No. 88-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF 281 AMERICAN HISTORIANS AS AMICI CURIAE SUPPORTING APPELLEES

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BRIEF OF 281 AMERICAN HISTORIANS AS AMICI CURIAE SUPPORTING APPELLEES

INTEREST OF AMICI

Amici are two hundred and eighty-one American historians who, with the permission of the parties, here seek to provide a rich and accurate description of our national history and tradition in relation to women's liberty to choose whether to terminate a pregnancy. Never before have so many professional historians sought to address this Honorable Court in this way. Amici have widely diverse perspectives and knowledge, but are united in the conviction that *Roe v. Wade* is essential to women's liberty and equality and consistent with the most noble and enduring understanding of our history and traditions.

SUMMARY OF ARGUMENT

Established constitutional principles require examination of our history and tradition as a Nation to determine the existence and contours of fundamental constitutional rights. The United States asserts that our history unambiguously supports the constitutionality of laws restricting women's access to abortion.

This brief will demonstrate that for much of our nation's history abortion was not illegal; that for much of the nineteenth century abortion remained legal prior to quickening; and that, in most states, the statutes regulating abortion did not punish women. It discusses the prevalence and visibility of abortion in the nineteenth century. It shows that a variety of complex factors underlay the nineteenth-century laws restricting abortion: concern for women's health, the medical profession's desire to control the practice of medicine, openly discriminatory concepts of the appropriate role of women, opposition to non-procreative sexual activity and to the dissemination of information concerning birth control, and hostility to those who did not fit the white Anglo-Saxon Protestant model. Our brief shows that concern for the fetus has become a central argument for anti-

abortion laws only as these earlier justifications have become either anachronistic or constitutionally and culturally impermissible.

Restricting access to abortion imposes ponderous burdens on the liberty and equality of women. A state cannot constitutionally justify the imposition of such burdens by adopting one, highly contested, metaphysical concept of the value of fetal life. This Court should affirm *Roe v. Wade.*

ARGUMENT

I. OUR TRADITIONS AND HISTORY DEFINE THE CONTOURS OF THE CONSTITUTIONAL RIGHT TO PRIVACY.

Since John Marshall, no Justice of this Court has seriously disputed that the wise and intended meaning of our Constitution is determined by interpreting its words in light of our nation's history and traditions.[1] Our history and tradition shape the meaning of the relatively concrete provisions of the Constitution, such as the First Amendment.[2] History and tradition also give content to the

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[1] *See, e.g., McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 400-06 (1819) (Marshall, C.J.); *Poe v. Ullman,* 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting); *Roe v. Wade,* 410 U.S. 113 (1973); *Moore v. East Cleveland,* 431 U.S. 494, 503-05 (1977) (plurality opinion). Justice White has expressed this view eloquently:

> [T]his Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting).

[2] *See, e.g., Martin v. Struthers,* 319 U.S. 141, 145 (1943) (door-to-door distribution of literature protected by First Amendment because "in accordance with the best tradition of free discussion").

more open-textured provisions of our Constitution—the prohibition in the Fifth and Fourteenth Amendments of state actions that deprive citizens of life, liberty or property without due process of law; the Fourteenth Amendment's guarantee of equal treatment under the law; and the Ninth Amendment's command that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Justice Frankfurter, a staunch defender of judicial restraint, underscored the role of history and tradition, joining this Court's invalidation of "released-time" religious instruction in public schools:

> Accommodation of legislative freedom and constitutional limitations upon that freedom cannot be achieved by a mere phrase. We cannot illuminatingly apply the "wall-of-separation" metaphor until we have considered the relevant history of religious education in America, the place of the "released time" movement in that history, and its precise manifestation in the case before us.

McCollum v. Board of Education, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring). Justice Frankfurter frankly acknowledged that " 'released time' ha[d] attained substantial proportions," but recognized that that fact did not decide the case. *Id.* at 224. A more exhaustive examination of our traditions led Justice Frankfurter, and seven other Justices, to strike down Illinois's "released-time" program.

While there is little disagreement that history and tradition are important guides to decision in this area of the law, there is significant dispute about what our history actually demonstrates.[3] This Court's 1973 decision in

[3] The brief *amicus curiae* of the United States, in the instant case, seeks to show that our history does not support women's claim of right to terminate pregnancy. It relies upon only one historical work: James Mohr's *Abortion in America: The Origins and Evolution of National Policy* (1978). Brief *amicus curiae* of the United States at 13, 16-17. Among historians this book is

Roe v. Wade provided a rich and sound description of the history of abortion. Since 1973 much historical work has expanded and deepened this understanding. An important part of American historical inquiry has shifted from the study of wars, formal legal rules, economics and elections, to provide a fuller and far more rounded account of American social history through exploration of diaries, letters, and other artifacts of what "ordinary people" did and believed.

In searching our nation's history for evidence of our society's basic beliefs, practices, and understandings, statutes are neither the only sources nor the best ones. As legal historian Hendrik Hartog has pointed out, "[i]n defining law as the command of the sovereign we ordinarily deny the legitimacy of interpretative stances other than those . . . which have the benefit of formal authoritativeness."[4] In any calculus of traditions and "fundamental" values, the moral beliefs and practices of ordinary people are entitled to consideration.[5]

II. AT THE TIME THE FEDERAL CONSTITUTION WAS ADOPTED, ABORTION WAS KNOWN AND NOT ILLEGAL.

As the Court demonstrated in *Roe v. Wade*, abortion was not illegal at common law.[6] Through the nineteenth century American common law decisions uniformly reaffirmed that women committed no offense in seeking

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widely regarded as accurate and comprehensive. Professor Mohr is among the historians on whose behalf our brief is submitted. Yet, as we shall demonstrate, the United States misapprehends both Mohr's work and the historical record.

[4] Hartog, *Pigs and Positivism*, 1985 Wis. L. Rev. 899, 934-35.

[5] *See* Veysey, "Intellectual History and the New Social History," in *New Directions in American Intellectual History* 3-26 (J. Higham & P. Conkin eds. 1979).

