing the state's compelling interest in protecting the potential life of the fetus, overcoming the right of women to access abortion.[71] The majority stated: "Because the pregnant woman carries a potential human being she 'cannot be isolated in her privacy. . . . [Her] privacy is no longer sole and any right of privacy she possesses must be measured accordingly.' "[72] *Maher* is an example of how easy it has become for the Court to qualify and limit a woman's "right to privacy." In a very telling reference, the Court quotes *Williamson v. Lee Optical Co.* for the proposition that the Connecticut legislature should be the one to decide whether or not to expend state funds for abortion.[73] Although the citation makes logical sense in the course of the Court's argument, it seems to be wildly out of place in a decision regarding the protection of a fundamental right since *Lee Optical* is commonly known as the archetypal opinion explaining rational basis review.[74] In what may have been a Freudian slip, the Court more or less acknowledged that it was no longer applying a heightened standard of review to state abortion restrictions.

It is no surprise then that three years later, the Court upheld another abortion restriction on the grounds that a woman's right to privacy did not overcome a government's right to give preferential treatment to women carrying a fetus to term over those seeking an abortion.[75] In September 1976,

68. *Maher*, 432 U.S. at 465–66.
69. *Maher*, 432 U.S. at 473–74.
70. *Maher*, 432 U.S. at 474.
71. *Maher*, 432 U.S. at 478.
72. *Maher*, 432 U.S. at 474 (citing *Roe*, 410 U.S. at 159).
73. *Maher*, 432 U.S. at 479 ("Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' ") (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955)).
74. 348 U.S. 483, 488 (1955).
75. Harris v. McRae, 448 U.S. 297, 297–98 (1980).

Congress prohibited the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances including the endangerment of the mother and for victims of rape and incest.[76] This provision was referred to as the Hyde Amendment.[77] In *Harris v. McRae*, the Court held that the constitutional freedoms provided in *Roe v. Wade* do not extend to access to public funds.[78] Further, it held that women are not entitled to the financial resources necessary to fully avail themselves of their constitutional right to access an abortion.[79]

The federal law at issue in *Harris* bore a close resemblance to the state law at issue in *Maher*, as they were both designed to coerce indigent women to bear children that they would otherwise not elect to have. By funding all of the expenses associated with childbirth and none of the expenses incurred when terminating a pregnancy, the government, whether federal or state, made an offer indigent women could not afford to refuse. Although the Court is technically right that the laws in both *Maher* and *Harris* simply seek to make childbirth more attractive, in reality, they make it the only option for some women. By effectively denying at least some women access to abortion, the government "impairs the woman's capacity for individual self-determination . . . [and] the capacity of responsible citizenship."[80] It is the rhetoric of privacy that allows the Court to deny these fundamental rights to women, because it "blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied."[81]

B. The Promising Potential of a Sex Equality Analysis

Had the Court taken the opportunity to analyze the challenged laws in both *Maher* and *Harris* under the framework of equal protection, it might have found good reason to invalidate these restrictions. As constitutional law expert Cass Sunstein points out, an Equal Protection argument "sees a prohibition on abortion as invalid because it involves a cooptation of women's bodies for the protection of fetuses."[82] More importantly,

> Unlike the privacy view, this argument does not and need not take a position on the status of the fetus. It acknowledges the possibility that fetuses are in important respects human beings.

76. 42 U.S.C.A. § 18023.
77. *Id.*
78. *Harris*, 448 U.S. at 302.
79. *Harris*, 448 U.S. at 316–17.
80. Law, *supra* note 9, at 1017.
81. *Id.* at 1020.
82. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)* 92 COLUM. L. REV. 1, 31 (1992).

> It is entirely comfortable with the claim that the destruction of a fetus is at least a morally problematic act. But it asserts that under current conditions, the government cannot impose on women alone the obligation to protect fetuses through a legal act of bodily cooptation.[83]

Therefore, an equal protection argument is highly preferable to a privacy argument because it properly frames the restrictions on government funding for abortion as a way of coercing women into allowing own their bodies to be co-opted in order to protect the life of another. This analysis illuminates what is so deeply troubling about these and other abortion restrictions: "Government never imposes an obligation of this sort on its citizens – even when human life is uncontroversially at stake."[84]

There is little reason to think that the sex equality analysis was not available to the Court at the time of *Maher* and *Harris.* The argument that restrictions on federal and state funding for abortion should be considered a form of sex discrimination does not take a giant leap of logic since the restrictions involve a defining characteristic of being female. Sunstein explained, "If a law said that 'no woman' may obtain an abortion, it should readily be seen as a sex-based classification," so "[a] law saying that 'no person' may obtain an abortion has the same meaning."[85] An equal protection holding in either case may have required that the Court revisit and even overturn its opinion in *Geduldig*. That was not out of the question, however, given the backlash *Geduldig* received,[86] in addition to Congress's extension of Title VII's prohibition of sex discrimination to discrimination on the basis of pregnancy.[87] Further, as previously noted, the District Court invalidated the law at issue in *Maher* on the grounds that it violated the Equal Protection Clause.

