LOSING THE NEGATIVE RIGHT OF PRIVACY: BUILDING SEXUAL AND REPRODUCTIVE FREEDOM

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INTRODUCTION

Recognition by the Supreme Court in *Roe v. Wade*[1] that women have a qualified right to abortion has fueled a controversy that remains dangerously unresolved. At the center is the question of whether women are entitled to self-determination, for to be denied control over reproduction and sexuality is to be denied full personhood and reduced to dependence. The explosive antagonism to *Roe* attests to the deeply radical nature of the demand, advanced first by feminists and then by lesbians and gay men, for a power which is fundamental in our traditional, liberal, constitutional scheme: the control over one's body and the direction of one's life.

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1. 410 U.S. 113 (1973).

As Justice Blackmun warned in *Webster v. Reproductive Health Services*,[2] the new majority on the Supreme Court is chillingly hostile to ceding this power.[3] Its denial has been a cornerstone of patriarchal power, whether expressed in the enslavement of African-American people, the reproductive servitude of women, or the denial to gay men and lesbians of the right to love. This Article provides a brief history of the Court's attacks on the powers recognized in *Roe* and examines that hostility as evidenced in the Court's recent decisions, culminating in *Bowers v. Hardwick*,[4] upholding the criminalization of lesbian and gay sex, and in *Webster*, undermining the right to abortion. The success of the Reagan and Bush Administrations in transforming the Court into an oracle of their right-wing agenda demands the rebuilding of both the political and theoretical bases for the protection of these fundamental rights. To do so, it is necessary to examine the deficiencies in, as well as the benefits of, the liberal concept of privacy. This Article will, therefore, explore the negative character of the privacy right as it has been espoused both politically and constitutionally, and at the same time suggest the potential of viewing privacy as a positive right, rooted in the concept of equality.

My hope for the next phase of the movement for procreative and sexual rights is that we not limit ourselves simply to winning back what we have lost, but rather set our sights on winning what we need: recognition of an affirmative right of self-determination. This will require acknowledging the inextricable interrelationship between reproductive and sexual decision making and the broader demand for equality. This will also require recognizing that it is society's responsibility both to protect choice and to provide the material and social conditions that render choice a meaningful right rather than a mere privilege. In a world riddled with racism, sexism, homophobia, poverty, and exploitation, choice cannot be free.

I.
OPPOSITION TO THE ABORTION RIGHT

Since 1973, the Court's decision in *Roe v. Wade* has survived numerous assaults. During the decade following the decision, the "fetal personhood" campaign, spearheaded by the Catholic church and later joined by Protestant New Right fundamentalists, occupied center stage.[5] These right-to-life advocates argue for the subservience of a woman to the fetus, pitting images of innocent, helpless souls against selfish, unnatural, and murderous women. Their goal is not simply to save fetuses but to return women to their "proper place," assuring that female-monogamous heterosexual marriage and mother-

2. 109 S. Ct. 3040 (1989).

3. *Id.* at 3072 n.7 (Blackmun, J., concurring in part & dissenting in part).

4. 478 U.S. 186 (1986).

5. The religious basis of the fetal rights position is extensively documented in McRae v. Califano, 491 F. Supp. 630, 690-728 (E.D.N.Y.), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).

hood remain women's primary occupation.[6]

Even before *Webster*, the anti-abortion campaign had frightening success in the Court, particularly in decisions permitting legislatures to deny abortion funding and hospital access to poor women,[7] and predicating a teenage woman's right of privacy on either parental approval or a judicial shaming ceremony.[8] The divergence between the right to abortion and the reality of access transformed abortion from a privacy right into a privilege and laid the foundation for the *Webster* decision and, potentially, the effective overruling of *Roe*, as presaged in *Webster*.

Yet in 1983, what was left of *Roe* — the right to be free of barriers to abortion interposed by the state — survived attack in both Congress and the Court. The Senate rejected Jesse Helms' Human Life statute,[9] a blatantly unconstitutional effort to overturn *Roe* by majoritarian vote,[10] as well as an array of Constitutional amendments which ranged from declaring the fetus to be a person under the fourteenth amendment to obviating the right to abortion and turning the issue back to the states.[11]

The hearings in the Senate coincided with the Court's consideration of *City of Akron v. Akron Center for Reproductive Health*.[12] This case involved the model "informed consent" legislation of the anti-abortion movement and was the first in which the Reagan Administration's Solicitor General filed an amicus brief implicitly calling for the overruling of *Roe*.[13] The Administration's position was substantially adopted by Justice O'Connor, which indicated that the anti-abortion side had picked up another vote, albeit one that might only seek to preserve the appearance of a right to abortion while destroying its reality for all but the most privileged women.[14] By a 6-to-3 vote, however, the majority resoundingly reaffirmed the principle of *Roe* that regu-

6. R. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM (2d ed. 1990).

7. Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

8. *See* Bellotti v. Baird, 443 U.S. 622 (1979) (striking down statute requiring parental consent or judicial approval with parental notification for minors but indicating in dicta that parental consent statutes would be upheld if they were to provide for judicial review without need for parental consultation); Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476 (1983) (upholding parental consent requirement that provided alternative to judicial review as envisioned by *Bellotti*). The resulting trauma for teenage women is documented in Hodgson v. Minnesota, 648 F. Supp. 756, 762-65, 769 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2926 (1990).

9. S. 158, 97th Cong., 1st Sess. (1981).

10. *See Human Life Bill: Hearings on S. 158 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., 127 CONG. REC. 287 (1981); Rice, *Transition: Fetal Rights: Defining "Person" Under 42 U.S.C. § 1983*, 1983 U. ILL. L. REV. 347, 357.

11. Rice, *supra* note 10, at 359 nn.87-90.

12. 462 U.S. 416 (1983).

13. Amicus Curiae Brief of the Solicitor General for the United States, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (Nos. 81-746, 81-1172).

14. *City of Akron*, 462 U.S. at 452-75 (O'Connor, J., dissenting). For discussion of Justice O'Connor's position, see *infra* note 132.

lation of abortion would not be lightly tolerated, and struck down hospitalization, consent and other expensive and chilling requirements.[15]

Despite the failure of anti-*Roe* initiatives in Congress, anti-abortion forces garnered sufficient clout to obtain repeated endorsements for a human life amendment in the Republican platform and exercised significant influence on the Reagan Administration.[16] Moreover, the Reagan Administration shifted gears in 1985 and joined its anti-abortion and right-wing agendas in advocating the strict interpretivist view that courts do not have the power to protect rights that are neither articulated in the text of the Constitution nor specifically intended by the framers.[17] While parading as the "jurisprudence of original intent," the practical implications of resuscitating the framers' intent as the measure of the Constitution explain its popularity with the right wing. The "founding fathers" are deified as the fount of wisdom, but we are not reminded that they lived in a thoroughly patriarchal society, preserved slavery in the Constitution, and mocked voting rights for women. Even the Radical Republicans, who, after the Civil War and the first wave of the feminist movement, framed the principle of equality in the fourteenth amendment, failed to envision school desegregation and rejected the vote for women.

In contrast to the originalist school, defenders of the Supreme Court's civil rights decisions hold that the Constitution is a document for the ages, that the broad principles it expresses are to be given new meaning in light of the historical evolution of our society, as well as the newfound meaning of human rights. Thus, just as we have expanded the concept of equality to include women, so the original set of rights must be expanded if women are to be admitted to full citizenship under the Constitution. As a result, the "originalist" attack on the Constitution is primarily an attack on the human rights decisions of the last forty years. Abortion and the right of privacy are, not suprisingly, a centerpiece of that attack.[18]

The Reagan Presidency pursued its political and jurisprudential assault on the Court by appointing over one-half of the federal judiciary and one-third of the Justices of the Supreme Court according to a "litmus" test of fealty to the overruling of *Roe*, the dismantling of the correlative right of privacy, and the narrowing of most of the rights enshrined in the Bill of Rights.[19] The

15. *City of Akron*, 462 U.S. at 432-52.

16. *Convention in Dallas, the Republicans: Excerpts from Platform Adopted by Republican Convention*, N.Y. Times, Aug. 22, 1984, at A18, col. 1.

17. *See* Address by Attorney General Edwin Meese III, American Bar Ass'n Annual Convention, Washington, D.C. (July 9, 1985), *reprinted in* Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455 (1986).

18. For a fuller discussion of a feminist critique of originalism, see Copelon, *Unpacking Patriarchy*, in A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION (J. Lobel ed. 1988). For an excellent discussion of the interpretivist versus noninterpretivist perspectives, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

19. *See* Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 39 CATH. U.L. REV. 1 (1989); Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766

success of the Reagan strategy in moving the Court to the right is reflected in the fact that Justice O'Connor, originally seen as one of the Court's staunchest conservatives, is now viewed as a moderate. Justice Scalia claims the far right position on the Court[20] with Chief Justice Rehnquist and Justice Kennedy aligned nearby. Justice White votes with the conservative members of the Court quite consistently in the privacy sphere.[21] With the resignation of Justice Brennan, one of the great architects, as well as poets, of the living Constitution,[22] President Bush carried forward the Reagan approach in less blatant terms, seeking to appoint Justices and judges "who will not legislate from the bench."[23] The confirmation of Judge David Souter without effective inquiry into his positions on privacy or other crucial aspects of the Constitution[24] appears likely to consolidate the conservative majority on the Court. At this juncture, the future of a right of privacy strong enough to protect aspects of self-determination on intimate matters condemned by religious and moralistic majorities is a dismal one.

II.
DISMANTLING THE RIGHT OF PRIVACY

A. The Medicaid Decisions

The funding decisions of 1977 and 1980, particularly *Maher v. Roe*[25] and *Harris v. McRae*,[26] rendered the privacy right meaningless for many women, thereby undermining a basic tenet of *Roe*. Prior to these cases, *Roe* had stood for the principle that women have a fundamental right to choose abortion, a right which can be overridden only by narrowly tailored, compelling state interests either in protecting maternal health through medical regulation begin-

(1987); *"Litmus Test" for Federal Judges*, N.Y. Times, Apr. 7, 1985, at D5, col. 1; Kurtz, *Reagan Transforms the Federal Judiciary: Conservatives Wield Powerful Gavel in Judging Candidates for the Bench*, Wash. Post, Mar. 31, 1985, at A4.

20. *See* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2860, 2862 (1990) (Scalia, J., concurring) (rejecting the claim for individual's control over medical care as tantamount to suicide and supporting states' rights to regulate termination of medical care since "the Constitution has nothing to say about the subject"); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring in part & in the judgment) (calling for the overruling of *Roe*); Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 n.6 (1989) (requiring specific historical evidence of protection of unenumerated due process rights).

21. Justice White joined the plurality in *Webster* and wrote the majority opinion in Bowers v. Hardwick, 478 U.S. 186 (1986). He dissented in Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating housing ordinance limiting occupancy of dwellings to members of single family with narrow definition of family). The apparent aberrations are Justice White's concurrence in Carey v. Population Servs. Int'l, 431 U.S. 678, 702 (1977) (invalidating state statute which prohibited the distribution of contraceptives to persons under 16 years of age) and his dissent in *Michael H.*, 109 S. Ct. at 2360.

22. *See* Brennan, *Reason, Passion and "The Progress of Law,"* 10 CARDOZO L. REV. 3 (1988).

23. N.Y. Times, July 24, 1990, at A1, col. 3.

24. N.Y. Times, Oct. 3, 1990, at A1, col. 4.

25. 432 U.S. 464 (1977).

26. 448 U.S. 297 (1980).

ning in the second trimester, or in protecting potential human life after viability, which occurs roughly in the third trimester.[27] *Roe* required that post-viability abortions be available where a woman's health or life was threatened by the pregnancy.[28] There is much that is problematic about this framework,[29] but it promised, at least, that abortion would be legal and accessible to women during the first two trimesters of pregnancy.