[6] *Roe v. Wade*, 410 U.S. 113, 132-36 & n.21 (1973). *See also* J. Mohr, *supra* note 3, at 3-19.

abortions.[7] Both common law and popular American understanding drew distinctions depending upon whether the fetus was "quick," *i.e.* whether the *woman* perceived signs of independent life.[8] There was some dispute whether a common law misdemeanor occurred when a third party destroyed a fetus, after quickening, without the woman's consent. But early recognition of this particular crime against pregnant women did not diminish the liberty of the woman herself to end a pregnancy in its early stages.[9]

Abortion was not uncommon in colonial America.[10]

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[7] For example, in 1845, Chief Judge Shaw of Massachusetts held that abortion, with the woman's consent, is not punishable at common law unless the fetus were quick. *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 43 Am. Dec. 396 (1845). In 1892 the Massachusetts Supreme Judicial Court held that, despite statutory enactments regulating abortion, the woman having an abortion was not a principal or an accomplice. *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N.E. 471 (1892). In *Abrams v. Foshee*, 3 Iowa 274, 278, 66 Am. Dec. 77, 80 (1856), the Iowa Supreme Court held that abortion, prior to quickening, was no crime. *Hatfield v. Gano*, 15 Iowa 177 (1863), held that Iowa's statutory enactment did not apply to abortion produced by a woman herself. *See* C. Smith-Rosenberg, *Disorderly Conduct* 219-20 (1985).

[8] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 3, at 24-26. In ordinary language in the eighteenth century and much of the nineteenth century the term "abortion" meant the termination of pregnancy after the point of quickening. *Id.* at 3-5.

[9] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 3, at 24-26. Means, *The Phoenix of Abortional Freedom*, 17 N.Y. L. Forum 335, 336-53 (1971) demonstrates that commentators who asserted that a misdemeanor could be charged against third parties who destroy a fetus by assaulting a women late in pregnancy misread the common law precedents upon which they purported to rely. Even in cases involving brutal beatings of women in the late stages of pregnancy, common-law courts refused to recognize abortion as a crime, independent of assault upon the woman, or in one case "witchcraft." *See* A. McLaren, *Reproductive Rituals* 119-121 (1983).

[10] "[O]bservers in the seventeenth and eighteenth centuries made repeated references to employment of abortifacients by both the single and the married." A. McLaren, *supra* note 9, at 114 and generally at 113-44.

Herbal abortifacients were widely known,[11] and cookbooks and women's diaries of the era contained recipes for medicines.[12] Recent studies of the work of midwives in the 1700s report cases in which the midwives provided women abortifacient compounds. More significantly, these cases are described as routine and are unaccompanied by any particular disapproval.[13]

The absence of legal condemnation of abortion in colonial America is all the more remarkable because both families and society valued children and population growth in a rural economy, with vast unsettled lands, where diseases of infancy claimed many lives. For these reasons, single women more often sought abortions in the Colonial era.[14] The absence of legal condemnation is particularly striking in the New England culture of tight-knit, religiously homogeneous communities in which neighbor observed the private behavior of neighbor and did not hesitate to chastise those who violated pervasive moral norms of the community.[15] In an era characterized

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[11] The classic work was N. Culpeper, *The English Physician* (1799). *See* J. Brodie, *Family Limitations in American Culture*, PhD Dissertation, University of Chicago 1982, at 224-30.

[12] C. Smith-Rosenberg, *supra* note 7, at 228.

[13] For example, a midwife reported, "She is suffering from obstructions and I prescribed the use of particular herbs." Diary of Martha Moore Ballard, Sept. 27, 1789, Maine State Manuscript Library. For a general discussion, see Ulrich, "Martha Moore Ballard and the Medical Challenge to Midwifery," in *From Revolution to Statehood: Maine in the Early Republic, 1783 to 1820* (J. Leamon & C. Clark eds. 1988).

[14] M. Grossberg, *Governing the Hearth* 159 (1985). J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* (1988), report, "Cases of attempted abortion usually involved illicit lovers, not married couples. 'When a single woman,' Margaret Lakes later confessed, she 'used means to destroy the fruit of her body to conceal her sin and shame.' Elizabeth Robins of Maryland confessed that she had twice taken savin, an abortifacient; her husband suspected that she had an incestuous relationship with her brother." *Id.* at 26.

[15] Adultery, incest, insubordination by children, and even "living alone not subject to the governance of family life," were condemned

by extensive oral and written moral prescripts from community and religious leaders, birth control and abortion were rarely the subject for moralizing. Where abortion is noted, it is not the practice itself that is subject of comment, but rather the violation of other social/sexual norms that gave rise to the perceived need to attempt to abort.[16]

In the late eighteenth century, strictures on sexual behavior loosened considerably. The incidence of premarital pregnancy rose sharply; in the late eighteenth century, one third of all New England brides were pregnant at the time of marriage, compared to less than ten percent in the seventeenth century.[17] Falling birth rates in the 1780s suggest that, at the same time our founders drafted the Constitution, including the Ninth Amendment's guarantee that the enumeration of certain rights "shall not be construed to deny or disparage others re-

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by the criminal law, when abortion was not. *See* Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. of Soc. Hist. 20, 22-24, 33 (1976); P. Laslett, *The World We Have Lost* 37-38 (1973); D. Flaherty, *Privacy in Colonial New England* 42-43, 76 (1972); P. Aries, *Centuries of Childhood: A Social History of Family Life* 405-07 (R. Baldick trans. 1962). For a more popular, fictional treatment, see N. Hawthorne, *The Scarlet Letter* (1850).

[16] J. D'Emilio & E. Freedman, *supra* note 14, at 12, report the following case from the 1600s. "Captain William Mitchell, an influential Marylander who served on the governor's council, not only impregnated Mrs. Susan Warren and gave her a 'physic' to abort the child, but he also 'lived in fornication' with his pretended wife, Joan Toaste. Even so, the first charge filed against Mitchell by the Maryland attorney was that he professed himself to be an Atheist and openly mocked all Religion."

[17] M. Gordon, *The American Family: Past, Present, and Future* 173 (1978). For comprehensive discussions see D. Smith & M. Hindus, *Premarital Pregnancy in America, 1640-1971: An Overview and Interpretation*, 5 J. Interdisciplinary Hist. 537, 553-57 (1975); Hoff-Wilson, "The Illusion of Change: Women and the American Revolution," in *The American Revolution: Explorations in the History of American Radicalism* 404 (A. Young ed. 1976).

tained by the people." the use of birth control and abortion increased.[18]

III. THROUGH THE NINETEENTH CENTURY, ABORTION BECAME EVEN MORE WIDELY ACCEPTED AND HIGHLY VISIBLE.

Through the nineteenth century and well into the twentieth, abortion remained a widely accepted popular practice, despite increasingly vigorous efforts to prohibit it after 1860.[19] Changing patterns of abortion practice and attitudes towards it can only be understood against a more general background of dramatic change in American economic and family life. During the period between ratification of the Constitution and adoption of the Civil War Amendments, Americans moved to cities and increasingly worked for wages.[20] In 1787, the average white American woman bore seven children; by the late 1870s, the average was down to fewer than 5; by 1900 it was 3.56.[21] Carl Degler calls this decline in fer-

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[18] Wells, *Family Size and Fertility Control in Eighteenth Century America: A Study of Quaker Families*, 25 Population Studies 73 (1971); M. Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* 232 (1980).

