Nos. 91-744, 91-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Petitioners,

v.

ROBERT P. CASEY, *et al.*,

Respondents.

ROBERT P. CASEY, *et al.*,

Petitioners,

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF 250 AMERICAN HISTORIANS AS AMICI CURIAE IN SUPPORT OF PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA

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BRIEF OF 250 AMERICAN HISTORIANS AS AMICI CURIAE IN SUPPORT OF PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA

INTEREST OF AMICI

Amici are 250 professional American historians who, with the permission of the parties, here seek to provide the Court a rich and accurate description of our national history and tradition in relation to women's liberty to choose whether to terminate a pregnancy. Amici represent a diverse array of historical specialties and approaches. They are united, however, in their conviction that this Court's decision in *Roe v. Wade* is supported by American history and the lessons that history imparts.

SUMMARY OF ARGUMENT

This Court has long consulted our nation's history and traditions to determine the contours of fundamental constitutional rights. This brief will demonstrate that for much of our nation's history, abortion was tolerated and not illegal; that for much of the nineteenth century, abortion remained legal prior to quickening; and that when states did enact laws regulating abortion, these statutes did not punish women. A variety of complex factors, and not simply moral or theological impulses, 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 ideas of the appropriate role for women, opposition to non-procreative sexual activity and to the dissemination of information concerning birth control, and even concern for racial and ethnic purity. This brief discusses the prevalence and visibility of abortion as a common social practice in the nineteenth century. Above all, this historical account refutes the erroneous assumption that abortion restrictions enjoyed broad social support in past eras.

Moreover, this nation's history confirms that abortion restrictions have imposed profound burdens on the liberty and equality of women. The Court should therefore reaffirm its commitment to providing strong constitutional protection to

women's fundamental liberty interest in reproductive choice and control of their own bodies.

ARGUMENT

I. OUR TRADITIONS AND HISTORY HELP DEFINE THE CONTOURS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO PRIVACY.

Since the beginning of the Republic, no Justice of the Supreme Court has seriously disputed that the meaning of our Constitution is to be determined by interpreting its words in light of our nation's history and traditions. "[A]n approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). Even when this Court has not specifically identified "history" as a source of authority, it has frequently taken "judicial notice" of this country's history and traditions in resolving difficult constitutional issues.[1] Because an understanding of our nation's history rightly influences this Court's fundamental constitutional understandings, it is essential to capture that history deeply and accurately. It is no accident that *Scott v. Sandford*, 19 How. 1, 19-20 (1857), and *Plessy v. Ferguson*, 163 U.S. 537, 544, 550-51 (1896) – two of this Court's most discredited decisions – rested largely on disputed and insupportable readings of history.

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[1] *See, e.g., Munn v. Illinois*, 94 U.S. 113, 125 (1877) ("[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold"); *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"); *McCollum v. Board of Education*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring) ("released-time" provision unconstitutional in light of the "relevant history of religious education in America" and "the place of 'released-time' in that history").

The relevance of history to this Court's task often goes beyond exploration of "framers' intent"; not every facet of the Constitution's meaning can be determined by reference to its words or to the apparent intent of its drafters. Justice White has said:

> [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). But if history cannot always pinpoint the views of the framers, the historical perspective *can* suggest fundamental principles by which to measure the scope of valued constitutional rights. In particular, history and tradition help give content to the open-textured provisions of our Constitution: the prohibition in the Fifth and Fourteenth Amendments of state action that deprives 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."

In 1961, Justice Harlan wrote of the importance of history and tradition in explicating the scope of the due process clause respecting bodily privacy:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the individual, has struck between

> that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *See also Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). Justice Harlan's words express the Constitution's general protection of the right to privacy, *see Griswold*, 381 U.S. at 483-86, and *Olmstead v. United States*, 277 U.S. 438, 474-75 (1928) (Brandeis, J., dissenting), and explain the role of history in illuminating how the autonomy to make fundamental personal decisions is basic to individual liberty. These words are especially relevant to this case. The history of abortion in this country illustrates that this Court was correct in *Roe v. Wade* in holding that the right to choose an abortion is fundamental to women's liberty.

This Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), accurately recounted the history of abortion in the United States and at British common law. Since 1973 and *Roe*, ongoing historical research and scholarship have expanded and deepened historians' understanding of abortion in America. In addition to the important legal-historical sources relied on in *Roe* (past statutes, legislative debates, and the decisions of common-law courts), historians in recent decades have begun to document people's actual beliefs and practices throughout history, offering an even deeper and richer understanding of baseline American values and traditions. As scholars familiar with these varied methods of historical inquiry, amici believe the Court must consult evidence of daily life as well as official and governmental action to uncover the beliefs and practices of the broad range of American society. It is this inclusive perspective on the past that should inform the Court's investigation of our nation's history and traditions. Such an inquiry does not mean that what has prevailed in the past must govern the present, for

that would deny any role for human progress. Rather, consideration of past practices and beliefs offers real lessons about the centrality of those practices and the meaning of attempts to regulate them.

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

As this Court demonstrated in *Roe v. Wade*, abortion was not illegal at common law.[2] Through the nineteenth century, American common law decisions uniformly reaffirmed that women committed no offense in seeking abortions.[3] 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.[4] 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 common law recognition of this crime against a pregnant woman did not

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[2] *Roe v. Wade*, 410 U.S. 113, 132-36 & n.21 (1973). *See also* J. Mohr, *Abortion in America: The Origins and Evolution of National Policy* 3-19 (1978).

[3] For example, in 1845, Chief Judge Shaw of Massachusetts held that abortion, with the woman's consent, was not punishable at common law unless the fetus was 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).

[4] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 2, at 24-26. In the ordinary language of 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.

diminish the woman's liberty to end a pregnancy herself in its early stages.[5]

Abortion was not a pressing social issue in colonial America, but as a social practice, it was far from unknown.[6] Herbal abortifacients were widely known,[7] and cookbooks and women's diaries of the era contained recipes for such medicines.[8] Recent studies of the work of midwives in the 1700s report cases in which the midwives appeared to have provided women abortifacient compounds. Such treatments do not appear to have been regarded as extraordinary or illicit by those administering them.[9]

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[5] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 2, at 24-26. Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L. Forum 335, 336-53 (1971) demonstrates that commentators who assert that a misdemeanor could be charged against a third party who destroyed a fetus by assaulting a woman late in pregnancy misread the common law precedents upon which they purport 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. *See* A. McLaren, *Reproductive Rituals* 119-121 (1984).

[6] Observers in the seventeenth and eighteenth centuries made repeated references to employment of herbal abortifacients by both single and married women, either self-administered or procured by husbands, male partners or family members. Specific instances are documented in R. Thompson, *Sex in Middlesex: Popular Mores in a Massachusetts County, 1649-1699* 11, 25-26, 42, 47, 51, 78, 107-08, 182-83 (1986); J. Spruill, *Women's Life and Work in the Southern Colonies* 325-326 (1972, orig. pub. 1938); L. Koehler, *A Search for Power: The "Weaker Sex" in Seventeenth-Century New England* 204-205 (1980). *See also* Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 Wm. & Mary Q. 19 (1991) (reporting instance of abortion by use of instrument). *Compare* A. McLaren, *supra* note 5, at 114 and generally at 113-44, reporting widespread evidence of abortifacient use in England during the same era.

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

[8] C. Smith-Rosenberg, *supra* note 3, at 228.

[9] One midwife reported, "She is suffering from obstructions and I prescribed the use of particular herbs." Diary of Martha Moore Ballard, Sept.

(Continued on following page)

The absence of legal condemnation of abortion in colonial America is all the more significant 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 than did married women.[10] The absence of legal condemnation is particularly striking in the New England culture of tightly-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.[11] Further, in an era filled with extensive oral and written moral prescripts from community and religious leaders, it is notable that 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 led to the pregnancy.[12]

(Continued from previous page)

27, 1789, Maine State Manuscript Library. For a discussion of the possibility that this may refer to an administered abortifacient, see L. Ulrich, *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785-1812* 56 (1990).

[10] M. Grossberg, *Governing the Hearth* 159 (1985). *Accord* J. D'Emilio & E. Freedman, *Intimate Matters* 26 (1988) ("Cases of attempted abortion usually involved illicit lovers, not married couples").

[11] Adultery, incest, insubordination by children, and even "living alone not subject to the governance of family life," were condemned by the colonial America criminal law – but 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* 405-07 (R. Baldick trans. 1962). For a more popular, fictional treatment, see N. Hawthorne, *The Scarlet Letter* (1850).

[12] J. D'Emilio & E. Freedman, *supra* note 10, 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."