In upholding funding restrictions on abortions,[30] the Court struck several

27. Roe v. Wade, 410 U.S. 113, 163-65 (1973).

28. *Id.* at 165.

29. The problems with the strict scrutiny framework lie in the treatment of health and the protection of potential human life as compelling state interests in the second and third trimesters, respectively. In so treating the concern for women's health, the Court gave to anti-abortion legislatures a rationale for promulgating restrictive and unnecessary abortion regulations. *Cf.* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759-68 (1986) (invalidating provisions requiring reporting and informed consent by women after a physician discussed the "detrimental physical and psychological effects" of the abortion); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 437, 441-42, 448, 450 (1983) (invalidating provisions of ordinance requiring hospitalization for all second-trimester abortions, parental consent for minors seeking abortions, "informed consent" through physician counseling, a 24-hour waiting period after consent before abortion, and disposal of fetal remains in a "humane and sanitary manner"); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71, 74, 77-79, 83-84 (1976) (striking down provisions that required spousal consent and parental consent for minors, that prohibited the abortion procedure, saline amniocentesis, after first 12 weeks of pregnancy, and that required physicians to exercise professional care to preserve the life of the fetus by threatening criminal and civil liability).

Although the Court's then pro-choice majority tightened the standard of necessity and invalidated most regulations, the Court based the constitutionality of regulations on established medical opinion. *See, e.g., City of Akron*, 462 U.S. at 431-39, 449-51. Even this liberal standard permits unnecessary medical regulation, *see* Connecticut v. Menillo, 423 U.S. 9 (1975) (upholding state statute criminalizing attempted abortions by "any person" with respect to nonphysicians after *Roe*), and opens the door to extensive regulation should the established medical profession back away from its pro-choice stance. *See* Parry, *The Rehnquist-Scalia Court Takes Hold — Part I: The Death Penalty and Abortion*, 13 A.B.A. MENTAL & PHYSICAL DISABILITY L. REP. 318 (1989). In addition, the treatment of the post-viability fetus as an interest overriding a woman's decisional authority (but not her health or life) has made it difficult for women to obtain abortions after the twentieth week because of doctors' tendency to steer clear of the cutoff at the third trimester. Only seven percent of providers will perform abortions past 20 weeks. Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63, 69 (1987). It has thus made abortion unavailable to the very small percentage (less than one percent) of very desperate, disproportionately minor women who seek abortions after 20 weeks. Koonin, Atrash, Smith & Ramick, *Abortion Surveillance Summaries, 1986-1987*, 39 MORBIDITY & MORTALITY WEEKLY REP. 23, 54 (1990). Beyond this practical obstacle, the viability cutoff compromises women's decisional and bodily integrity. Rather than assuming that women would do everything possible to avoid the greater physical hardship and moral seriousness of late abortions, the legal "deadline" reflects a distrust of women's judgment and subjects them to risk and pain for the sake of "another," which in a nonsexist world would be tantamount to involuntary servitude. *See* Copelon, *The Applicability of Section 241 of the Ku Klux Klan Acts to Private Conspiracies to Obstruct or Preclude Access to Abortion*, 10 BLACK L.J. 183, 196-99 (1987); Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U.L. REV. 480 (1990); Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1977); Tribe, *Commentary: The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 336-40 (1985). In addition, the viability line has opened the door to coercive treatment, imprisonment, and even surgical invasion of pregnant women. *See* sources cited *infra* note 77.

30. *Harris*, 448 U.S. at 297-327; Maher v. Roe, 432 U.S. 464, 464-81 (1977).

fatal blows to the *Roe* framework: it upheld legislation designed to discourage abortion; it permitted manipulation of a woman's decision making by funding childbirth but not abortion; it approved the power to prefer the protection of fetal life over the woman's right to decide before viability; and it permitted a legislative judgment on the value of embryonic life which *Roe* had placed beyond the competence of legislatures.[31] In so doing, the Court cast aside precedent which recognized the chilling effect of the denial of benefits as well as the discriminatory effect of differential funding.[32] Instead, it declared that the right to privacy protects a woman's access to abortion only against barriers erected by the state and not against poverty, which it declared to be neither created nor affected by state regulation.[33] Having thus disposed of poor women's right of privacy, the Court applied the rational relationship standard rather than strict scrutiny and held that it is permissible for states, in this context, to elevate the protection of fetal life over both a woman's decisional right[34] and her health.[35] Other implications of this limitation on the right of privacy for poor women were articulated in a footnote in *Maher*: demographic concerns about population growth could justify a state's departure from a position of neutrality about childbirth and abortion.[36]

This spurious and unprincipled distinction between state created barriers and "personal fault" bifurcated the Constitution, creating one document for the rich and one for the poor. It also signaled the growing power of the anti-abortion effort to gain primacy for fetal life. With the retirement of Justice Powell, the architect of the *Maher* distinction, the bifurcation of constitutional protection has fallen apart altogether, leaving the privacy right of all women,

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31. *Roe*, 410 U.S. at 159-62.

32. *E.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (invalidating one-year residence requirement as condition to receive county-funded nonemergency medical care as invidious classification impinging on right of interstate travel); Dunn v. Blumstein, 405 U.S. 330 (1972) (state durational residence laws for voter violative of equal protection clause since not furthering a compelling state interest); Sherbert v. Verner, 374 U.S. 398 (1963) (holding state could not constitutionally apply unemployment compensation eligibility rules to deny benefits to claimant who refused employment because of her religious beliefs).

33. *Maher*, 432 U.S. at 474. This view of the state's responsibility to the poor stands in direct contrast to the position taken by the Court in an earlier opinion:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. *We have come to recognize that forces not within the control of the poor contribute to their poverty.* This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. *Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.* At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. *Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."*

Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) (citations omitted) (emphasis added).

34. *Maher*, 432 U.S. at 478-80.

35. *Harris*, 448 U.S. at 315-17, 324-26.

36. *Maher*, 432 U.S. at 478 n.11.

rich and poor, at risk. Justices hostile to *Roe*, who have long cited *Maher* and *Harris* to support their positions,[37] are now gaining the majority. As a result, the current Court is poised to eliminate strict scrutiny and empower the state to provide blanket protection for fetal life,[38] thereby extinguishing the right to abortion for all women.

Indeed, there can be no clearer example of the principle that no right is secure if it is not secure for everybody. Had more privileged women poured out in opposition to the cutbacks on Medicaid with the dedication and passion that the impending overruling of *Roe* has evoked, there might be less question today about the security of the right to abortion, the funding of abortions, or the Bill of Rights itself. While many pro-choice and feminist organizations did vigorously oppose the Medicaid cutoffs, the fact that Medicaid was an issue of poor people's rights severely narrowed the base of support and the scope of outreach efforts directed toward a significantly libertarian constituency for reproductive choice. While there were intensive lobbying campaigns and some local demonstrations, there was no national "March For Women's Lives." Beyond concerns about the effect of the cut-offs on poor women, no one predicted that an anti-abortion decision would be confronted with the kind of resistance that met *Webster*. While neither marches nor predictable resistance directly determines Supreme Court decisions, they do affect the climate in which the Court and politicians make decisions. Had the pro-choice movement congealed between 1977 and 1980, before President Reagan had two terms to transform the federal judiciary, perhaps the constitutional picture would look different today.

B. Sexual Self-Determination

The Court's decisions in *Thornburgh v. American College of Obstetricians & Gynecologists*[39] and *Bowers v. Hardwick*[40] in the 1986 Term reflected the growing success of the Reagan Administration's attack on the right of privacy. In *Thornburgh*, the defection of Chief Justice Burger on the eve of his resignation to the anti-choice position reduced the pro-choice vote to a narrow 5-4 majority and blunted the pro-choice opposition to his replacement by Justice Rehnquist and to the next appointee, Justice Scalia, whose conservative views were well-known. At the same time, the 5-4 decision in *Hardwick*, upholding Georgia's gender-neutral criminal sodomy laws as applied to gay men and lesbians only,[41] made it clear that moralistic bigotry rather than constitutional

37. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 798 (1986) (White, J., dissenting); City of Akron v. Akron Center for Reproductive Health, 402 U.S. 416, 453 (1983) (O'Connor, J., dissenting); H.L. v. Matheson, 450 U.S. 398, 413 (1981) (Burger, C.J.).

38. *See infra* note 132 and text accompanying notes 122-23.

39. 476 U.S. 747 (1986).

40. 478 U.S. 186 (1986).

41. *Id.* at 192.

principle would dictate the scope of the privacy right.

Maher and *Harris* destroyed the promise of an efficacious and egalitarian right of privacy, a positive right which would guarantee access as well as opportunity. *Hardwick*, however, struck at the core of what remained: the negative liberal right to be free from governmental interference with intimate personal choices.

There were many ways for the Court to recognize a right of privacy in *Hardwick*. It could have emphasized that Michael Hardwick's activity occurred in his bedroom, and therefore warranted the same constitutional protection afforded in *Stanley v. Georgia*.[42] It could have deplored the horrors of invading the bedroom, as it did in *Griswold v. Connecticut*,[43] which invalidated prohibitions on contraceptive use as an invasion of marital intimacy.[44] It could have recognized that the sheltered, intimate nature of the association at issue implicated the same values underlying the recognition of privacy in the contraception and abortion cases. To adopt this reasoning, however, the Court would have had to acknowledge something it consistently avoided in privacy cases — that the protection of procreative choice is inextricably linked to the recognition of a right to sexual pleasure independent of reproduction or marriage.[45]

The majority rejected all these routes, and while it claimed to do so as an exercise of judicial restraint,[46] its reasoning is an illustration of homophobic excess. The majority decision, written by Justice White, immediately and explicitly disclaims having any position on the wisdom of criminal sodomy laws or the propriety of legislative repeal.[47] He claims only to decline to recognize rights for which there is no explicit textual support, thereby preserving the proper relationship between the Court and the legislatures.[48] Interestingly, White usually does not subscribe to the originalist school of interpretation, which venerates the founding "fathers" and the text of the Constitution as the fount of wisdom. Although some form of originalism is nearly dominant on the Court with the addition of Justices Scalia and Kennedy, *Hardwick* is not simply a product of its growing ascendance. The task of the majority was to

42. 394 U.S. 557 (1969) (upholding conduct in a home which would not be protected outside the home).

43. 381 U.S. 479 (1965).

44. *Id.* at 485-86.

45. *Id.*; Carey v. Population Servs. Int'l., 431 U.S. 678, 684-85 (1977) (New York law criminalizing sale of contraceptives to minors did not meet compelling state interest test imposed on regulations burdening the decision of whether to bear a child); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (right to privacy encompasses activities relating to marriage and decision whether or not to terminate pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (Massachusetts law criminalizing distribution of contraception to unmarried persons violates equal protection clause by providing dissimilar treatment to married and unmarried persons who are similarly situated with respect to right to be free from governmental intrusion into the decision of whether to bear a child).

46. *Hardwick*, 478 U.S. 186, 190 (1986).

47. *Id.*

48. *Id.* at 194-95.

draw lines so as to accommodate Justice White, who supported the contraception decisions[49] yet abhorred the abortion decisions,[50] and Justice Powell, the swing vote in *Hardwick*, who supported them both.[51] The *Hardwick* decision illustrates that judicial restraint is but a thin veil for the condemnation of gay and lesbian sexuality and that it is homophobia, not jurisprudence, that compelled the majority's analysis.