[19] C. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* 243-46 (1980). Several studies by physicians in various parts of the U.S. suggest that in the mid-nineteenth century one abortion was performed for every four live births. *See* J. Mohr, *supra* note 3, at 76-80. Reports from the late 1870s estimated even greater numbers. *Id.* at 81-82. The Michigan Board of Health estimated in 1898 that one-third of all pregnancies in that state ended in abortion. Haggard, *Abortion: Accidental, Essential, Criminal, Address Before the Nashville Academy of Medicine*, Aug. 4, 1898, at 10, discussed in C. Smith-Rosenberg, *supra* note 7, at 221.

[20] *See* C. Degler, *supra* note 19.

[21] Smith, "Family Limitation, Sexual Control, and Domestic Feminism in Victorian America," in *A Heritage of Her Own* 226 (N. Cott & E. Pleck eds. 1979). For discussion of continual decline in family size in the eighteenth and nineteenth centuries, see R. Petchesky, *Abortion and Woman's Choice* 73-74 (1986).

tility "the single most important fact about women and the family in American history." [22]

Economic reasons motivated urban couples to limit their family size. Working class married women, faced with the material difficulty of managing a family budget on a single male wage, resorted to abortion as the most effective available means of "conscious fertility control."[32]

But more than economic factors were at work in the restriction of fertility.[24] White middle-class Americans were, in particular, influenced by changing family conceptions and definitions of motherhood. As men's work patterns deviated farther from those of women, "wife" and "home" became powerful symbols of men's economic security and social standing.[25] Nineteenth-century women faced sharply conflicting demands. "The True Woman was domestic, docile, and reproductive. The good bourgeois wife was to limit her fertility, symbolize her husband's affluence, and do good within the world." [26]

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[22] C. Degler, *supra* note 19, at 191.

[23] *See* R. Petchesky, *supra* note 21, at 53.

[24] The size of rural families also declined sharply during the nineteenth century. Faragher, *History From the Inside-Out: Writing the History of Women in Rural America*, 33 Am. Q. 536, 549 (1981); R. Petchesky, *supra* note 21, at 74. James Mohr observes that by the 1860s abortion "seemed to thrive as well on the prairies as in large urban centers." J. Mohr, *supra* note 3, at 100.

[25] The home was conceived as "a bastion of peace, of repose, of orderliness, of unwavering devotion to people and principles beyond the self . . . safe from the grinding pressures and dark temptations of the world at large. . . . The husband-father undertook an exclusive responsibility for productive labor. . . . [F]amily life was wrenched apart from the world of work—a veritable sea-change in social history. . . . [T]he wife-mother . . . became the centerpiece in a developing cult of Home." Demos, "Images of The American Family, Then and Now," in *Changing Images of the Family* 51, 52 (V. Tufte and B. Myerhoff eds. 1979).

[26] C. Smith-Rosenberg, *supra* note 7, at 225.

To limit the number of children they bore, women adopted a range of strategies, including abortion.[27] Through the 1870s abortion was "common," a "matter of fact" and often "safe and successful." [28] The most common methods of abortion in the nineteenth century involved herbs and devices that women could purchase from pharmacists and use themselves.[29] Nonetheless, in 1871, New York City, with a population of less than one million, supported two hundred full-time abortionists, not including doctors who sometimes performed abortions.[30]

For most of the nineteenth century, abortion was highly visible. "Beginning in the early 1840s abortion became, for all intents and purposes, a business, a service openly traded in the free market. . . . [Pervasive advertising told Americans] not only that many practitioners would provide abortion services, but that some practitioners had made the abortion business their chief livelihood. Indeed, abortions became one of the first specialties in American medical history." [31]

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[27] One physician wrote that "abortion is not always associated with crime and disgrace; it may arise from causes perfectly natural and altogether beyond the control of the female." T. Beck, 1 *Elements of Medical Jurisprudence* 207 (1823), *quoted in* M. Grossberg, *supra* note 14, at 160.

[28] L. Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* 51-52 (1976).

[29] *See* LaSorte, *Nineteenth Century Family Planning Practices*, 41 J. of Psychohistory 163, 166-70 (1976).

[30] *New York Times*, Aug. 23, 1871, at 6.

[31] J. Mohr, *supra* note 3, at 47. "[A] genuinely flourishing market in abortion services existed in the United States from the 1840s through the 1870s." *Id.* at 98. In the 1860s and 1870s both the popular press and medical journals were full of advice about abortion servicse. *Id.* at 67-68. *See also* C. Degler, *supra* note 19, at 230.

IV. NINETEENTH-CENTURY ABORTION RESTRICTIONS SOUGHT TO PROMOTE OBJECTIVES THAT ARE TODAY PLAINLY EITHER INAPPLICABLE OR CONSTITUTIONALLY IMPERMISSIBLE.

Between 1850 and 1880, the newly formed American Medical Association, through some of its vigorously active members, became the "*single most important factor in altering the legal policies toward abortion in this country.*" [32] Nineteenth-century "regular" physicians enlisted state power to limit access to abortion for reasons that are, in retrospect, parochial, and have long since been rejected by organized medicine.[33] The doctors found an audience for their effort to restrict abortion because they appealed to broader concerns: maternal health, consumer protection, a discriminatory idea of the natural subordination of women, nativist fears generated by the fact that elite Protestant women often sought abortions. Some of those seeking these diverse objectives also sought to attribute moral status to the fetus.

A. From 1820-1860, Abortion Regulation in the States Rejected Broader English Restrictions And Sought To Protect Women From Particularly Dangerous Forms Of Abortion.

In 1803, English law made all forms of abortion criminal.[34] Despite this model, for two decades, no American state restricted access to abortion. In 1821, when one state, Connecticut, acted, it prohibited only the administration of a "deadly poison, or other noxious and de-

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[32] J. Mohr, *supra* note 3, at 157 (emphasis supplied). *See also* R. Petchesky, *supra* note 21, at 79.

[33] *See* brief *amicus curiae* of the American Medical Association in the instant case.

[34] The law was passed as part of a comprehensive revision of the criminal code, urged by Lord Ellenborough, broadening the sweep of the criminal law and increasing penalties. J. Mohr, *supra* note 3, at 23; *Roe v. Wade*, 410 U.S. 113, 136-38 (1973).

structive substance." [35] Moreover, the act applied only after quickening, and punished only the person who administered the poison, not the woman who consumed it. In the late 1820s, three other states followed the Connecticut model, prohibiting the use of dangerous poisons *after* quickening.[36] Most American states did not see abortion as a problem demanding legislative attention.