In the late eighteenth century, strictures on sexual behavior loosened considerably. The incidence of premarital pregnancy rose sharply; by the late eighteenth century, one third of all New England brides were pregnant when they married, compared to less than ten percent in the seventeenth century.[13] Falling birth rates in the 1780s suggest that, at the time of the drafting of the Constitution, the use of birth control and abortion was increasing.[14]

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 practice, despite growing efforts after 1860 to prohibit it.[15] Changing patterns of abortion practice and attitudes towards it can only be understood against the background of dramatic change in American economic and family life during this period.

During the period between ratification of the Constitution and adoption of the Civil War Amendments, Americans

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

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

[15] C. Degler, *At Odds* 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 2, 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 3, at 221.

moved to cities and increasingly worked for wages.[16] In 1787, the average white American woman bore seven children; by the late 1870s, the average was down to fewer than five; by 1900 it was 3.56.[17] Carl Degler calls this decline in fertility "the single most important fact about women and the family in American history."[18]

Urban couples limited family size for economic reasons: 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."[19] Other economic factors were at work in restricting fertility.[20] Middle-class Americans were influenced by changing definitions of the family and of motherhood. As men's work patterns deviated further from those of women, "wife" and "home" became powerful symbols of men's economic security and social standing.[21] Even as women were regarded as agents of reproduction, the expectation that they turn outward into the larger society served as an incentive to limit the number of children they bore. Nineteenth-century women thus faced sharply conflicting

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[16] *See* C. Degler, *supra* note 15.

[17] 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* 73-78 (rev. ed. 1990).

[18] C. Degler, *supra* note 15, at 191.

[19] *See* R. Petchesky, *supra* note 17, at 53; Rodrique, "The Black Community and the Birth Control Movement," in *Passion and Power* 141-42 (K. Peiss & C. Simmons eds. 1989).

[20] 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 17, 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 2, at 100.

[21] Demos, "Images of The American Family, Then and Now," in *Changing Images of the Family* 51, 52 (V. Tufte and B. Myerhoff eds. 1979).

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."[22]

To limit the number of children they bore, women of all classes adopted a range of strategies, including abortion. Through the 1870s abortion was "common," a "matter of fact" and often "safe and successful."[23] The most common methods of abortion in the nineteenth century involved self-administered herbs and devices available from pharmacists.[24] Nonetheless, women also relied on professional abortionists: in 1871, New York City, with a population of less than one million, supported two hundred full-time abortionists, not including doctors who also sometimes performed abortions.[25]

For most of the nineteenth century, abortion was a visible as well as common practice. "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."[26]

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[22] C. Smith-Rosenberg, *supra* note 3, at 225.

[23] L. Gordon, *Woman's Body, Woman's Right* 51-52 (rev. ed. 1990).

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

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

[26] J. Mohr, *supra* note 2, at 47. In the 1860s and 1870s both the popular press and medical journals were full of advice about abortion services. *Id.* at 67-68. *See also* C. Degler, *supra* note 15, at 230.

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

Nineteenth-century allopathic 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. Indeed, between 1850 and 1880, the newly formed American Medical Association, through some of its active members, became the "single most important factor in altering the legal policies toward abortion in this country."[27]

The doctors found an audience for their effort to restrict abortion because they appealed to specific social concerns and anxieties: maternal health, consumer protection, discriminatory ideas about the properly subordinate status of women, and racist/nativist fears generated by the fact that elite Protestant women often sought abortions. Some of those doctors 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.[28] 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 destructive substance"

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[27] J. Mohr, *supra* note 2, at 157. *See also* R. Petchesky, *supra* note 17, at 79; L. Gordon, *supra* note 23, at 59.

[28] 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 2, at 23; *Roe v. Wade*, 410 U.S. at 136-38.

as a means of bringing about an abortion.[29] 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.[30] 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.[31] 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. Before scientific understanding of germ theory and antisepsis, any surgical intervention was likely to be fatal. The New York act finally adopted applied only to surgical abortion and included the first "therapeutic" exception, approving abortion where two physicians agreed that it was "necessary."[32] 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.[33] Because these early abortion laws were drafted and justified to protect women, they did not punish women as parties to an abortion.[34]

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[29] The *Public Statute Laws of the State of Connecticut* 152-53 (1821). *See* J. Mohr, *supra* note 2, at 22. *See also* Quay, *Justifiable Abortion – Medical and Legal Foundations*, 49 Geo. L. J. 395 (1960-61).