The equation of gay sexuality with evil and danger was the underpinning of Justice White's rejection of Hardwick's claim that the protection previously recognized by the Court for family relationships, procreation, marriage, contraception, and abortion logically extends to sexual intimacy.[52] Justice White's hostility was apparent in his characterization of Hardwick's claim as a "claimed constitutional right to engage in acts of sodomy."[53] The term "sodomy" is, of course, a shocker, an explicit reference to the unredeemable evil of Sodom and Gomorrah.[54] The term "homosexual" — a phrase developed by doctors and sexologists to describe an unfortunate condition — rather than "gay" or "lesbian," positive terms originating in the community, signals discomfort, social distance, and judgment.[55] Finally, by using the terminology of criminal indictments, suggesting harm and nonconsent, the Court implicitly denied the possibility that gay sex might be fluid and loving. Justice White baldly asserted that there is "no resemblance" or "connection between family, marriage, or procreation on the one hand and homosexual activity on the other."[56] The gay person is served up as a creature apart, and gay intimacy is treated as wholly unrelated to heterosexual intimacy, whether it be a one-night

49. *Carey*, 431 U.S. at 702 (White, J., concurring in part & in the result in part); *Eisenstadt*, 405 U.S. at 460 (White, J., concurring in the result); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring).

50. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986) (White, J., dissenting); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 452 (1983) (White, J., joining dissenting opinion of O'Connor, J.).

51. *Thornburgh*, 476 U.S. at 747 (Powell, J., joining majority opinion of Blackmun, J.); *City of Akron*, 462 U.S. at 416 (Powell, J., writing for the majority); *Carey*, 431 U.S. at 703 (Powell, J., concurring in part & in the judgment).

52. *Hardwick*, 478 U.S. at 193 (citing Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships), Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (procreation), Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage), *Griswold*, 381 U.S. at 479 (contraception), *Eisenstadt*, 405 U.S. at 438 (contraception), and Roe v. Wade, 410 U.S. 113 (1973) (abortion)).

53. *Id.* at 191.

54. *Genesis* 19:1-11; *see, e.g.*, P. CONRAD & J. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS 173-74 (1980).

55. It is enormously refreshing to read judicial decisions which use the terminology "gay" instead of homosexual and "straight" as well as heterosexual for contrast. The ones that I have seen emanate from federal courts in the Bay Area, which is a testament to the impact of a strong and proud lesbian and gay community not only on the language but also the outcomes in the courts. *See, e.g.*, Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987). The term "homosexual" is used in this Article only when referring specifically to that characterization of gays and lesbians.

56. *Hardwick*, 478 U.S. at 190-91.

stand or a lasting relationship. Gay sex is analogized to drugs, firearms, and stolen goods as well as to adultery, bigamy and incest.[57] In the event that one might doubt these assertions, Justice White constructs an unambiguous, unbroken, and fallacious chain of historical condemnation.[58] All this is pressed into the service of his conclusion that the claim that gay intimacy is protected is "facetious at best."[59] This language does not reflect reasoned analysis or reluctant restraint; rather, it bespeaks anger and trivialization. In rejecting Michael Hardwick's claim that his constitutional right of privacy was violated, the majority advanced its view of gay sexuality as an unrecognized form of sexual activity or intimate relationship, and as exploitative, predatory and threatening to personal and social stability. In so doing, the Court echoed the stereotypes at the heart of homophobia — the portrayal of gay people as dangerous, subhuman "others."[60]

The concurring opinions in *Hardwick* reveal the homophobia of the Court in different ways. Chief Justice Burger purports to add force to the majority opinion by reliance on the Judeo-Christian tradition, surely a suspect basis in an antiestablishmentarian state. He also relies on Blackstone's Commentary, which describes sodomy as "the infamous crime against nature" of "deeper malignity" than rape, and "a crime not fit to be named."[61] The reference is both chilling in its deprecation of women (since, under the common law, only an unmarried woman could be raped), and paranoid in its equation of sodomy with supreme evil. It is hard not to hear it as the voice of a man fearing the sexual interest of another man as the ultimate assault on masculinity, identity, and power.

By contrast, Justice Powell — the swing vote in *Hardwick* — advocates the stigmatizing function of the sodomy laws in a more controlled but no less insidious fashion. Noting that the twenty-year penalty imposed by the Georgia statute might be cruel and unusual,[62] he nonetheless deems it unnecessary to decide the question. And further noting that Georgia's interest is undercut by the failure to have enforced the law for several decades, he nevertheless

57. *Id.* at 195.

58. Among the fallacies in the opinion are (1) the failure to acknowledge that colonial prohibitions of sodomy, like the Georgia statute before the Court in *Hardwick*, proscribed all sodomy without respect to the gender of the participants, and that the object of these proscriptions was nonprocreative sex and the potential for inheritable physical defect; (2) the failure to acknowledge the historical traditions of tolerance; and (3) the confusion between the act of sodomy and homosexual identity, which emerged only in the nineteenth century. *See, e.g.*, V. BULLOUGH & B. BULLOUGH, SIN, SICKNESS AND SANITY: A HISTORY OF SEXUAL ATTITUDES 55-73, 201-09 (1977); Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988).

59. *Hardwick*, 478 U.S. at 194.

60. For a fuller critique of the *Hardwick* decision, see Copelon, *A Crime Not Fit to Be Named: Sex, Lies, and the Constitution*, in THE POLITICS OF LAW 177-94 (D. Kairys 2d ed. 1990), and Goldstein, *supra* note 58.

61. *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES *215).

62. *Id.* (Powell, J., concurring).

upholds the law because it involves "conduct that has been condemned for hundreds of years."[63]

Hardwick not only reflects the inefficacy of the right of privacy in the face of a virulent and frightening homophobia,[64] it also provides the blueprint for the undoing of abortion and other privacy rights. First, the majority's reluctance in recognizing the legitimacy of unenumerated rights[65] and its emphasis on whether the conduct claimed to be protected is "rooted in tradition,"[66] rather than part of a "scheme of ordered liberty,"[67] threatens to reduce the right of privacy to only that which has been protected traditionally through common or positive law.[68] It thus laid the groundwork for a radical departure in the methodology of evolving rights that are not explicit in the text of the Constitution. Whereas the task of the Court was to decide whether the criminalization of sodomy is consistent with the Constitution, the majority treated the fact of past criminalization as determinative. Rather than examine the nature of liberty, the Court searched for proscription. Rather than examine "ancient proscriptions" in light of modern values or the relation between the state and the individual to see whether their premises merited continued respect, the Court constitutionalized the prejudices of (or rather, attributed to) the past. In treating the prior criminalization of sodomy as a bar to recognition of a fundamental right to be sexual, *Hardwick* ignores the rule of *Loving v. Virginia*,[69] which struck down the longstanding criminalization of interracial marriage as a denial of fundamental liberty.[70]

Second, the Court uncritically accepts majoritarian prejudice expressed through a legislative judgment as a "rational" basis for criminalization.[71] This is a betrayal of the approach suggested in the contraception and abortion cases. Yet, because the Court refused in those decisions to recognize direct protection for sexual intimacy,[72] and failed explicitly to reject the claim that personal morality can be a legitimate basis for state regulation,[73] the Court left the door open — probably deliberately — for the *Hardwick* decision.

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63. *Id.* at 198 n.2.

64. *See id.* at 197 (Burger, C.J., concurring).

65. *Id.* at 194-95.

66. *Id.* at 192-94.

67. These two standards, conduct "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty", were enunciated by Justice Harlan for recognition of unenumerated rights protected by substantive liberty under the due process clause. Poe v. Ullman, 367 U.S. 497, 541-45 (1961) (Harlan, J., dissenting).

68. *See* discussion of Michael H. v. Gerald D., 109 S. Ct. 2333 (1989), *infra* text accompanying notes 79-91.

69. 388 U.S. 1 (1967).

70. *Id.* at 12.

71. Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986).

72. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5, 703 (1977) (Powell, J., concurring).

73. In Roe v. Wade, 410 U.S. 113, 148 (1973), the Court dismissed this discussion because it was not "seriously" argued. *But cf.* Eisenstadt v. Baird, 405 U.S. 438, 442-48 (1972) (where plurality rejects under rationality standard moral disapproval as a basis for restriction on distribution of contraceptives).

Hardwick underscores the danger this approach poses to constitutional liberty. Unfounded, pseudo-scientific, and blatantly moralistic views about sexuality and reproduction have underlaid gender-, race- and class-biased population policies pursued in and by this country. Such views fueled the drive to criminalize abortion in the nineteenth century[74] and the eugenic sterilization laws ignominiously approved in *Buck v. Bell* over sixty years ago.[75] They also fuel contemporary calls for the sterilization of women workers[76] and for new controls over pregnant women.[77] Moreover, sexuality, historically the preeminent source of taboo and target of irrational vendettas, demands the most stringent of protections. *Hardwick* betrays the core purpose of the right of privacy by condemning sexuality of lesbians and gay men and by legitimating homophobic prejudice, fear, and even violence.

C. *Parental Rights*

In its 1989 Term, the Court took another sharp turn to the right. Justice Powell, the decisive vote against funding in *Harris*, for the legality of abortion in *Thornburgh*, and against the decriminalization of lesbian and gay sex in *Hardwick*, resigned. The nomination of Judge Robert Bork finally triggered opposition from the mainstream civil rights and pro-choice community, which had responded half-heartedly in response to the elevation of Justice Rehnquist to Chief Justice and the appointment of Justice Scalia. At the same time, the defeat of Bork — the abrasive, outspoken, inhumane, extreme right-wing ideologue — seemed like a resounding rejection of originalism. Yet the victory proved to be illusory. Bork became the test of ineligibility and the softer-spoken, evasive Judge Anthony Kennedy was easily confirmed despite powerful indications that he would carry on the Reagan program for the Court.[78]

The 1989 Term confirmed that *Hardwick* was not a jurisprudential aberration but the product of a new conservative approach, and that lesbian and gay rights, like the funding of abortion, cannot be denied constitutional protection without threatening the whole fabric of privacy rights. In *Michael H.*

74. L. GORDON, WOMEN'S BODY: WOMEN'S RIGHT: BIRTH CONTROL IN AMERICA (2d ed. 1990); J.C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 1800-1900 (1978).

75. 274 U.S. 200, 207 (1927) (upholding statute authorizing, in certain cases, the sterilization of "mental defectives"). *See* A. CHASE, THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM (2d ed. 1980); A. DAVIS, WOMEN, RACE AND CLASS (2d ed. 1983); Gould, *Carrie Buck's Daughter*, 93 NAT. HIST. 14 (July 1984).

76. *See, e.g.*, International Union v. Johnson Controls, Inc., 886 F.2d 871, 892-93, 898 (7th Cir. 1989) (en banc) (rejecting Title VII claim challenging employer's fetal protection policy), *cert. granted*, 110 S. Ct. 1522 (1990).

77. *See, e.g.*, Gallagher, *Prenatal Invasions and Intervention: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179 (1989); Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans*, 74 CALIF. L. REV. 1951 (1986); *see also Johnson Controls*, 886 F.2d 871.