In 1830, Connecticut became the first state to punish abortion after quickening.[37] In the same year, New York, also animated by a concern for patient safety, considered a law to prohibit *any* surgery, unless two physicians approved it as essential. Prior to scientific understanding of germ theory and antisepsis, any surgical intervention was likely to be fatal. The act finally adopted applied only to surgical abortion and included the first "therapeutic" exception, approving abortion where two physicians agreed that it was "necessary." [38] As the Court recognized in *Roe v. Wade*, until the twentieth century, abortion, particularly when done through surgical intervention, remained significantly more dangerous to the woman than childbirth.[39] Because nineteenth-century abortion laws were drafted and justified to protect women, they did not punish women as parties to an abortion.[40]

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[35] *The Public Statute Laws of the State of Connecticut* 152-53 (1821). *See* J. Mohr, *supra* note 3, at 22. *See also* Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Georgetown L. Rev. 395 (1960-61).

[36] Missouri adopted such a statute in 1825, Illinois in 1827, and New York in 1828. *See* J. Mohr, *supra* note 3, at 25-27.

[37] Conn. Stat. Tit. 22, § 14 at 152 (1821), reported by Quay, *supra* note 35, at 453.

[38] *See* N.Y. Rev. Stat., pt. IV, Ch. I, tit. VI § 21, at 578 (1828-1835), reported by Quay, *supra* note 35, at 499.

[39] *See Roe v. Wade*, 410 U.S. at 148-50; Means, *supra* note 9, at 353-54, 358-59, 382-96.

[40] *Roe v. Wade*, 410 U.S. at 151-52; M. Grossberg, *supra* note 14, at 163-64.

None of these early laws, restricting forms of abortion thought to be particularly unsafe, were enforced.[41] That absence itself speaks powerfully, particularly since abortion was prevalent. Despite legislative action and medical opposition, common, openly tolerated practice suggests that many Americans did not perceive abortion as morally wrong.[42]

B. From The Mid-Nineteenth Century, A Central Purpose Of Abortion Regulation Was To Define Who Should Be Allowed To Control Medical Practice.

Without exception, physicians were the principal nineteenth-century proponents of laws to restrict abortion. A core purpose of the nineteenth-century laws, and of doctors in supporting them, was to "control medical practice in the interest of public safety." [43] This is not to deny that some doctors had moral objections to abortion, as well as moral and social views about women and race. But the most significant explanation for the drive by medical doctors for statutes regulating abortion is the fact that these doctors were undergoing the historical process of professionalization.

Medicine was not then the organized, highly regulated profession we know today. It was an occupation in which conventional and scientifically authoritative modes of practice still contended for stature and authority with more popular modes, such as botanic medicine, homeopathy, herbalists, midwives and abortionists. Allopathic physicians sought to establish and consolidate professional sovereignty.[44] This struggle was not easy, nor

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[41] J. Mohr, *supra* note 3, at 37.

[42] C. Degler, *supra* note 19, at 233-34, cites physicians who observe that women who are "otherwise quite intelligent and refined, with a keen sense of their moral and religious obligations to themselves and to others, deem it nothing amiss to destroy the embryo during the first few months of its growth."

[43] J. Mohr, *supra* note 3, at 31-32.

[44] *See* P. Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry* (1982).

was its outcome certain. The professionalizing spirit, illustrated by pressures to require licensure for doctors, was contrary to the egalitarian spirit of public life in Jacksonian America.[45] It was only by mid-century, with the founding of the American Medical Association, that professional sovereignty was tentatively established for "scientific" medicine.[46]

Most nineteenth-century Americans did not seek the help of physicians in dealing with pregnancy, abortion and childbirth.[47] Childbirth remained an affair of family, friends, and midwives until well into the nineteenth century.[48] The process by which childbirth became asso-

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[45] From the 1820s through the 1840s, the prevailing political ideology in the United States was strongly opposed to all forms of moncpoly or elitism. Thus, exclusive political clubs or economic associations were regarded with suspicion. *See Antebellum American Culture* 187-95 (D. Davis ed. 1977).

[46] *See generally* P. Starr, *supra* note 44; W. Rothstein, *American Physicians in the Nineteenth Century: From Sects to Science* (1972). The phenomenon of professionalization in American culture has been much studied. *See, e.g.*, T. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (1977); G. Geison, ed., *Professions and Professional Ideologies in America* (1983); Bender, "The Erosion of Public Culture: Cities, Discourses, and Professional Disciplines," in *The Authority of Experts: Studies in History and Theory* 84-106 (T. Haskell ed. 1984); and B. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (1976). Although some historians celebrate the effects of professionalization on our culture and others criticize them, all agree on two basic propositions: the professionalizing impulse is a response to needs pereceived by practioners regarding the establishment and maintenance of legitimate social authority, and the professionalizing of numerous disciplines has resulted in a less public and less egalitarian nature of those disciplines. The development of the medical profession in America is a vivid example of these larger developments.

[47] No group of physicians was more insecure than those specializing in problems of women's reproductive health. C. Smith-Rosenberg, *supra* note 7, at 231.

[48] *See* J. Leavitt, *Brought to Bed: Child-Bearing in America, 1750-1950* (1986); R. Wertz & D. Wertz, *Lying-In: A History of*

ciated with doctors and hospitals, and with a heightened degree of medical intervention, is a well-documented example of the medical profession's gradual consolidation of authority. This development was not necessarily coercive or conspiratorial. Women were eager for services and knowledge that might lessen the risks and pain of childbirth. But the physician's effort to move childbirth to the hospital involved more than clinical considerations. Similarly, the deep involvement of doctors in the early abortion statutes was intimately connected with professional struggles between proponents of "scientific medicine" and those who practiced less conventional modes of healing.

As we have seen, the first anti-abortion laws were "anti-poisoning" statutes rather than sweeping prohibitions on all abortions. Because certain abortifacients derived from herbs and purgatives could be fatal if taken in overly large quantities, it became a crime to "administer" such remedies.[49] These laws did not express an abhorrence of abortion any more than current laws banning the unauthorized practice of law represent an abhorrence of legal representation. Rather, they served the dual function of protecting the public and solidifying the bounds of professional authority.