Justice Stevens's dissenting opinion in *Harris* also defined the issue as one of equal protection: "When the sovereign provides a special benefit or a

---

83. *Id.* at 32.

84. *Id.* at 34. For examples of this proposition, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1354 (2d ed. 1988).

85. Sunstein, *supra* note 82, at 32–33.

86. Law, *supra* note 9, at 983 ("Criticizing *Geduldig* has since become a cottage industry.").

87. Congress provided in the Pregnancy Discrimination Act (PDA) of 1978 that "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." 42 U.S.C. § 2000e(k) (Supp. V 1981). The PDA is intended to require that pregnancy, childbirth, and other related medical conditions are treated as well as any medical disability not unique to one sex. *See* Erickson, *Pregnancy Discrimination: An Analytic Approach*, 5 WOMEN'S RTS. L. REP. 83, 102 (1979).

special protection for a class of persons, it must define the membership in the class by neutral criteria; it may not make special exceptions for reasons that are constitutionally insufficient."[88] It is clear, then, that the equal protection argument was on the table when the Court decided both *Maher* and *Harris*. Both cases presented the Court with a prime opportunity to recategorize reproductive rights as an equal protection issue, rather than a privacy issue. The Court could have declared that the government may not employ the law to restrict women's autonomy and opportunities in ways that it does not restrict men by virtue of maintaining the traditional ideals of sex and procreation. Unfortunately, the Court maintained its division of reproductive rights and issues of sex equality to the detriment of women, and in particular, indigent women.

III. *Maher* and *Harris* are also Properly Understood as Challenges to Discrimination on the Basis of Economic Status

In the years after *Roe*, it became clear that the Court considered the right to have an abortion as a negative right: the Constitution mandated that women be free from governmental interference with their choice, but they did not have a positive right of access to abortions. No two cases more clearly demonstrate this concept of abortion as a negative right than *Maher v. Roe* and *Harris v. McRae*. In both cases the Court rejected indigent women's claims that their due process and equal protection rights were violated by a state's exclusion of "nontherapeutic" abortions from its Medicaid coverage and by the Hyde Amendment.[89]

The majority opinions in both cases expressed that a woman's poverty was her problem alone, regardless of its effect on her ability to procure a safe and effective abortion, and that the state had no stake in her personal outcome.[90] In particular, "[t]he [*Harris*] majority implied that the protection of liberty in the Due Process Clauses, from which the right to choose abortion stems, was a protection of negative liberty, not an affirmative guarantee of government services."[91] Treating the right to an abortion in this way allowed the majority in both *Maher* and *Harris* to ignore the disparate impact the regulations had on women of lesser economic means. Had the Court chosen to acknowledge that the law at issue in each case created different rights for

88. 448 U.S. at 349.
89. *Maher*, 432 U.S. 464; *Harris*, 448 U.S. 297.
90. *See Maher*, 432 U.S. at 474; *Harris*, 448 U.S. at 316–17.
91. David B. Cruz, *"The Sexual Freedom Cases"?: Contraception, Abortion, Abstinence, and the Constitution*, 35 Harv. C.R.-C.L. L. Rev. 299, 313 (2000).

those with means and those without, it might have reached a different outcome on the basis of equal protection.

In fact, prior to the *Maher* decision, the Court had already held on several occasions that indigent people were entitled to certain rights that required the government to either provide for or subsidize the corresponding benefits.[92] The majority of these cases were decided on equal protection grounds.[93] It was therefore far from unthinkable at the time *Maher* was decided that the Equal Protection Clause should protect against invidious discrimination on the basis of socioeconomic status. Indeed, Frank Michelman, one of the preeminent Constitutional scholars in his day, had addressed this possibility in 1969,[94] later coining the term "welfare-rights," which came to represent the idea that American citizens might have not only moral, but also constitutional rights to provisions for certain basic ingredients of individual welfare, including health care.[95]