78. N.Y. Times, Feb. 7, 1988, at D4.

v. Gerald D.,[79] the plaintiff argued that the right of privacy encompassed his parental rights in relation to his biological daughter with whom he had lived for a time and built a social relationship. The plurality refused to recognize his parental rights because the mother of the child was married to and living with another man when the child was born.[80] Rather than acknowledge the right of a father who has both a biological and social relationship with his daughter, Justice Scalia, who authored the opinion, held that a fundamental liberty must be an interest "traditionally protected by our society."[81]

This opinion provided a recipe for rejecting fundamental rights claims under the due process clause. In deciding whether a fundamental right is at stake, Justice Scalia suggested that the Court first define the right with the greatest possible specificity.[82] In *Michael H.*, the interest as defined by Justice Scalia was not the right of a parent to a relationship with his daughter, but rather the right of an adulterous parent.[83] Second, the claimant must demonstrate traditional protection of the interest at issue or, at least, that there is no legal tradition that denied such protection.[84] In so doing, Justice Scalia redefined the purpose of the due process clause. Rather than viewing it as a source of general principles of liberty against which to measure a challenged restriction, Justice Scalia described the due process clause as a mechanism for "prevent[ing] future generations from lightly casting aside important traditional values."[85]

Even Justices O'Connor and Kennedy had difficulty with Justice Scalia's narrow approach to due process.[86] Their concurring opinion noted that Justice Scalia's insistence on evidence of a "traditional protection," would cast doubt on the Court's decisions in *Griswold*,[87] *Eisenstadt*,[88] and *Loving*,[89] as well as *United States v. Stanley*[90] in which Justices Brennan and O'Connor relied on the Nuremberg Code provision against involuntary experimentation as the source of a due process right.[91] Despite this resistance to Justice Scalia's extreme position, the due process methodology suggested in *Michael H.* is likely to play a very influential role, if not capture a majority, in future

79. 109 S. Ct. 2333 (1989).
80. *Id.* at 2336-37.
81. *Id.* at 2341.
82. *Id.* at 2342.
83. *Id.* at 2344 n.6.
84. *Id.* at 2341.
85. *Id.* at 2341 n.2.
86. *Id.* at 2346-47.
87. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (recognizing contraception as an aspect of marital privacy).
88. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (dicta, later adopted in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), recognizing the right of unmarried people to acquire contraceptives).
89. Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing the right to marry irrespective of race).
90. 483 U.S. 669 (1987).
91. *Id.* at 686-87 (Brennan, J., dissenting); *id.* at 710 (O'Connor, J., dissenting).

decisions, given the tendency of Justice Kennedy to side with Chief Justice Rehnquist, and the addition of Justice Souter to the Court.[92]

D. The Abortion Cases

1. Webster *and the Undoing of* Roe

With a potential majority of five on the bench and the case of *Webster v. Reproductive Health Services*[93] on its docket, the Court was ready to expand the right-wing attack to the area of procreative rights. In his third amicus brief calling for the overruling of *Roe*,[94] President Reagan's Solicitor General attacked the unenumerated rights cases, acceding only to *Griswold*'s recognition of marital privacy.[95] The pro-choice movement responded to the prospect of losing *Roe* with the largest Washington, D.C. demonstration in the city's history.[96]

Webster did not explicitly overrule *Roe*, but augured its demise. Though *Webster* did not recriminalize abortion, or eliminate it from the roster of protected fundamental rights, it did make abortion inaccessible to many women. Any decision having such an effect subverts *Roe*'s guarantee to women of unrestricted choice and substantially unrestricted access to abortion services during the first twenty-four weeks of pregnancy. Thus, the Medicaid decisions[97] were, in effect, a significant overruling of *Roe* because they permitted interference with a woman's abortion decision and deprived poor women of access to legal abortion. *Webster* imposed further limitations by restricting public hospitals and suggesting severely scaling back the circumstances under which abortion would be legal and accessible in the future.[98]

Webster's most concrete impact is its approval of state and, by extension, local power to exclude privately financed abortions from public hospitals.[99] While the dissent viewed this as an intrusion into a classically "private" relationship wholly distinguishable from the funding context,[100] the plurality treated it as just another occasion when the state is entitled to "make a value judgment favoring childbirth over abortion."[101] Not only was this a troubling extension of *Maher* and *Harris*, but the statute at issue[102] actually defined as

92. Judge Souter evaded Senator Biden's questioning on his views of due process, privacy, and abortion, with the exception of acceding to the existence of a right of marital privacy. Wash. Post, Sept. 15, 1990, at A1.

93. 109 S. Ct. 3040 (1989).

94. *See supra* note 13 and accompanying text and *infra* note 172 and accompanying text.

95. Amicus Curiae Brief of the Solicitor General for the United States at 12 n.18, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605).

96. N.Y. Times, Apr. 19, 1989, at A1, col. 6.

97. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

98. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3042-43 (1989) (plurality opinion).

99. *Id.* at 3042.

100. *Id.* at 3068 n.1 (Blackmun, J., concurring in part & dissenting in part).

101. *Id.* at 3052 (plurality opinion) (citing *Maher*, 432 U.S. at 474).

102. MO. REV. STAT. §§ 188.210, 188.215 (1986).

"public" wholly private hospitals whose only connection to the state was its location on state-leased land.[103] Thus, the Court allowed states to interfere with relationships that traditionally have been deemed private.

The consequences of limiting women's access to abortions in public hospitals are profound. Such hospitals are frequently used by women who often have no alternative: poor women, women of color, women living in rural areas, and women needing late abortions. In addition, excluding abortions from public hospitals and facilities with limited public connections threatens to marginalize the practice of abortion and remove it from the curriculum of medical schools which often conduct their training in hospitals that are related in some way to the state.

On the more symbolic plane, the *Webster* majority refused to invalidate the Missouri statute's preamble which declares that "the life of every human being begins at conception," and requires that state laws be interpreted to provide unborn children with the same rights accorded other persons, provided that such interpretations do not violate the federal Constitution or the Supreme Court's decisions.[104] The majority of the Court declined to rule on the constitutionality of the preamble because there was no indication that it would "be applied to restrict the activities of appellees in some concrete way."[105] Justice Blackmun rejected this disingenuous position on the ground that it inevitably would chill the provision of abortion services as well as some of the most common forms of contraception.[106]

Justice Stevens, in his separate opinion, had a different criticism of the preamble. He stated, as he had in a previous concurrence,[107] that the declaration that life begins at conception is an endorsement of a religious tenet of some Christian faiths which serves no identifiable secular purpose and depreciates contrary religious and conscientious beliefs.[108] Thus, the majority's ap-

103. *Webster*, 109 S. Ct. at 3042-43 (plurality opinion). *But see id.* at 3059 (O'Connor, J., concurring in part & in the judgment) (questioning whether the public provision of water sewage treatment or the lease of the land is sufficient to justify repletion).

104. *Id.* at 3047 (plurality opinion) (citing MO. REV. STAT. §§ 1.205(1)-(2) (1986)).

105. *Id.* at 3050 (viewing the preamble as an expression of the state's value judgment rather than as an operative part of the Act).

106. *Id.* at 3068 n.1 (Blackmun, J., concurring in part & dissenting in part). The statute defines fetal life as beginning with "fertilization" and therefore affects contraceptive devices which prevent implantation such as the IUD, the morning-after pill, some high-dose birth control pills and potentially RU-486, the so-called abortion pill. *See* MO. REV. STAT. § 1.205 (1986); *see also Webster*, 109 S. Ct. at 3081 n.7 (Stevens, J., concurring in part & dissenting in part). Significantly, the preamble was an important basis for the state's opposition to the right to die claim in Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2846 (1990).

107. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (Stevens, J., concurring).

108. *Webster*, 109 S. Ct. at 3082-85 (Stevens, J., concurring in part & dissenting in part). The establishment clause claim was also the subject of extensive finding of fact by the district court in McRae v. Califano, 491 F. Supp. 630, 690-728, annex 742-844 (E.D.N.Y.), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980), documenting the religious nature of the belief that abortion is the taking of human life, *id.* at 691-96, 725, the sharp divergence of religious positions on the subject, *id.* at 696-702, 712-15, the galvanizing and directive role of the Roman

proval of the preamble, he felt, was violative of the establishment clause and inconsistent with the *Roe* principle that the lack of theological, philosophical and medical consensus precludes the state from taking a position on when life begins.[109] Given that the preamble states the religious premise of the Missouri law, the entire statute should have been declared unconstitutional on this ground alone. While no Justice has taken issue with *Roe*'s rejection of the contention that personhood under the fourteenth amendment begins at conception,[110] the majority's acceptance of the Missouri preamble does not bode well for challenges to future state legislative or constitutional enactments declaring the fetus a person.

Finally, the provision of the Missouri statute requiring doctors to test for viability at twenty weeks[111] led four Justices to announce their views that *Roe* should be overruled completely.[112] Justice O'Connor refused to join what she viewed as a manufactured conflict with *Roe*,[113] a stance which evoked a scathing attack from Scalia.[114] Yet her previous opinions had already called for a

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Catholic clergy and laity in the right-to-life movement, *id.* at 711-12, and the decisiveness of the combination of religious belief and fear of reprisal from a religiously motivated constituency on the vote favoring the Hyde Amendments, *id.* at 724-25. Nonetheless, both the district court and the Supreme Court rejected the establishment claim as a "coincidence" between religious belief and secular concerns, although the district court viewed it as a violation of the free exercise clause. *Id.* at 741; 448 U.S. at 319-20.

109. *Webster*, 109 S. Ct. at 3083 n.12 (citing Roe v. Wade, 410 U.S. 113, 159 (1973)).

110. *Id.* at 3083-84 n.13. *Roe* held that the term "person" in the fourteenth amendment applied only to born people. 410 U.S. at 156-59.

111. MO. REV. STAT. § 188.029 (1986).

112. *Webster*, 109 S. Ct. at 3057 (Rehnquist, C.J., opinion joined by White & Kennedy, JJ.), 3064 (Scalia, J., concurring in part in the judgment). The Court's treatment of this part of the statute is confounding. The lower courts held, and the dissenters on the Supreme Court agreed, that the statute mandates tests that not only undermine the discretion afforded a doctor under *Roe*, but also are irrational as they are performed before viability is even possible. Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 422-23 (W.D. Mo. 1987); Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1074-75 (8th Cir. 1988); *Webster*, 109 S. Ct. at 3069-70 (Blackmun, J., concurring in part & dissenting in part). The Rehnquist plurality disagreed, holding that the statute allows the physician to make the ultimate determination as to whether the tests are necessary. *Id.* at 3054-56 (Rehnquist, C.J., opinion joined by White & Kennedy, JJ.). Having construed the viability-testing provision in this manner, the plurality then attempted to reconcile it with *Roe* and City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). In an uncharacteristic burst of close scrutiny, the plurality deemed the provision inconsistent with *Roe*, thereby creating a vehicle for denouncing *Roe*'s trimester framework as "unsound in principle and unworkable in practice." *Id.* at 3056 (Rehnquist, C.J., opinion joined by White & Kennedy, JJ.) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)). Chief Justice Rehnquist denied having overruled *Roe*, however, stating instead that his opinion merely "modif[ied] and narrow[ed] *Roe*." *Id.* at 3058. Though Justice Scalia concurred in the judgment, he felt the Court should have explicitly overruled *Roe*. *Id.* at 3064 (Scalia, J., concurring in part & in the judgment). For an excellent critique of *Webster*, see Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 81 (1989).

113. *Webster*, 109 S. Ct. at 3060-61 (O'Connor, J., concurring in part & in the judgment). Justice O'Connor interpreted the viability-testing provision as having the same meaning as that understood by the plurality. However, she did not construe the provision as colliding with *Roe* or any of the Court's past decisions concerning state regulation of abortion. *Id.*

114. *Id.* at 3064-65 (Scalia, J., concurring in part & in the judgment).

radical restructuring of *Roe*.[115]

The eventual overruling of *Roe* will likely continue to take the form of judicial deference to legislative restriction, rather than the Court's outright denial of a woman's right to have an abortion. For example, while the plurality of the Court views abortion as a "liberty interest protected by the Due Process Clause,"[116] it would subject state restrictions on abortion to only minimal scrutiny. Justice O'Connor views abortion as a "fundamental" liberty deserving protection of a strict scrutiny analysis;[117] nevertheless she would apply such a high standard of review only to "unduly burdensome" regulations,[118] that is, regulations that act as a near-absolute barrier to access. Under this test, Justice O'Connor would have sustained, for example, a law requiring, without any medical justification, that second-trimester abortions be performed in hospitals rather than clinics.[119] Yet a hospitalization requirement would sharply curtail the availability of abortion by increasing the cost to well over $1000.[120] After factoring in the need to travel to and from the hospital, potentially repeatedly if waiting periods are required, and the loss of work, a legal abortion would not be affordable to most women. Thus Justice O'Connor's "undue burden" threshold is a formula which preserves the appearance of an abortion right while taking away a real opportunity to exercise it. It is a formula which overrules the basic premise of *Roe* which says that the state may not lightly impose any burden on the abortion right. It is a formula which writes poorer women, including working class and many middle class women, out of the Constitution's protection. It is a formula which surreptitiously falls most heavily on women of color.[121] It is thus a formula

115. *See* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453-59 (1983) (O'Connor, J., dissenting); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

116. *Webster*, 109 S. Ct. at 3058 (Rehenquist, C.J., opinion, joined by White & Kennedy, JJ.); *id.* at 3064 (Scalia, J., concurring in part & in the judgment).