More significant, the nineteenth century movement to regulate abortions was one chapter in a campaign by doctors that reflected a professional conflict between "regulars" (those who ultimately became the practitioners and proponents of scientific medicine) and "irregulars." As James Mohr explains:

> Practically, the regular physicians saw in abortion a medical procedure that not only gave the competition an edge but also undermined the solidarity of their own regular ranks. If a regular doctor re-

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Childbirth in America (1977); B. Ehrenreich & D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1979).

[49] J. Mohr, *supra* note 3, at 21-22.

> fused to perform an abortion he knew the woman could go to one of several types of irregulars and probably receive one. . . . As more and more irregulars began to advertise abortion services openly, especially after 1840, regular physicians grew more and more nervous about losing their practices to healers who would provide a service that more and more American women after 1840 began to want. Yet, if a regular gave in to the temptation to perform an occasional discreet abortion, and physicians testified repeatedly that this frequently happened among the regulars, he would be compromising his own commitment to an American medical practice that would conform to Hippocratic standards of behavior. *The best way out of these dilemmas was to persuade state legislators to make abortion a criminal offense. Anti-abortion laws would weaken the appeal of the competition and take the pressure off the more marginal members of the regulars' own sect.*[50]

To be sure, some "regulars" were morally troubled by abortion, and not all "irregulars" were willing to perform them. A variety of reasons explain why "regular physicians became interested in abortion policy from an early date and repeatedly dragged it into their prolonged struggle to control the practice of medicine in the United States." [51] In the larger context, however, public consideration of abortion in antebellum America was more an issue of medical authority and professional sovereignty than of any particular social or moral attitude toward abortion. Without such an explanation centering on professional imperatives, it is difficult to account for the fact that the American Medical Association and its members became primary proponents of twentieth-century statutes legalizing abortion. *See* Section V, *infra*.

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[50] *Id.* at 37 (citation omitted, emphasis added).

[51] *Id.*

C. Enforcement Of Sharply Differentiated Concepts Of The Roles And Choices Of Men And Women Underlay Regulation Of Abortion And Contraception In The Nineteenth Century.

The American Medical Association's campaign to restrict access to abortion succeeded for many reasons. Concerns over the dangers of surgical abortion to women were well founded. Further, physicians persuaded male political leaders that "abortion constituted a threat to social order and to male authority." [52] Since the 1840s, a growing movement for women's suffrage and equality had generated popular fears that women were departing from their purely maternal role.[53] These fears were fueled by the fact that family size declined sharply in the nineteenth century.[54]

In 1871, the American Medical Association's Committee on Criminal Abortion described the woman who sought an abortion:

> She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures—but shrinks from the pains and responsibilities of maternity; and, destitute of all delicacy and refinements, resigns herself, body and soul, into the hands of unscrupulous and wicked men. Let not

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[52] C. Smith-Rosenberg, *supra* note 7, at 235.

[53] The moral fervor of the abolitionist cause drew Northern women more deeply into public life than ever before in our history. *See* E. Flexner, *Century of Struggle: The Woman's Rights Movement in the United States*, Ch. 13 (rev. ed. 1975). Some of the women who were active in the anti-slavery movement perceived parallels between the subjugation and disenfranchisement of black people and the oppression of women. In 1848, the first Women's Rights Convention, held in Seneca Falls, New York, issued a proclamation that closely tracked the original Declaration of Independence. Stanton, "Declaration of Sentiments 1848," reprinted in L. Kerber & J. Mathers, *Women's America: Refocusing the Past* 431-33 (1982).

[54] M. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* 155-57 (1983).

> the husband of such a wife flatter himself that he possesses her affection. Nor can she in turn ever merit even the respect of a virtuous husband. She sinks into old age like a withered tree, stripped of its foliage; with the stain of blood upon her soul, she dies without the hand of affection to smooth her pillow.[55]

The nineteenth-century American Medical Association's view of women is strikingly similar to that adopted by this Court in 1872, when women were denied the right to practice law because "divine ordinance," and "the nature of things," prescribed a "family institution [that] is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."[56] This Court has, of course, now come to see this view as part of our "long and unfortunate history of sex discrimination," and as constitutionally illegitimate.[57]

The women's movement of the nineteenth century affirmed that women should always have the right to decide whether to bear a child and sought to enhance women's control of reproduction through "voluntary motherhood," ideally to be achieved through periodic abstinence.[58] Anxieties about changing family functions and gender

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[55] Atlee & O'Donnell, *Report of the Committee on Criminal Abortion*, 22 Transactions of the American Medical Association 241 (1871), *quoted in* C. Smith-Rosenberg, *supra* note 7, at 236-37. Smith-Rosenberg observes that, although middle-class husbands were undoubtedly active participants in their wives' decisions about abortion, the nineteenth-century "AMA linked doctor and husband as the equally wronged and innocent parties. The aborting wife, in contrast, was unnaturally selfish and ruthless." *Id.* at 236.

[56] *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

[57] *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

[58] *See* L. Gordon, *supra* note 28, at 109. During this period, much scientific and folk wisdom held a flatly inaccurate view of the cycle of female fertility. *Id.* at 101. This inaccurate belief, combined with hard data on declining birthrates, *see* notes 21-23 *supra*, underscore how common abortion must have been.

roles were critical factors motivating the all-male legislatures that adopted restrictions on abortion.[59]

In contrast to the feminist demand for control of reproduction, the federal government, in 1873, took the lead in banning access to information about both contraception and abortion. The Comstock law [60] restricted not only medical information on abortion and contraception, such as a medical text on physiology written by an eminent Harvard scientist, but also literary depictions, such as Leo Tolstoy's disapproving tale of infidelity, *The Kreutzer Sonata*, as well as moral literature, including a pamphlet urging total chastity.[61] An 1876 federal court decision rejected a claim that physicians should have the right to distribute contraceptive information.[62]

In the nineteenth century, opposition to abortion and contraception were closely linked, just as political and doctrinal support for this Court's decisions in *Griswold v. Connecticut* and *Roe v. Wade* are linked in this century. Michael Grossberg observes that "Anthony Comstock had labeled as abortionists everyone who advocated or dealt in family-limitation materials and services." [63]

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[59] C. Smith-Rosenberg, *supra* note 7, at 218.

[60] The act prohibits mailing, transporting or importing "obscene, lewd or lascivious" items, specifically including all devices and information pertaining to "preventing conception and producing abortion." *See* Comstock Act, Ch. 258, § 1, 17 Stat. 598 (1873). It was not until 1971 that an amendment was passed deleting the prohibition as to contraception. Pub. L. 91-662, 84 Stat. 1973 (1971). The ban as to information about abortion remains. *See* 18 U.S.C. § 1461 (1988) (current version of Act).