The idea behind "welfare-rights" can logically be extended to abortion restrictions. In reality, the idea that the abortion right raised issues of class, as well as gender, had been percolating since before *Roe*.[96] "Protecting abortion as an equality right would give poor women access to safe abortions, and free all women from the indignities of asking 'the man' for permission not to bear a child."[97] As mentioned above, an *amicus curae* brief in *United States v. Vuitch*—a case decided in 1970, seven years before *Maher* and ten years before *Harris* argued that abortion restrictions unduly burden indigent

92. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (due process requires state to provide indigents access to divorce procedures); Douglas v. California, 372 U.S. 353 (1963) (equal protection compels state to provide indigents with counsel for single appeal as of right); Griffin v. Illinois, 351 U.S. 12 (1956) (equal protection compels states conditioning full direct appellate review of criminal convictions on trial transcripts to provide those transcripts to indigents); *cf., e.g.*, Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250 (1974) (durational residency requirement for nonemergency medical care violates equal protection by denying newcomers "basic necessities of life"); Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires hearing prior to termination of welfare payments).

93. *See Mem'l Hosp.*, 415 U.S. 250 (holding that durational residency requirement for nonemergency medical care violates equal protection by denying newcomers "basic necessities of life"); *Douglas*, 372 U.S. 353 (holding that equal protection compels state to provide indigents with counsel for single appeal as a right); *Griffin*, 351 U.S. 12 (holding that equal protection compels states conditioning full direct appellate review of criminal convictions on trial transcripts to provide those transcripts to indigents).

94. *See* Frank I. Michelman, *The Supreme Court 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969–70).

95. Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

96. *See* Siegel, *supra* note 9, at 825.

97. *Id.*

women.[98] The dissenting justices in *Harris* latched onto this argument. Justice Brennan in particular noted the impact that the Hyde Amendment would have on indigent women and further called for heightened scrutiny:

> Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality. The instant legislation thus calls for more exacting judicial review than in most other cases.[99]

Had the Court adopted Brennan's view, it would have found the Hyde Amendment unconstitutional on equal protection grounds and potentially created a new suspect class: indigent people. This decision could have had monumental effects on reproductive rights jurisprudence, significantly limiting the ability of states to create abortion restrictions, the likes of which we see today.[100] Instead, the Supreme Court continued to espouse the traditional privacy framework grounded in the Due Process Clause of the Fourteenth Amendment, opening the door for restrictive state abortion regulations that have a dangerous disparate impact on low-income women.[101]

IV. Assuaging Doubts: An Equal Protection Framework would Provide Stronger Protection for Reproductive Rights

If one were to take a cynical view of the Court and its treatment of reproductive rights, they would certainly be tempted to argue that, regardless of the doctrinal framework, the conservative members of the Court would find a way to uphold state laws restricting access to abortion. In order

---

98. Brief for the Joint Washington Office for Social Concern, *supra* note 44, at 11.

99. Harris v. McRae, 448 U.S. 297, 332 (1980).

100. Targeted regulation of abortion providers, also known as TRAP laws, are regulations that single out abortion clinics for medical regulations no other clinics that provide similarly low-risk services need to obey. The number of states with TRAP restrictions more than doubled between 2000 and 2014. Fifty-nine percent of women in the country now live in a state that has a TRAP law designed specifically to reduce access to safe abortions. Amanda Marcotte, *The Anti-Abortion Laws are Getting Smarter*, SLATE (July 9, 2014) http://www.slate.com/blogs/xx_factor/2014/07/09/guttmacher_institute_report_on_abortion_restrictions_trap_laws_are_super.html.

101. *See* Introduction *supra*; Conclusion *infra*.

to counter this argument, it is helpful to examine the Court's treatment of one of the other major social issues of the late twentieth century: same-sex marriage. In 1986, the Court heard one of its first cases regarding gay rights, *Bowers v. Hardwick*.[102] The Court upheld a ban on sodomy in Georgia, dismissing the argument that the law was a violation of the "right to privacy" established in *Griswold*: "[N]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[103] This supported some legal theorists in concluding that the privacy doctrine first articulated by Justice Douglas in *Griswold* was now incoherent and unpredictable.[104]

Following the blow in *Bowers*, the gay rights movement began to move away from the language of "privacy" and due process, and towards the language of equality.[105] The first legal result of this linguistic shift came in 2003, when the Court overruled *Bowers* in *Lawrence v. Texas*, declaring a Texas sodomy ban unconstitutional.[106] Although the majority relied on a due process argument, Justice O'Connor wrote a concurring opinion focused on equal protection,[107] laying the groundwork for future arguments advancing gay rights centered on equality.