117. *City of Akron*, 462 U.S. at 473-74 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

118. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

119. *City of Akron*, 462 U.S. at 466 (O'Connor, J., dissenting) Likewise, Justice O'Connor's test would uphold a law requiring that elaborate information regarding informed consent be provided personally by the physician. *Id.* at 472. This is illustrated by her dissenting opinion in the 1990 case of Hodgson v. Minnesota, 110 S. Ct. 2926, 2949, where she wrote to invalidate the two-parent notice requirement on the ground of its irrationality, but did not find it to be an undue burden.

120. Less than 20% of public hospitals provide abortion. Henshaw, Forrest, Sullivan & Tutze, *Abortion Services in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSP. 5 (1982). Beyond restricting access to the service, a hospitalization requirement would artificially increase the cost from two to six times. NATIONAL ABORTION FED'N, CELEBRATING *Roe v. Wade*: DRAMATIC IMPROVEMENTS IN AMERICAN HEALTH 6 (Jan. 1989); *see also* Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSP. 119, 125-26 (1984).

121. For an excellent examination of the impact of the "unduly burdensome" standard on poor women and women of color, see Amicus Curiae Brief of the National Council of Negro Women at 23-60, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605).

which elucidates the integral role of strict scrutiny in guaranteeing fundamental rights, irrespective of class and race.

Another "backdoor" approach to undermining *Roe* flows from the state's asserted interest in fetal life. Although no Justice has stated support for the notion of fetal personhood, a notion explicitly rejected in *Roe*,[122] the five Justices comprising the *Webster* majority agree that the state has a "compelling interest" in protecting potential human life throughout pregnancy.[123] What this means to Justice O'Connor, who balances the state's interest against a woman's fundamental privacy right, is an open question. Perhaps she would require, as a constitutional matter, a number of exceptions, purportedly protective of women's health and well-being, where the interest in fetal life is necessarily trumped. This would not salvage the abortion right but would instead turn the clock back to the days when the reform laws[124] precluded access to all but the most privileged women.[125]

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122. *See supra* note 110 and accompanying text.

123. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3057 (1989) (Rehnquist, C.J., opinion joined by White & Kennedy, JJ.); *id.* at 3062 (O'Connor, J., concurring in part & in the judgment); *id.* at 3064-67 (Scalia, J., concurring in part & in the judgment); *see also City of Akron*, 462 U.S. at 452 (O'Connor, J., dissenting).

124. See Doe v. Bolton, 410 U.S. 179, 202-07 (Appendices A and B) (1973), which invalidated a statute, modeled on an American Law Institute (ALI) statute, providing exceptions where (i) necessary to preserve the life or health of the pregnant women, (ii) the pregnancy resulted from rape, including statutory rape, or (iii) there was a likelihood of severe fetal defect. The ALI statutes also authorized review by two doctors and the *Bolton* statute required approval by a hospital committee, which was generally a shaming ceremony. *Id.* at 205-07 (Appendix B) (reprinting MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962)).

125. For the vast number of women seeking abortions, the exceptions in the old criminal laws provided little refuge. Available statistics from New York State, where the law permitted only life-saving abortion, N.Y. PENAL LAW § 80 (1909) (current version as modified at N.Y. PENAL LAW § 125.40 (McKinney 1988)), illustrates the inaccessibility even of legal abortion to all women, but particularly to the poor who are disproportionately women of color. Despite the fact that doctors stretched the "life-only" exception to include psychiatric distress and fetal defects, an average of only 400 legal ("therapeutic") abortions were performed in New York City per year during the early 1960s, in contrast to an estimated 50,000 illegal abortions. Erhardt, Tietze & Nelson, *United States: Therapeutic Abortions in New York City*, 51 STUD. IN FAM. PLAN. 8, 8-9 (1970); Polgar & Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 FAM. PLAN. PERSP. 125 (1976). Moreover, although poor women and women of color are at a substantially higher risk of complications in pregnancy, 93% of in-hospital (legal) abortions in New York State were performed on white women who were able to afford private rooms. Pilpel, *The Abortion Crisis*, in THE CASE FOR LEGALIZED ABORTION NOW 101 (Alan Guttmacher Institute 1967). The discriminatory impact of the reform laws is further illustrated by statistics on therapeutic abortions performed on private patients at New York University Hospital and public patients at Bellevue Hospital in New York City, both of which were served by the same medical staff. For example, in 1968, the year of the rubella epidemic, by which time doctors had loosened their application of the life exception and narrowed the gap between certification for rich and poor, four times more abortions were performed for genetic indications on the private patients. Psychiatric certifications in 1968 were three and one-half times more frequent for private patients. *See* McRae v. Califano, 491 F. Supp. 630, 663-64 (E.D.N.Y.), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980). Nationwide, private patients had between four and twenty times more legal abortions than public patients. Irwin, *The New Abortion Laws: How Are They Working?*, 48 TODAY'S HEALTH 21, 23 (1970); Niswander, *Medical Abortion Practices in the United States*,

Justice O'Connor's approach is considered moderate in comparison to the other four Justices who would, in Justice Blackmun's words, "match[] a lead weight (the State's allegedly compelling interest in fetal life as of the moment of conception) against a feather (a 'liberty interest' of the pregnant woman that the plurality barely mentions, much less describes)."[126] It is thus not clear that a future Court would impose any limitation on state power to prohibit abortion,[127] except perhaps where there exists an imminent threat to the woman's life. Under such a standard, even pregnant women facing life-threatening conditions may not get abortions. Procedural obstacles often deter women from obtaining abortions and penalties may chill doctors from performing abortions before the onset of a life-threatening crisis, at which time it is frequently too late.[128]

Equally shocking as the heartless and misogynistic consequence of the plurality's position is the wholly unprincipled way in which Chief Justice Rehnquist reaches it. In a spurious extension of originalist jurisprudence, he attacks the legitimacy of the trimester framework using language that would severely curtail the Court's power to protect constitutional rights in a variety of contexts.[129] The opinion further displays antipathy to the most limited judicial review of legislative restrictions. There is no discussion of the long line of cases recognizing the fundamental right of privacy.[130] *Griswold* alone is distinguished, not on the basis of the legitimacy of a limited marital right of privacy, but rather on the ground that *Griswold* did not require a complex structure for enforcement.[131] There is no analysis of the reasons why abortion

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in ABORTION AND THE LAW (Smith ed. 1967). Not surprisingly, the ratio of deaths to births in illegal abortions for women of color was six times that of white women. *Compare* GOLD, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA 27 (1990) *with* National Center for Health Statistics, *Advanced Report on Final Natality Statistics, 1988*, 39 MONTHLY VITAL STATISTICS REP. 15 (1990). *See also* McRae v. Califano, 491 F. Supp. at 637-39. *See generally* Amicus Curiae Brief of the National Council of Negro Women, *supra* note 121.

126. *Webster*, 109 S. Ct. at 3077 n.11 (Blackmun, J., concurring in part & dissenting in part).

127. Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting) (it is irrational to prefer fetus to woman's life); *id.* at 221 (White, J., dissenting) (discussing substantial health concerns).

128. For a discussion of uncertainties and the chilling effect of a "life-endangerment" standard, see McRae v. Califano, 491 F. Supp. at 664-68.

129. "The key elements of the *Roe* framework — trimesters and viability — are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." *Webster*, 109 S. Ct. at 3056-57 (Rehnquist, C.J., opinion joined by White & Kennedy, JJ.). This approach calls into question an array of remedial schemes which result from the weighing of rights against state interests, from *Miranda* warnings to time, place, and manner restrictions on first amendment expressions. *See id.* at 3067 (Blackmun, J., concurring in part & dissenting in part).

130. *See Roe*, 410 U.S. at 153; *id.* at 169 (Stewart, J., concurring); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983); *See also* cases discussed *supra* notes 42-45 and accompanying text.

131. *Webster*, 109 S. Ct. at 3057-58 (Rehnquist, C.J., opinion joined by White & Kennedy, JJ.).

does not constitute a fundamental right, only a simple, bald statement that it does not. Nor is there any explanation of why the fetus should be treated as a compelling state interest, beyond citations to the prior opinions of Justices White and O'Connor.[132] Thus with a sleight-of-hand reminiscent of the Court's uncritical acceptance of moral disapproval as a reasonable ground for criminalizing sodomy in *Hardwick*,[133] the *Webster* plurality cast aside twenty-five years of jurisprudence and a set of rights critical to women's health and equality.

2. *Parental Notification*

The 1990 abortion cases concerning parental notification did not affect the validity of *Roe*, but they nonetheless reconfirmed *Roe*'s vulnerability. In *Hodgson v. Minnesota*,[134] the Court, in a 5-to-4 vote, struck down a two-parent notice provision that failed to contain an alternative of judicial authorization,[135] but a different majority found unobjectionable a two-parent notice provision with a 48-hour waiting period with the option of a judicial bypass.[136] In *Ohio v. Akron Center for Reproductive Health*,[137] a 6-to-3 majority upheld a one-parent notice statute that required physicians to personally notify parents and imposed a daunting bypass procedure.[138]

Justice Kennedy's opinions for the dissenters in *Hodgson* and the majority in *Akron Center* contain ominous indications that an emerging majority will purposefully disregard both settled precedent and the facts before it. The

132. *Id.* at 3057 ("we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability") (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting), and *id.* at 828 (O'Connor, J., dissenting)).

In *City of Akron*, Justice O'Connor appeared to rely, in significant part, on the proposition that viability — the capacity of the fetus for meaningful survival with artificial aid — could be pushed inexorably backward and, therefore, does not provide a reliable distinction between the beginning and the latter part of pregnancy. *City of Akron*, 462 U.S. at 457 n.5, 458. Her medical sources have repudiated her interpretation of their statements, *see* Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1023 n.245 (1984), but she has not questioned her earlier critique. *Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring) (citing *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)).

133. *See supra* notes 41, 58 and accompanying text.

134. 110 S. Ct. 2926 (1990).

135. *Id.* at 2945-47 (Stevens, J., joined by Brennan, Marshall, Blackmun & O'Connor, JJ.).

136. *Id.* at 2950-51 (O'Connor, J., concurring in part and in the judgment in part); *id.* at 2969-71 (Kennedy, J., concurring in the judgment in part & dissenting in part, joined by Rehnquist, C.J., & White & Scalia, JJ.).

137. 110 S. Ct. 2972 (1990) (Kennedy, J., joined by Rehnquist, C.J., & White, Stevens, O'Connor & Scalia, JJ.).