[61] *See* M. Grossberg, *supra* note 14, at 190.

[62] *United States v. Foote*, 25 Fed. Cas. 1140, 1141 (S.D.N.Y. 1876), discussed in M. Grossberg, *supra* note 14, at 191. Edward Bliss Foote, the defendant, was an advocate of free-thought, civil liberties, women's rights and birth control. After his arrest, Foote wrote, "It is my conscientious conviction that every married woman should have it within her power to decide for herself just when and just how often she will receive the germ of a new offspring." *See id.*; L. Gordon, *supra* note 28, at 168.

[63] M. Grossberg, *supra* note 14, at 193.

The core purposes of the Comstock Act were to enforce chastity on the young and unmarried and to preserve the subservient position of women within a "traditional" family structure. Nineteenth-century restrictions on abortion and contraception can only sensibly be understood as a reaction to the uncertainties generated by large shifts in family functions and anxieties generated by women's challenges to their historic roles of silence and subservience.

D. Nineteenth-Century Contraception And Abortion Regulation Also Reflected Ethnocentric Fears About The Relative Birthrates Of Immigrants And Yankee Protestants.

Nativism, notably anti-Catholicism, had been part of American politics and culture as early as the Jacksonian period.[64] The Civil War and Reconstruction Era dramatically raised consciousness about national identity and citizenship. Social conservatives in the 1850s articulated an "organicist" ideal in which social unity would predominate over diversity.[65] By the 1870s social thought was turning the insights of Charles Darwin toward racist ends.[66] The political ideology of "free labor," forged in the nascent Republican Party in the years preceding the Civil War,[67] was severely challenged by an influx of foreign labor in the latter part of the nineteenth century. The discriminatory immigration policies and nativist fears of the late nineteenth and early twentieth centuries had their roots in a far earlier period, when

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[64] D. Davis, *From Homicide to Slavery: Studies in American Culture* 137-54 (1986); S. Lipset & E. Raab, *The Politics of Unreason: Right-Wing Extremism in America, 1790-1970* (1970).

[65] *See* G. Frederickson, *The Inner Civil War: Northern Intellectuals and the Crisis of the Union* (1965).

[66] *See* R. Hofstadter, *Social Darwinism in American Thought* (1955).

[67] E. Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1970).

Americans first became concerned about the creation of an urban population of wage workers.[68]

Beginning in the 1890s, and continuing through the first decades of the twentieth century, these nativist fears coalesced into a drive against what was then called "race suicide." [69] The "race suicide" alarmists worried that women of "good stock"—prosperous, white, and Protestant—were not having enough children to maintain the political and social supremacy of their group.[70] Anxiety over the falling birth rates of Protestant whites in comparison with other groups helped shape policy governing both birth control and abortion.[71] As James Mohr points out, "The doctors both used and were influenced by blatant nativism. . . . There can be little doubt that Protestants' fears about not keeping up with the reproductive rates of Catholic immigrants played a greater role in the drive for anti-abortion laws in nineteenth-century America than Catholic opposition to abortion did." [72]

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[68] The classic work on this issue is J. Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925* (1988).

[69] *See* L. Gordon, *supra* note 28, at 136-58.

[70] *See* C. Degler, *supra* note 19, at 229-30, on the concern of physicians that women of "good stock" were particularly likely to obtain abortions. In Buffalo in 1855, the fertility ratio of Irish women of ages 30-34 was over twice that of native white women. *Id.* at 134.

[71] J. Reed, *From Private Vice to Public Virtue: The Birth Control Movement and American Society Since 1830* (1978); D. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (1985); D. Kennedy, *Birth Control in America: The Career of Margaret Sanger* (1971).

[72] *See* J. Mohr, *supra* note 3, at 167. Horatio Robinson Storer, who spearheaded the American Medical Association's mid-nineteenth century anti-abortion campaign, frequently referred to racial themes. *See id.* at 180-90. One doctor lamented in 1874 that, owing to the prevalence of abortion among Protestant women, "the Puritanic blood of '76 will be but sparingly represented in the approaching centenary." *Id.* at 167. Carl Degler also documents that physicians of the 1850s and 1860s expressed particular concern

V. ENFORCEMENT OF ABORTION RESTRICTIONS IN THE FIRST HALF OF THE TWENTIETH CENTURY FOLLOWED HISTORIC ETHNIC AND CLASS DIFFERENTIATIONS, AFFIRMED HISTORIC CONCERNS ABOUT ENFORCING GENDER ROLES, AND IMPOSED ENORMOUS COSTS UPON WOMEN, THEIR FAMILIES AND PHYSICIANS.

Statutory restrictions on abortion remained virtually unchanged until the 1960s. Physicians were allowed to perform abortions only "to preserve the mother's life." Nonetheless, the incidence of abortion remained high, ranging from one pregnancy in seven at the turn of the century, to one in three in 1936.[73] Most abortions were performed illegally.[74] Legal restrictions did not stop abortion, but made it furtive, humiliating, and dangerous.[75]

In the first half of the twentieth century, a two-tiered abortion system emerged in which services depended on the class, race, age and residence of the woman. Poor and rural women obtained illegal abortions, performed by people, physicians and others, who were willing to defy the law out of sympathy for the woman or for the fee. More privileged women steadily pressed physicians for legal abortions and many obtained them. Some doctors could be persuaded that deliveries would endanger women's health; the dilation and curetage procedure was indicated for numerous other gynecological health problems.

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that abortion was increasingly sought by married women of "high repute." C. Degler, *supra* note 19, at 229.

[73] *See* F. Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* 338, and Appendix A, 453-75 (1936). *See also* Stix, *A Study of Pregnancy Wastage*, 13 Milbank Memorial Fund Q. 347 (1935); Stix & Wiehl, *Abortion and Public Health*, 28 Am. J. Pub. Health 622, Table I (1938).

[74] *See* K. Luker, *Abortion and the Politics of Motherhood* 48-54 (1984).

[75] *See* brief *amicus curiae* of the National Abortion Rights Action League in the instant case.

Shifts in the definition of "therapeutic" abortion responded to larger social forces.[76] Early in the century, "race suicide" fears fueled efforts to suppress both abortion and birth control.[77] During the Depression, abortions increased as the medical profession recognized impoverishment as an indication for therapeutic abortion.[78] In the 1940s and 1950s the definition of therapeutic abortion expanded to include psychiatric indications.[79] Physicians were caught in a double bind: abortion was criminal, but the reasons women sought them were so multiple and compelling that they were difficult to resist.