The equality argument was even more fitting in the context of the fight for same-sex marriage: the rite of marriage centers on a *public* declaration of commitment and devotion. There is nothing private about the act of getting married. Not surprisingly then, the Court based its decision in *U.S. v. Windsor*, where it struck down the Defense Of Marriage Act, on the "Constitution's guarantee of equality," rather than any privacy-based argument.[108] Instead of declaring gay and lesbian people a protected class, the majority ruled out any of the government's "reasonable" justifications for the classification, which left only the obviously unconstitutional justification of "animus."[109]

At the same time that gay rights were expanding, reproductive rights were contracting due in large part to the continued reliance on the privacy doctrine by both the Court and reproductive justice advocates. In *Burwell v. Hobby Lobby*, the Court held that the Affordable Care Act's mandate that

102. 478 U.S. 186 (1986).
103. *Bowers*, 478 U.S. at 191.
104. *See* Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959, 960–62 (1987).
105. *See* Jill Lepore, *To Have and to Hold*, NEW YORKER, May 25, 2015, 34, 37–38.
106. 539 U.S. 558 (2003).
107. *Lawrence*, 539 U.S. at 579.
108. 133 S. Ct. 2675, 2693 (2013).
109. *Windsor*, 133 S. Ct. at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

employers provide their employees with health insurance that covers contraception improperly infringed upon the religious liberty of a for-profit corporation, which was protected under the Religious Freedom Restoration Act.[110] The majority's opinion emphasized that the Health and Human Services Department did not sufficiently prove that access to insurance that included coverage for contraception was a compelling interest.[111] The outcome in both *Windsor* and *Hobby Lobby* came down to one vote: that of Justice Kennedy. If contraception and the right to an abortion were seen as indispensable elements of sex-equality, rather than a matter of privacy, Justice Kennedy, and potentially other members of the *Hobby Lobby* majority, may have been forced to rule against the for-profit corporation seeking to deny women access to medical treatments that ensure their place as equal citizens under the law.

V. Conclusion

Despite the elusions above, it is impossible to predict what the Court's reproductive rights jurisprudence would have looked like had the decisions in *Maher* and *Harris* come out differently. However, as early as 1992, it was clear that the privacy doctrine was no longer adequate to sufficiently protect reproductive rights. That year, the Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[112] In some respects, the opinion was a victory for pro-choice advocates, as the court declined to overturn *Roe*.[113] In other respects though, the opinion, which qualified *Roe* in significant ways, was a huge setback for reproductive rights. The Court abandoned *Roe*'s trimester scheme and substituted an "undue burden" standard,[114] whereby regulations that do not completely prohibit abortions prior to fetal viability will be upheld as long as they do not have the purpose or effect of imposing a substantial burden on women seeking abortions.[115] Nineteen years after

---

110. 134 S. Ct. 2751 (2014).

111. *Hobby Lobby*, 134 S. Ct. at 2779 ("HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting 'public health' and 'gender equality' . . . RFRA, however, contemplates a 'more focused' inquiry.")

112. 505 U.S. 833 (1992).

113. *Casey*, 505 U.S. at 846.

114. *See Casey*, 505 U.S. at 954 (Rehnquist, C.J., joined by White, Scalia, & Thomas, JJ., concurring in the judgment in part and dissenting in part).

115. *See Casey*, 505 U.S. at 876–78 (joint opinion); *see also id.* at 954 (Rehnquist, C.J., joined by White, Scalia, & Thomas, JJ., concurring in the judgment in part and dissenting in part) ("*Roe* decided that abortion regulations were to be subjected to 'strict scrutiny' and could be justified only in the light of 'compelling state interests.' The joint opinion rejects that view.").

Roe, the privacy standard had been so watered down that it is difficult to see how it was significantly more stringent than rational basis review.[116]

Today, 32 states and the District of Columbia prohibit the use of state funds for abortions except in those cases in which federal funds are available, or in other words, when the woman's life is in danger or the pregnancy is the result of rape or incest.[117] South Dakota goes even further, limiting funding to cases of life endangerment.[118] It is difficult to see how these laws would survive legal challenges had the Court taken the opportunity in *Maher* and *Harris* to re-categorize the issue of reproductive rights as one of sex-equality rather than privacy. ♣

116. *See Casey*, 505 U.S. 833; *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 520 (1989) (suggesting that the state need assert only a "legitimate" interest to sustain an abortion-related restriction). For examples of current state abortion restrictions see *State Policies in Brief: An Overview of State Abortion Laws*, GUTTMACHER INST. (Jan. 1, 2016), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.
117. GUTTMACHER, *supra* note 116, at 1.
118. *Id.*