138. The requirement that minors go to court for authorization of their abortions is terrifying to minors. *See Hodgson*, 110 S. Ct. at 2940 & n.29. The bypass procedure upheld in *Akron Center* was designed as a multi-faceted obstacle course requiring that the minor (i) identify herself and her parent on the complaint, (ii) select among three pleading options, (iii) prove by clear and convincing evidence either that she is mature or that her best interest is served by the abortion, and (iv) suffer what could be a 22-day delay in obtaining her abortion. *Akron Center*, 110 S. Ct. at 2977-78.

four dissenters in *Hodgson* voted to uphold the two-parent no-bypass statute,[139] without regard to the absolute burden it placed on minors and the one parent they might choose to notify. Justice Kennedy's opinion does not address the proposition that minors have some liberty interest in determining whether to have an abortion. Rather, he focuses on the interest of parents in directing the upbringing of their children,[140] transforming the parental right recognized in *Meyer v. Nebraska*[141] and *Pierce v. Society of Sisters*[142] against state interference into a rationale for state interference. For the first time, the Court elevates to overriding importance a parental interest in authority over daughters no longer linked, as in prior cases, to the protection of the welfare of the child. Moreover, the four Justices arrived at their opinion contrary to the weight of extensive evidence demonstrating that the statute served no legitimate purpose.[143] Justice Kennedy suggested a weakened formulation of the minimal rationality test, arguing that the Court should "defer to a reasonable judgment by the state legislature when it determines what is sound public policy."[144] By rejecting the power of the Court to determine the reasonableness of legislative judgments in light of the facts before it, the Kennedy position renders factual evidence about the impact of the law at issue irrelevant.[145]

In *Hodgson*, Justice O'Connor once again cast the decisive vote, concluding that although a two-parent requirement is irrational, it can be salvaged by a judicial bypass procedure.[146] Justice O'Connor recognized a protected liberty interest in minors as well as adult women, and she refused to recognize parental authority as an independent basis for regulation.[147] Based on the extensive evidence of harm to both minors and, for those living in one-parent or abusive households, the parent they might choose to notify, she concluded that the statute was irrational,[148] thus showing some sensitivity to the practical effects of the law. On the other hand, while finding the formidable two-parent no-bypass provisions irrational, she implicitly treated them as presenting no undue burden, suggesting perhaps that only an absolute bar against minors obtaining abortions would trigger strict scrutiny. Similarly, in ac-

139. *Hodgson*, 110 S. Ct. at 2965-69 (Kennedy, J., concurring in the judgment in part & dissenting in part, joined by Rehnquist, C.J., & White & Scalia, JJ.).

140. *Id.* at 2962-64.

141. 262 U.S. 390 (1923).

142. 268 U.S. 510 (1925).

143. *See Hodgson*, 110 S. Ct. at 2938-41 (majority citing findings of the district court of testimony as to negative effects of the law on minors and parents).

144. *Id.* at 2966.

145. This position, together with the notion of a parental right to control children's lives, was in fact asserted by the Solicitor General in the most far-reaching attack on privacy and substantive due process yet to be presented to the Court. *See* Amicus Curiae Brief of the Solicitor General for the United States at 26, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (No. 88-1309) (arguing that the district court's inquiry impermissibly scrutinized the rationality of the legislative enactment).

146. *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring in part and in the judgment in part).

147. *Id.* at 2949-50.

148. *Id.* at 2937-41.

cepting the bypass provision in *Akron Center*,[149] Justice O'Connor failed to examine the wholly unnecessary burdens such a provision imposes. Whether Justice O'Connor would insist on a bypass procedure where only one parent is required to be notified is unclear from her positions in these opinions.[150]

Thus, it is all too likely that the resignation of Justice Brennan from the Court and his replacement by Justice Souter[151] will put the last nail in the coffin of intimacy rights, particularly the right to abortion, as well as most other constitutional rights.[152] *Webster* has already sent a clear signal to the states that restrictive legislation is the order of the day. In the next few years, several cases in the lower courts involving regulatory and penal sanctions on abortion will probably bring the issue of overruling *Roe* squarely before the Court.[153] It is possible that the new majority will find it difficult to coalesce around the issue, or the Justice Souter will surprise us with a post-confirmation conversion, but neither scenario is likely.[154] Unless Justice O'Connor applies her new standards to give much more protection than her previous

149. Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990) (Kennedy, J., joined by Rehnquist, C.J., & White, Stevens, O'Connor & Scalia, JJ.).

150. *Compare id.* at 2978-83 (upholding statute with one-parent notification and judicial bypass provision) *with Hodgson*, 110 S. Ct. at 2951 (O'Connor, J., concurring in part and in the judgment) (requiring judicial bypass procedure in order to uphold two-parent notice requirement). The decision in Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990), also emits contradictory but not promising signals for the survival of a meaningful right to abortion.

151. David Souter was ingeniously chosen and promoted by President Bush for his lack of "tracks." Predictably, those aspects of Judge Souter's record which intimated a very conservative jurisprudence were discounted. Any forceful response from mainstream civil rights groups, still reluctant to challenge anyone seemingly less extreme than Judge Bork, was blunted. As a result, the Senate Judiciary Committee conducted hearings and voted on Judge Souter's confirmation with no serious inquiry into his positions on privacy, abortion, or other issues of constitutional significance. *See Hearings on the Nomination of Judge David Souter*, N.Y. Times, Sept. 15, 1990, at A10.

152. In *Cruzan*, eight Justices held that a competent person has a liberty interest in refusing unwanted medical treatment. *Id.* at 2851. Justice O'Connor, in her concurring opinion, underscored the importance not only of this interest, but also of recognizing a surrogate decision maker to protect that interest. *Id.* at 2856-57. The majority emphasized, however, that this is a liberty interest and not an aspect of a "generalized constitutional right to privacy," *id.* at 2851 n.7, indicating a desire to curtail any further development of the privacy right. Moreover, the Court's recognition of an individual's liberty interest is undercut by its lenient scrutiny of the asserted state interests and by its strict requirement of proof of the individual's wishes for termination of treatment. Whether the new majority will come to understand the abortion right as an aspect of this same liberty interest, and whether that would result in heightened scrutiny, is questionable, given the majority's difficulty in applying general principles of constitutional law to women in the abortion context rather than relying on purely moralistic judgments.

153. *See* Guam Soc'y of Obstetricians and Gynecologists v. Ada, No. 90-00013 (D. Guam, Aug. 23, 1990) (order granting preliminary injunction); Planned Parenthood of Southeastern Pa. v. Casey, 686 F. Supp. 1089 (1988); *see also* Sherman, *Experts Disagree: Pennsylvania Case May Spell End for* Roe, Nat'l L.J., Sept, 10, 1990, at 3, col. 1.

154. Souter's only word on abortion was in Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986), where he filed a concurring opinion that showed particular solicitude for conscientious anti-abortion beliefs. In his opinion, he characterized abortion as a "necessarily permitted" aspect of medical practice by reason of *Roe*. *Id.* at 253, 513 A.2d at 355. This is the language of supremacy clause obedience and not adherence to *Roe*.

decisions indicate, and another Justice joins her, the "right" to abortion will be a chimera and legal abortion will be subject to legislative extinction.

III. THE POLITICAL CONTEXT OF CONSTITUTIONAL INTERPRETATION

It is highly unlikely that the Constitution will be a source of protection for reproductive and sexual rights for many years to come, unless the devastating impact of the Court's cutbacks on these rights, together with other areas of law discussed in this Conference, generates a sufficiently powerful movement to turn the Court around. If anything, the developments of the last twenty-five years underscore the inescapably political nature of the process underlying constitutional interpretation.

The right of privacy and control over one's body, though embedded in common law,[155] drew constitutional protection as a consequence of the patent suffering imposed by restrictive reproductive laws and the political activism which it spawned. In the late 1960s, feminism played a crucial role in transforming a reform effort, led by medical providers, family planners and advocates of population control into a human rights struggle. This success of feminism generated a virulent backlash which has cloaked its anti-women agenda in the sanctification of fetal life.[156] The campaign for fetal rights incited a fervor typical of religious issues and transformed many Democratic voters into single-issue Republicans. It also played a significant role in the consolidation of the extreme right in this country, including its control of the presidency beginning with Ronald Reagan.[157]

As a result, the last decade has witnessed a startling retrenchment in constitutional protection as President Reagan filled the Supreme Court with his ideological cohorts. It is not surprising that abortion emerged as the litmus test of extreme conservatism. Just as the abortion issue played a crucial role in galvanizing the political right, so it has functioned to consolidate a conservative majority on the Court.

Accordingly, it is clear that the losses of the 1980s cannot be recouped, nor the progress of the 1960s and 1970s be advanced, without rebuilding a broad human rights movement. It will require more empathy and coalition-building between different constituencies than ever achieved before (with the exception of the mobilization to defeat the nomination of Judge Bork). It will also require establishing a positive agenda, that is, fighting not simply to cut the degree of loss but rather to resume the progress toward equal justice.

The remainder of this Article identifies two aspects of this task: first, an establishment of a positive standard for the appointment of federal judges and

155. *See, e.g.*, Union Pac. R.R. Co. v. Botsford, 141 U.S. 250 (1891).

156. While the "fetal rights" movement is male-dominated, it has attracted many women who believe that their traditional lifestyles are threatened by the burgeoning progress of feminism.

157. *See* K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); R. PETCHESKY, *supra* note 6, at 242-51.

Supreme Court Justices; second, the pursuit of reproductive and sexual rights, grounded not in a negative right of privacy, but in a positive concept of self-determination, rooted in equal justice and necessitating social and economic support.

A. The Appointment of Justices

After almost a decade of highly politicized appointments to the federal courts, we must abandon the myth of neutrality, a component of which holds that any smart lawyer can become a Supreme Court Justice and the job will shape the person. It is necessary to insist upon a standard that is consistent with the preeminent task of the Court; we must look not to the promises of the nominees but to their records.

The coalition that defeated Judge Robert Bork's nomination was a broad and impressive one. Its legacy, however, is far less satisfying because it went no further than establishing Judge Bork as the standard of ineligibility. Experience with the Kennedy and Souter nominations demonstrates that quieter, politer, but less honest ideologues will slip through by professing ambiguity in their positions regarding constitutional change. This is an insufficient standard for the confirmation of a Justice of the Supreme Court, whose preeminent task is the interpretation of the Bill of Rights and the protection of minorities against majoritarian oppression.

The question then should be not whether the nominee is as bad as Judge Bork, but whether her life and experience affirmatively demonstrate a concrete commitment to equal justice. Under an equal justice standard, it is not necessary to look for a "smoking gun." The absence of a track record and the presence of substantial ambiguity should be disqualifying. The Senate should not be satisfied until there is substantial evidence that a prospective Justice has demonstrated empathy to the conditions of the oppressed and has acted upon those commitments, whether as a theorist, judge, lawyer, or simply as a member of the community.

Adherence to such a standard may well mean protracted battles over successive nominees as long as the Bush Administration continues to search for judges "who will not legislate from the bench." In voting for the Souter nomination, Senate Judiciary Committee Chair Joseph Biden said that the alternative was an eight-person Court for potentially a long time.[158] That would have been a better option and one not unknown in the history of the relations between the Senate and the President.[159] It is late, but never too late, to make the elusive yet enduring dream of equal justice once again meaningful in the political process.

158. 136 CONG. REC. S14338-02 (daily ed. Oct. 2, 1990) (statement of Sen. Biden).

159. For example, for 28 months from 1844 to 1846, the Senate repeatedly rejected presidential Supreme Court nominees, forcing President Tyler to leave office with one seat unfilled. *See* 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 381-394 (rev. ed. 1937).

B. *The Conundrum of Privacy*

The feminist movement insisted on a woman's right to control childbearing not as a matter of privacy, but as a fundamental aspect of women's liberty. It analogized forced pregnancy to involuntary servitude and argued that criminal abortion laws violated the thirteenth amendment. The feminist movement sought "free abortion on demand" and emphasized the disparate impact of criminal abortion laws on poor women. Feminists saw the freedom to choose as essential to gender equality, advancing both women's full personhood and their capacity to participate equally in all aspects of life.[160] The right to terminate an unwanted pregnancy was also linked to the right of women to be sexual, free of the patriarchal constraints of uncontrolled pregnancy or the mandate to be heterosexual.[161] However, most abortion rights advocates have been wary of using this argument even though antagonism to women's sexual freedom lies at the core of the attack on abortion.

Given the array of possible frameworks, it is significant, and not surprising, that the Court in *Roe* chose privacy as the vehicle for protecting abortion. Privacy was compatible with a legal tradition of noninterference in marriage; a tradition that denied women legal relief from economic and physical abuse by their husbands and that had long served to reinforce male dominance in the home. Adopting the privacy approach buttressed the conservative idea that the personal is separate from the political, that the larger social structure has no impact on individual choice.