In the 1950s, more restrictive attitudes toward both legal and illegal abortions [80] were part of a conservative response to growing female labor-force participation and independence.[81] The 1960s movement to legalize abortion arose in response to this, rather brief, wave of anti-abor-

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[76] L. Reagan, *When is Abortion Necessary to Save a Woman's Life?: The Political Dimension of Therapeutic Abortion During the Period of Criminalized Abortion in the United States, 1880-1973* (unpublished paper, Univ. of Wisconsin, Madison, June 20, 1987).

[77] On November 20, 1912, 390 federal postal inspectors arrested 173 people for using the mails to disseminate information about abortion and contraception in violation of the Comstock Act. The campaign was called the "federal war on race suicide." "Take Chicagoans in Federal War on Race Suicide," *Chicago Tribune*, Nov. 21, 1912, p. 1.

[78] In 1931 an American Medical Association editorial noted that "poverty . . . does not constitute an indication for abortion, [but] there is no doubt that in the United States many abortions are performed for borderline cases in which there is a strong ethical indication plus a more or less minor medical ailment." *Abortion or Removal of Pregnant Uterus*, 95 J. Am. Med. Ass'n 1169 (1931).

[79] K. Luker, *supra* note 74, at 45-47, 54-57.

[80] L. Lader, *Abortion* 42-51 (1966).

[81] M. Ryan, *Womanhood in America: From Colonial Times to the Present* 198-215 (1975); *America's Working Women: A Documentary History—1600 to the Present* 299-308 (R. Baxandall, L. Gordon & S. Reverly eds. 1976).

tion enforcement. Physicians, particularly those who worked in public hospitals and clinics, saw women who needlessly suffered and died as a consequence of illegal abortions.[82] Others were disturbed that most of those women were poor and black.[83] Many were distressed by the class bias inherent in the psychiatric indications for therapeutic abortions.[84] In the late 1960s, concerned physicians were joined by women who had come to understand that control of reproductive capacity is the *sine qua non* of women's self-governance and moral personhood.[85]

As a number of states acted to legalize abortion, additional concerns heightened pressure for recognition of constitutional protection for the basic right of abortion choice. Debate over abortion, now revolving around insoluble metaphysical disputes about the moral status of the fetus, preoccupied state legislatures and often prevented them from addressing other vital issues.[86] Class and regional differentiations were accentuated as it became possible for women with resources to travel to states where abortion was legal. In *Roe v. Wade*, this Court responded to all of these forces in holding that constitutional rights of liberty and privacy protect the right of the woman and her physician to choose abortion.

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[82] *See* brief *amicus curiae* of the American Public Health Association and brief *amicus curiae* of the Attorneys General in Support of Appellees.

[83] *See* brief *amicus curiae* of Organizations of Women of Color.

[84] *See McRae v. Califano*, 491 F. Supp. 630, 668-76 (E.D.N.Y. 1980).

[85] K. Luker, *supra* note 74, at 92-125.

[86] *See* J. Mohr, *Iowa's Abortion Battles of the Late 1960s and Early 1970s*, forthcoming in 1989 from the Center for the Study of the Recent History of the United States, Iowa City, Iowa; K. Luker, *supra* note 74, at 66-91.

VI. THE MORAL VALUE ATTACHED TO THE FETUS BECAME A CENTRAL ISSUE IN AMERICAN CULTURE AND LAW ONLY IN THE LATE TWENTIETH CENTURY, WHEN TRADITIONAL JUSTIFICATIONS FOR RESTRICTING ACCESS TO ABORTION BECAME CULTURALLY ANACHRONISTIC OR CONSTITUTIONALLY IMPERMISSIBLE.

Some of those seeking to enlist the power of the state to deny women's liberty to choose abortion have long articulated a concern for the fetus.[87] Yet until the late twentieth century, this concern was always subsidiary to more mundane social visions and anxieties. The mid-nineteenth century physicians' campaign sought to prohibit the practice of botanic medicine and chiropractic, as well as abortion. Protection of fetal life is plainly not the driving concern of such a movement. Those who opposed abortion and birth control to stanch "race suicide," sought to protect the privilege of elite white Anglo-Saxon Protestants, not to protect fetuses.

Religious support for the physicians' campaign to bar abortion was practically non-existent.[88] Physicians vigorously sought to enlist moral authority and organized

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[87] *See* J. Mohr, *supra* note 3, at 165-66.

[88] The extensive religious press of the United States, both Catholic and Protestant, "maintained a total blackout on the issue of abortion from the beginning of the nineteenth century through the end of the Civil War." J. Mohr, *supra* note 3, at 183. It was not until 1869 that a papal declaration condemned abortion as a violation of the fetus prior to "ensoulment," held to be 40 days gestational age for a male fetus and 80 days for a female. Before that time, Catholic theology condemned early abortion on precisely the same terms as it had condemned masturbation and contraception, *i.e.* a distrust of sexuality and an interference with natural processes. In Catholic doctrine late abortions were always held to be a form of homicide. No American diocesan newspaper reported the Pope's 1869 statement. *Id.* at 187. In that same year, the Bishop of Baltimore issued the only formal nineteenth-century Catholic condemnation of abortion in America, *id.* at 186, and the Old School Presbyterians became the only major Protestant denomination to condemn abortion. *Id.* at 192. No other religious denominations or leaders followed.

religion in their campaign to restrict abortion, and "were openly disgusted when the established voices of moral authority refused to speak on their behalf. . . . Medical journals accused the religious journals of valuing abortifacient advertising revenue too highly to risk criticizing the practice." [89]

Further, the small support that physicians found among Protestant religious leaders appeared to be "more worried about falling birth-rates among their adherents than about the morality of abortion itself." [90] The conspicuous absence of religious support for the physicians' anti-abortion crusade is particularly striking compared to extensive religious involvement in other nineteenth-century movements for changing social morality, such as temperance.[91]

Nineteenth-century laws restricting access to abortion were not based on a belief that the fetus is a human being. To the contrary, New Jersey Chief Justice Green expressed the prevailing judicial opinion in 1849 when he asserted that although it was "true, for certain purposes, [that] the law regards an infant as *in being* from the time of conception, yet it seems nowhere to regard it as *in life*, or to have respect to its preservation as a living being." [92] Michael Grossberg summarizes the nineteenth-century cases, saying, "[A] fetus enjoyed rights only in property law and then only if successfully born. It had no standing in criminal law until quickening, and none at all in tort. The law highly prized children, not fetuses." [93]

Judith Walzer Leavitt's analysis of medical decisions about the procedure of craniotomy (a surgical mutila-

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[89] J. Mohr, *supra* note 3, at 184.

[90] *Id.* at 195.

[91] *Id.* at 182-96.