The right of privacy was approved by a broad constituency favoring contraception and abortion. These included: doctors who urged decriminalization of abortion based upon the privacy of the physician-patient relationship; the family planners who opposed constraints on reproductive control and those who sought to rationalize marriage and childbearing; the population controllers who wanted to discourage childbearing; and the libertarians who argued that, in exchange for being left alone, a person should ask nothing from society by way of support.

Privacy arguments, with their successes in the Court and their broad appeal, thus became the predominant argument for protection of reproductive rights and sexual self-determination. The right to privacy also played prominently in lesbian and gay rights litigation until *Hardwick*, which forced gay and lesbian advocates to rethink their reliance on privacy. Similarly, *Webster* has forced reassessment of the right to privacy with respect to reproductive freedom.

The core idea of the right of privacy as developed by the Court, that

160. These ideas were largely brought before the Court in amicus briefs. *See, e.g.*, Amicus Curiae Brief of New Women Lawyers, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18); Amicus Curiae Brief of New Jersey Coalition for Battered Women, Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (No. A-99/100), *reprinted in* 7 WOMEN'S RTS. L. REP. 285 (1981-82); *see also* Law, *supra* note 132.

161. *See* sources cited *supra* note 160.

women should control decision making regarding their reproduction, reflects a principle of noninterference by the state that can reinforce, rather than undermine, women's autonomy. While this is a progressive transformation of the concept of privacy, from a mechanism of control over women to one of protection of self-determination,[162] it is nonetheless a deeply flawed basis for reproductive or sexual freedom. Not surprisingly, a sharp tension between two notions of privacy has emerged: the liberal idea of privacy, characterized as the negative and qualified right to be left alone by the state, and the more radical ideal of privacy, depicted as the positive liberty of self-determination and equal personhood. The privacy doctrine is theoretically and practically double-edged, having within it the tendency to constrain as well as to expand reproductive rights.

IV. THE PROGRESSIVE IMPACT OF PRIVACY

There is probably no decision that has so profoundly affected women's lives as *Roe v. Wade*. Since 1973, over twenty-five million women have had legal abortions.[163] The legalization of abortion transformed an unwanted pregnancy from a potentially life-shattering event into one over which a woman could take rightful control. Abortion, though a potentially difficult and painful decision, was no longer a dangerous, desperate, criminal, and stigmatizing experience; it became a safe and legitimate health-care option.

Constitutional recognition of the right to abortion has profound symbolic importance as well. It is the precondition for women's passage from chattel to full personhood. At least in principle, it acknowledged the power of women to be self-determining, to refuse to be the object of someone else's desire for procreation, whether that desire is that of the state, the husband, the progenitor, or the self-styled guardians of embryonic life.

Roe had broader, although guarded, implications for sexual freedom. Despite the Court's consistent unwillingness to recognize a woman's right to be sexual, its decisions protecting contraception and abortion pave the way for the liberation of female sexuality. By removing for many heterosexual women the duty or terror of unwanted pregnancy, contraception and legal abortion alleviated part of the repression and shame that have historically attended female sexuality.[164] And despite the retrograde decision in *Hardwick*, by per-

162. A. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 92 (1988).

163. *See, e.g.*, Brief for Appellees at 24, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (No. 84-495).

164. One strand of late twentieth-century feminism rejects the idea that the availability of contraception and abortion has contributed to a more liberated female sexuality, arguing rather that heterosexual relations are by definition oppressive in a society where genders are unequal and that legal abortion enhances women's vulnerability to sexual coercion by men. *See, e.g.*, A. DWORKIN, RIGHT WING WOMEN (1983); C. MACKINNON, FEMINISM UNMODIFIED 93-102 (1987). While apparently not opposing legal abortion, this view uses a flawed and dangerous stereotype for it precludes exploration and appreciation of women's capacity for sexual agency, power, and desire. Even accepting, as I do, that women may be vulnerable to sexual coercion as a product of inequality, abortion does not increase that vulnerability. At the very least, abor-

mitting the separation of sexuality and reproduction, the right to abortion indirectly protects the right of lesbians to sexual self-determination.

While the privacy doctrine is exceedingly limited, it has evolved in several important respects in the twenty-five years since *Griswold v. Connecticut*[165] first suggested the notion of an independent right to privacy to protect the use of contraceptives in marriage. Although a significant innovation in constitutional law, the notion of marital privacy was not only very narrow, but it drew upon the principle of nonintervention in the family, a principle that historically reinforced patriarchal power over a wife and her resources.

The Court's recognition of the right of unmarried people to obtain contraception in *Eisenstadt v. Baird*[166] was a critical step toward recognition of female self-determination. Constitutionally, it marked the transformation of the family from a corporate body or unit, with privacy rights protecting the male-controlled entity, into an association of separate individuals, with separate claims to constitutional protection. The Court's later rejection of the power of a husband or father to veto an abortion[167] further reinforced the journey from familial privacy to individual autonomy.

A parallel evolution in the privacy doctrine occurred in relation to a woman's role in the abortion decision. When the Court first recognized the right to abortion, it characterized the decision as belonging to the physician.[168] While the women's movement interpreted *Roe* as giving women the right to decide, it was not until 1977 that the Court granted the woman the power to decide independently.[169] Although doctors still exercise considerable control over the conditions under which an abortion is performed,[170] the need for medical legitimation of the decision itself has diminished.

The Court's most forceful articulation of the right to abortion came in response to the first outright challenge to its legitimacy: the Reagan Administration's request in *Thornburgh v. American College of Obstetricians & Gynecologists*[171] that the Court completely overrule *Roe v. Wade*.[172] In response, Justice Blackmun wrote for a majority of five:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision — with the guidance of her physician and with the

tion enables women to avoid the further degrading and potentially life-destroying consequences of sexual domination. For many pregnant women, abortion is an act of self-affirmation.

165. 381 U.S. 479 (1965).

166. 405 U.S. 438, 453-55 (1972).

167. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69-75 (1976).

168. Roe v. Wade, 410 U.S. 113, 163 (1973).

169. Whalen v. Roe, 429 U.S. 589, 599 (1977).

170. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (physician's exercise of medical judgment encompasses both assisting the woman's decision-making process and implementing the woman's decision should she choose abortion).

171. 476 U.S. 747 (1986).

172. Amicus Curiae Brief of the Solicitor General for the United States, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (No. 84-495).

> limits specified in *Roe* — whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.[173]

Formulating the abortion right in this way is doubly significant because it places the woman's right to make autonomous decisions about childbearing in the context of equality. That women should have the right to abortion is not an instance of special treatment; it is instead an extension to women of the traditional, constitutional values of liberty, possession of the self, and the opportunity to participate meaningfully in all aspects of public life. The *Thornburgh* opinion reflects, for the first time, the beginning of a feminist understanding of the necessity of the abortion right to women's full personhood. It is significant that when the challenge to abortion rights intensifies, it is the feminist argument for self-determination rather than the liberal idea of being left alone that comes to the fore.

The positive meaning of privacy was further elaborated by Justice Blackmun in his dissent in *Bowers v. Hardwick*,[174] in which he recognized the right to choose one's intimate relationships:

> Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of the personality[.]" The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.[175]

Justice Blackmun argued that privacy means more than toleration of "offensive" conduct; rather, the Constitution should affirmatively protect sexual intimacy and respect sexual difference because the process of sexual and familial self-definition is central to authenticity and self-realization.[176] By suggesting a right of intimate association, he not only elevates the personal to a position of constitutional importance but ranks it with the intellectual and political in the roster of protected freedoms.[177]

The impending overruling of *Roe* threatens all of these developments. Just as *Hardwick* provided a blueprint for the undermining of *Roe*, so will the

173. *Thornburgh*, 476 U.S. at 772 (Blackmun, J., joined by Brennan, Marshall, Powell & Stevens, JJ.).

174. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

175. *Id.* at 205 (citations omitted) (emphasis in original) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

176. *Id.* at 205-06.

177. *See* Karst, *The Right of Intimate Association*, 89 YALE L.J. 624 (1980).

loss of the right to abortion threaten contraception rights and the whole line of privacy cases in which unenumerated rights are held to be fundamental.[178] Moreover, Justice Kennedy's decision in the recent Ohio minors' case suggests that the core concept of individual autonomy, first enunciated in *Eisenstadt*, may yield to the traditional corporate notion of the family, which views women, both minor and adult, as subject to the will of others, rather than self-determining.[179] It is not enough, however, to lament the losses, whether actual or potential. It is necessary to face the defects in the interpretation of the right of privacy and build more reliable protection for the future. In the realm of reproduction and sexuality, the notion of self-determination is a critical buffer against taboo, misogyny, and fascistic demographic schemes, but it is not enough.

V. THE LIMITATIONS OF PRIVACY

Despite eloquent efforts to transform privacy into a positive liberty, prevailing opinions treat it as no more than a limited right to be left alone, at best. This negative and defensive idea of privacy denies the relationship of social conditions and public responsibility to the ability of the individual to exercise autonomy. It also renders privacy a weak vehicle for challenging traditional, sexist reproductive and sexual norms.

A. Toleration and Prejudice

Viewing privacy merely as the right to be left alone has serious consequences for the development of constitutional protection and the progress of a feminist movement, because such a limited right does not challenge society's underlying prejudices. And, as we have seen, noninterference inevitably yields to imposing controls when deeply rooted social prejudices and hostility are not addressed.

In *Roe*, for example, the right to abortion was qualified by fetal viability.[180] This is attributable not only to political compromise,[181] but also to the combined defects of a negative theory of privacy and a truncated view of women's personhood. Limiting a woman's right — whether it be to choose abortion or to refuse Caesarian surgery in childbirth — in the interest of a viable,

178. *See* cases discussed *supra* notes 42-45 and accompanying text.

179. In a sweeping peroration approving a parental notice statute, Justice Kennedy wrote:

> A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association.

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2983-84 (1990) (Kennedy, J., joined by Rehnquist, C.J., & White & Scalia, JJ.).

180. Roe v. Wade, 410 U.S. 113, 163-65 (1973).

181. R. WOODWARD & S. ARMSTRONG, THE BRETHREN 271-75 (1979).

yet still physically dependent, potential life denies the woman's full moral and physical autonomy. Recognizing a countervailing weight in fetal life, whether after viability as in *Roe*, or throughout pregnancy as advocated in *Webster*,[182] denies the fundamental condition of pregnancy. It burdens the pregnant woman with a duty to save fetal life at an enormous physical and emotional cost to herself — a cost that we as a society ask of no person, not even the parent of a born child.[183]

Women must have the authority to make their own abortion decisions not because they are suffering victims, but because the right to choose is integral to charting one's own destiny and to endowing another with the potential for life. When pregnancy is finally viewed as a voluntary gift of life to another rather than as a woman's duty, the abortion debate will cease to turn on conception or viability. When women who refuse childbearing are considered responsible rather than reprehensible, there will be no motive for conditioning women's reproductive choices. And when women are finally viewed as entitled to a sexual life entirely apart from childbearing, the sanctification of fetal life will abate, as will the desire to punish a sexual woman with either an unwanted pregnancy or an illegal abortion.

Just as the negative right of privacy has failed to displace hostility toward women's sexual and reproductive sovereignty in the abortion cases, so has it failed to challenge the antagonism towards lesbian and gay intimacy that underlies the majority's opinions in *Hardwick*.[184] Lesbian and gay intimacy failed the negative privacy test because it threatens gender identity and differentiation, the expectation of heterosexuality, and the power relations it embodies. While a negative right of privacy theoretically accommodates sexual difference, it does not address fears about sexual difference. A heterosexist culture goes to elaborate lengths to construct distinct gender identities as well as a propensity toward heterosexuality.[185] It may be that the very fragility of the sexually channeled self heightens the perception of danger when someone crosses the sex-gender line. Because sexual identity and heterosexuality are not ordained but subject to choice,[186] those who deviate from the heterosexual

182. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3057 (1989) (Rehnquist, C.J. joined by White & Kennedy, JJ.).