[92] *Cooper v. State*, 22 N.J. L. (2 Zab.) 52, 56-57 (1849) (emphasis in the original), discussed in M. Grossberg, *supra* note 14, at 165.

[93] M. Grossberg, *supra* note 14, at 165.

tion of the live fetal head to permit vaginal extraction) provides one complex window on the moral status of the fetus, during the period from 1880 to 1920. At this time, most women gave birth at home. When a woman's pelvis was too small to permit delivery, two alternatives were possible.[94] A Caesarean section would ordinarily save the fetus, but posed high risks to the woman's life. A craniotomy killed the fully formed fetus, but with significantly less risk to the woman.

Most physicians thought craniotomy, which could save the life of the woman, the more appropriate choice in this difficult situation.[95] Others based their assessment on their judgment of the social and moral worth of the woman.[96] But the core issue for physicians was the principle that "the obstetrician alone must be the judge of what is to be done." [97] Roman Catholic writers widely condemned craniotomy in popular medical journals, informing obstetricians in 1917 that it was "[b]etter that a million mothers die than that one innocent creature be

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[94] In some cases, physicians could attempt to avoid this dilemma by stretching or breaking the woman's pelvis. *See* Leavitt, *The Growth of Medical Authority: Technology and Morals in Turn-of-the-Century Obstetrics*, 1 Med. Anthropology Q. 230, 233-35 (1987).

[95] Craniotomy was, of course, a brutal and distasteful procedure. Nonetheless, one medical leader, speaking to a medical society audience, in 1892 explained:

> I should much prefer Caesarean section in these cases, but I scarcely expect in the near future that a larger number will consent to it. The husband, *if told the truth* [about the dangers to the woman of cesarean section], will demand craniotomy, and I think moreover that every one of us would do the same under similar circumstances. I know I should, and I feel confident that every gentleman here to-night would too, if his own wife were in question.

T. Barker, *When is Emryotomy Justifiable? Proceedings of the Philadelphia County Medical Society* 132-39 (1892), *quoted in* Leavitt, *supra* note 94, at 240.

[96] Leavitt, *supra* note 94, at 246.

[97] *Id.* at 244.

killed." [98] But continued medical practice and dialogue demonstrate that neither patients nor physicians attached such high, absolute value to the fetus, even when it was plainly viable.

As this Court observed in *Roe v. Wade*, the pattern of American abortion laws does not support the view that they were designed principally to incorporate a view of the fetus as a person. Both the lesser punishment for abortion than for homicide, and the various exceptions allowing the physician to determine that abortion is justified, rebut the assumption that laws against abortion reflect that belief.[99]

Further, increasing "scientific" understanding does not support attributing enhanced moral value to the fetus. That pregnancy is a biologically continuous process has long been recognized by Americans even when the common law recognized a woman's right to choose abortion. For example, a popular home medical book published in 1817 and dedicated to the *Wives of the Ministers of the Gospel of the United States*, stated: "[T]he contents of the pregnant womb, formed in miniature at conception, are the child, the waters, the membranes holding them, the navel cord, and afterbirth." [100] The book goes on to describe in detail embryonic and fetal development. Historically, claims that startling advances in medical knowledge about pregnancy and fetal development should alter attitudes toward abortion have consistently been highly exaggerated.[101]

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[98] *Id.* at 239-40.

[99] *See Roe v. Wade*, 410 U.S. 113, 132-50 (1973).

[100] *Quoted in* K. Luker, *supra* note 74, at 23.

[101] *See* K. Luker. *supra* note 74, at 23-25. Other parties before this Court are better able than historians to address current claims of technical advances. *See* brief *amicus curiae* of the American Medical Association, refuting the claim that it is now possible to maintain fetal life outside the womb at ever earlier stages of

VII. A PRESUMED INTEREST IN PROTECTING FETAL LIFE DOES NOT JUSTIFY DENYING WOMEN THEIR HISTORIC LIBERTY TO CHOOSE ABORTION.

A culture can, of course, allow growing humanistic impulses to attach greater moral value to fetuses or to potential human life, even if these moral judgments are not triggered by new scientific understanding. But, for two core reasons, this Court should reject state efforts to invoke the protection of fetal life to justify restrictions upon women's access to abortion.

First, as this brief has demonstrated, the complex historic grounds for restricting access to abortion are now either socially irrelevant or recognized as constitutionally illegitimate. Both culturally and legally, it is today impossible to defend abortion restrictions as a means of enforcing an absolutist religious belief, grounded in natural law, that intimate relations must always remain open to the possibility of procreation.[102] Similarly, abortion restrictions cannot be justified by desires to keep women in traditional roles.[103] Likewise, our social con-

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gestation. *See also* brief *amicus curiae* of American Law Professors in Support of Appellees.

One technological development that has spurred the effect to attach moral value to the fetus is the technology that allows the imaging of the fetus in utero. B. Katz Rothman observes that "the fetus in utero has become a metaphor for 'man' in space, floating free, attached only by the umbilical cord to the spaceship. But where is the mother in that metaphor? She has become empty space." B. Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* 114 (1986). Rosalind Petchesky observes, "[I]mages by themselves lack 'objective' meanings; meanings come from the interlocking fields of context, communication, application and reception. . . ." Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction,* 13 Feminist Studies 263, 286 (1987).

[102] *See Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

[103] *See Stanton v. Stanton,* 421 U.S. 7 (1975); *Orr v. Orr,* 440 U.S. 268 (1979).

sensus, embodied in principles of legal equality, would not permit the Court to defend restrictions on abortion as a means of encouraging the propagation of white Yankee stock or of punishing racial or religious minorities. But any sophisticated understanding of American history and traditions must recognize that such motivations do not disappear simply because they are no longer culturally or constitutionally legitimate. In this context, we must therefore question whether protection of unborn life has become a surrogate for other social objectives that are no longer tolerated.

Second, and decisively, this Court must affirm *Roe v. Wade*, and reject asserted state interests in protecting prenatal life, because the costs of denying constitutional protection to abortion choice are simply too enormous. Our experience from the 1890s until 1973 amply demonstrates that if women are denied access to legal abortions, many will turn in desperation to self-abortion, folk remedies, or illegal practitioners. Many will die. Others will suffer permanent damage to their reproductive capacity. Still others will bear children for whom they cannot provide adequate care. Apart from these devastating consequences to the lives and health of women, restricting access to abortion will again deny the fundamental legitimacy of women as moral decision-makers.

CONCLUSION

The judgment of the Court of Appeals and this Court's decision in *Roe v. Wade* should be affirmed.

Respectfully submitted,

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