183. Regan, *supra* note 29, at 1610; Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 63 (1971).

184. Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (finding no connection between family and homosexual activity); *id.* at 192-93 (stating that "[p]roscriptions against that conduct have ancient roots" and drawing comparisons between homosexual activities and adultery, incest, and other sexual crimes).

185. *See* J. MONEY & A. EHRHARDT, MAN & WOMAN, BOY & GIRL: THE DIFFERENTIATION AND DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY (1972); Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE; THE POLITICS OF SEXUALITY 177 (A. Snitow, C. Stansell & S. Thompson eds. 1983) [hereinafter POWERS OF DESIRE]; Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (R. Reiter ed. 1975).

186. Although some lesbians and gay men experience their sexual orientation as pre-determined and immutable, "many individuals, homosexuals and heterosexuals alike, are capable of

norm must be stigmatized and excluded.

Lesbian and gay relationships also threaten the traditional hegemony of men in the sexual pecking order, as illustrated by Chief Justice Burger's view that consensual sodomy is morally worse than rape.[187] The prospect that women can have sexual pleasure, nurture relationships, and construct communities without men can also change the balance of sexual power in heterosexual relations, precisely the arena most resistant to equalitarian intervention.[188] Not until there is a broader appreciation of the construction of gender roles, the diversity of sexuality, and the value of authentic, rather than obedient, choice, will the right to make these decisions be secure.

The *Hardwick* majority's emphasis on society's interest in sexual conduct[189] also underscores the shortsightedness of relying on a negative or closeted right of privacy to advance sexual freedom. Sexual self-definition must cross the bounds of privacy, for autonomy cannot be realized apart from social interaction. While privacy implies secrecy and shame, the choice of sexual partners of the same sex is no more intrinsically private than the identity of a person's spouse. Choice of partners affects not only one's sexual identity, but also one's familial and social life, and one's public and private identity. To settle for mere tolerance of sexual difference as opposed to social affirmation of self-definition is not only degrading, but ultimately self-defeating.

B. Autonomy and Social Responsibility

The negative theory of privacy is also profoundly inadequate as a basis for reproductive and sexual freedom because it perpetuates the myth that the ability to effectuate one's choice rests exclusively in the individual, rather than acknowledging that choices are facilitated, hindered or entirely frustrated by social conditions. In so doing, the negative privacy theory exempts the state from responsibility for contributing to the material conditions and social relations that impede, and conversely, could encourage autonomous decision making.

Nowhere are the inadequacies of the negative right of privacy more clearly or cruelly demonstrated than in the Court's decision in *Harris v. McRae*, permitting the state to deny Medicaid funding for abortion[190] and, more recently, in *Webster*, approving the inaccessibility of essentially private hospi-

making decisions as to their sexual orientation." Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 934 (1989). In fact, many gay rights advocates have advanced the theory of immutable sexual orientation in order to identify homosexuals as a "suspect class" deserving of equal protection. *Id.* at 920-22. It should be noted, however, that such an approach fails to recognize the true complexity of human sexual identity, argues for tolerance of the pathetic rather than respect for the authentic, and fails to promote *choice* of sexuality as an *affirmative* right to self-determination.

187. *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring).

188. Snitow, Stansell & Thompson, *Introduction*, in POWERS OF DESIRE, *supra* note 185, at 34.

189. *Hardwick*, 478 U.S. at 192-94.

190. Harris v. McRae, 448 U.S. 297, 315-17 (1980).

tals.[191] These cases made clear that a negative right of privacy carries no corresponding obligation on the part of the state to facilitate fundamental choices.[192] Rather, the integrity of a poor woman's decision making process may be eviscerated by a state's misogynistic allocation of resources exclusively for childbirth rather than abortion.

To treat a poor woman's restricted choice as a consequence of her own personal failure, rather than of public policy and resulting market conditions, is a dangerous fiction. It permits the state to escape responsibility for the tragic conditions of people's lives and allows it to blame the poor, who are largely women, for their hardship.[193] It is a small step, as the Medicaid cases indicate, from blaming the victim to controlling her. *Harris* and *Maher* demonstrate that where exercise of the right of privacy depends on public resources, moralistic disapproval or population control will justify frustrating the right.[194] If the right to choose were perceived as a matter of affirmative liberty or equality, it would be impermissible for the state to manipulate decision making through selective allocation of public funds, and the state would be required to provide the needed service.[195]

The gap between a private right of choice and the necessary conditions for autonomy widens when we consider the broad range of factors that influence, and in many cases determine, a woman's choice concerning reproduction. The high number of abortions dictated by economic factors and the sterilization campaigns against poor, minority, and disabled women shows us that autonomy is impossible without the eradication of poverty and discrimination.[196] Racism, sexism, heterosexism, disability, and poverty can make the difference between abortions that reflect choice and those that reflect necessity. Nor do privacy rights, while a basic precondition of autonomy, do not magically provide women, gay men, or lesbians with the real power to make choices about sex and intimacy, a power upon which their true liberation depends.

A meaningful conception of autonomy presupposes a society in which both work and family life are restructured to encourage gender-shared, same-sex, and communal childrearing. Autonomy also requires a wide array of so-

191. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3050-53 (1989) (upholding restrictions on the use of public employees and facilities for nontherapeutic abortions).

192. The notion of the privacy right as implying no affirmative governmental responsibility is a part of a broader trend in the Court to deny any governmental responsibility for protection of life or liberty. *See* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989).

193. *See Harris*, 448 U.S. at 316-17; Maher v. Roe, 432 U.S. 464, 474 (1977).

194. *Harris*, 448 U.S. at 297; *Maher*, 432 U.S. at 474.

195. *Harris*, 448 U.S. at 337 (Marshall, J., concurring). By contrast, see *The Airey Case*, a decision of the European Court on Human Rights, recognizing that the right of family privacy requires the state to provide the resources necessary to exercise that right effectively. In that case, the necessary resource was the appointment of a lawyer to plead plaintiff's case for separation from bed and board. The Airey Case, 32 Eur. Ct. H.R. (ser. A) (1979).

196. *See, e.g.*, A. DAVIS, *supra* note 75, at 202-21; R. PETCHESKY, *supra* note 6; *see also supra* notes 29, 121.

cial supports that guarantee the preconditions for self-realization such as shelter, food, day-care, health care and education. Autonomy presumes the availability to each person of meaningful work and relationships as well as the opportunity for political, social, and cultural engagement.[197]

Likewise, autonomy with respect to sexual self-determination is inseparable from material and social conditions. It requires redistributing power between the sexes as well as dismantling heterosexism. Heterosexism is the pervasive cultural presumption favoring heterosexual relationships and the corresponding silencing and condemnation of same-sex, familial, and communitarian relations.[198] Heterosexism reinforces sexism just as laws discriminating against gay people injure all persons who seek the freedom to experience a full range of human emotions, behavior, and relationships, without gender-defined constraints.[199]

The economic and social realities of male power and female dependency, as well as their translation into male aggression and female passivity in the sexual realm, complicate women's ability to make autonomous choices concerning their intimate sexual, reproductive, and familial relations.[200] The possibility of choosing to live one's life as a gay man or a lesbian did not emerge until social conditions permitted independence from the traditional family.[201] Such a choice will not be fully guaranteed until the right to express one's sexual identity is recognized, accepted, and materially supported to the same extent as heterosexual intimacy.

Finally, the negative right of privacy obscures the urgent need for state-sponsored incentives to protect reproductive and sexual autonomy. The state must address broad threats stemming from toxicity in the workplace and the environment, AIDS, and the simple and unforgivable failure to provide adequate prenatal care and treatment for sexually transmitted diseases. These are threats not only to choice, but to human survival. Neither wealth nor "state-of-the-art" technology, nor quarantine or sexual abstinence, can guarantee protection. These are problems that can only be solved by society as a whole; privatized solutions, like individualized rights, cannot avert the danger.

VI. THE FUTURE STRUGGLE FOR EQUALITY

Only extensive social transformation will guarantee full autonomy. While this transformation can never be accomplished solely through judicial recognition or enforcement of rights, the current composition of the Court suggests that it will actually obstruct rather than cautiously advance that pro-

197. R. PETCHESKY, *supra* note 6, at 390.

198. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 187, 195.

199. *Id.* at 232.

200. *See generally* POWERS OF DESIRE, *supra* note 185; PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (C. Vance ed. 1984).

201. D'Emilio, *Capitalism and Gay Identity*, in POWERS OF DESIRE, *supra* note 185, at 100, 104.

cess. Just as the progressive developments in the Court were the product of the civil rights, feminist, and lesbian/gay movements, so the hostility of the Court requires and is reigniting a new wave of activism that uses litigation, legislative and administrative processes, collective bargaining, grassroots strategies, artistic creation, and cultural work.

How a movement articulates its demands and its vision will influence future constitutional, legal, and social developments. While the right of privacy has advanced reproductive and sexual autonomy, it has also permitted these rights to be disconnected from the broader vision of equality that women's and lesbian and gay liberation requires.[202] We cannot let the Court's diluted version of rights become the measure of the movement's goals, even as attention is turned to state courts, legislatures, and other forums. Rather, we must recognize the dialectical character of the interaction between limited doctrine and broader visions, as well as between social activism and legal reform.[203]

In both legal and political advocacy, therefore, privacy must be transformed into an affirmative right to self-determination, grounded in the broader principle of equality and the concrete conditions of reality. The core significance of reproductive and sexual self-determination is that it is an elemental precondition to liberation, necessary although not sufficient. We must articulate these arguments in the public sphere before they can have resonance in the courts and legislatures. The right to make a decision guarantees neither that it is truly desired, fully available, or socially respected. Self-determination must be understood as a component of, and inseparable from, equality.

Equality is important because it breaks down the hierarchy between the personal and the political and demands examination of the gendered assumptions that underlie this dichotomy. With regard to abortion, the equality principle would require recognition that forced pregnancy is involuntary servitude and that abortion is essential to women's full personhood and participation in all spheres of life. And finally, with regard to sexuality, equality does not simply carve out an exception to the heterosexual model: it challenges the hegemony of the model itself. Rather than a society in which heterosexuality is programmed and presumed, equality counsels genuine acceptance of sexual diversity to protect the expression of sexual difference as well as the possibility of authentic self-definition and intimacy for everyone. Like privacy, equality doctrine is currently negative and truncated. Equality should not be judged

202. The same problem inhered in the recent effort to obtain an Equal Rights Amendment [hereinafter ERA] disconnected from reproductive and sexual self-determination. Not only was the vision of equality a truncated one, but perhaps the political strategy was faulty as well. While attempting to avoid conflict with that small part of the anti-abortion/anti-sex movement that supports a narrow concept of gender equality, the ERA movement lost or alienated the active commitment of a substantial portion of the reproductive rights and lesbian/gay movement, an error which hopefully will not be repeated on the next round. *See* T. Butler, Abortion Law: "Unique Problem for Women" or Sex Discrimination? (Feb. 9, 1991) (unpublished manuscript) (on file with Author).

203. *See* Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 652 (1986).

by its doctrinal condition, but rather by its potential as an encompassing and ever evolving vision for advancing social, as well as constitutional, change.

But finally, you might ask, "How can she talk about constitutional theory when the Court is destroying even the partial rights we have gained?" My answer is that we cannot abandon the Constitution because it is a promise as much as a reality; that the process of claiming constitutional protection is essential to denying legitimacy to those who would scuttle that promise as well as to keeping that promise alive in state courts, in legislatures, and among the people; and that the way we claim our rights is the foundation for their future realization. It is also important to recognize, as this conference underscores, that the current majority is systematically hacking away at the constitutional foundation of every area of civil rights. In the breadth of this attack lies the prospect of a broad and unprecedented coalition for human rights, one which joins all of the issues which are essential to human freedom and equality.