[30] Missouri adopted such a statute in 1825, Illinois in 1827, and New York in 1828. *See* J. Mohr, *supra* note 2, at 25-27.

[31] Conn. Stat. Tit. 22, § 14 at 152 (1821), reported by Quay, *supra* note 29, at 453.

[32] *See* N.Y. Rev. Stat., pt. IV, Ch. I, tit. VI, § 21, at 578 (1828-1835), reported by Quay, *supra* note 29, at 499.

[33] *See Roe v. Wade*, 410 U.S. at 148-50; Means, *supra* note 5, at 353-54, 358-59, 382-96.

[34] *Roe v. Wade*, 410 U.S. at 151-52; M. Grossberg, *supra* note 10, at 163-64.

None of these early laws, restricting forms of abortion thought to be particularly unsafe, were enforced.[35] That absence itself speaks powerfully, particularly because abortion was a prevalent practice in this era. Despite legislative action and medical opposition, the common and openly tolerated practice suggests that many Americans did not perceive abortion as morally wrong.[36]

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

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.[37] This is not to deny that some doctors had moral objections to abortion, although their arguments tended to be framed "from the perspective of medical science."[38] But the most significant explanation for the drive by medical doctors to enact statutes regulating abortion is the fact that these doctors were undergoing the historical process of professionalization – the effort to attain control over a specialized body of knowledge.

Medicine was not then the organized, highly regulated profession we know today. It was an occupation in which

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[35] J. Mohr, *supra* note 2, at 39, *citing* A. Wilder, *History of Medicine* 499-511 (1901).

[36] C. Degler, *supra* note 15, 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." *Id.* at 233-34.

[37] J. Mohr, *supra* note 2, at 43.

[38] Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 287 (forthcoming 1992).

conventional and scientifically authoritative modes of practice (allopathic medicine) still contended for stature and authority with other modes, such as botanic medicine, homeopathy, herbalists, midwives and abortionists. Allopathic physicians sought to establish and consolidate professional sovereignty.[39] It was only by mid-century, with the founding of the American Medical Association, that professional sovereignty was tentatively established for "scientific" medicine.[40]

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."[41] As James Mohr explains:

> If a regular doctor refused 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

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[39] *See* P. Starr, *The Social Transformation of American Medicine* (1982).

[40] *See id.*; W. Rothstein, *American Physicians in the Nineteenth Century* (1972). On professionalization, see, for example, G. Geison, ed., *Professions and Professional Ideologies in America* (1983).

[41] Another illustrative chapter is the "medicalization" of childbirth, transforming what had been an affair of family, friends, and midwives into a procedure associated with doctors, hospitals, and sophisticated medical interventions. *See* J. Leavitt, *Brought to Bed: Child-Bearing in America, 1750-1950* (1986); R. Wertz & D. Wertz, *Lying-In: A History of Childbirth in America* (1977); B. Ehrenreich & D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1979); C. Smith-Rosenberg, *supra* note 3, at 231.

> 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.*[42]

To be sure, some "regulars" were morally troubled by abortion, and not all "irregulars" performed them. But issues of medical authority and professional sovereignty 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."[43]

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 in the nineteenth century to restrict access to abortion succeeded for many reasons. Concerns over the dangers of surgical abortion to women were well founded. In addition, physicians persuaded political leaders (who were, of course, uniformly male) that "abortion constituted a threat to social order and to male authority."[44] Since the 1840s, a growing movement for women's suffrage and equality had generated popular fears

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[42] J. Mohr, *supra* note 2, at 37 (citation omitted, emphasis added).

[43] *Id.*

[44] C. Smith-Rosenberg, *supra* note 3, at 235.

that women were departing from a purely maternal role[45] – fears fueled by the decline in family size during the nineteenth century. A central rhetorical focus of the woman's movement was framed by a new perception of women as the rightful possessors of their own bodies.[46]

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 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.[47]

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[45] From the 1840s on, the moral fervor of the abolitionist cause drew Northern women more deeply into public life than ever before in the nation's history. 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. *See* E. Flexner, *Century of Struggle* ch. 13 (rev. ed. 1975).

[46] M. Ryan, *Cradle of the Middle Class* 155-57 (1983); Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. Am. Hist. 836 (1987).

[47] 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 3, 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.

The nineteenth-century American Medical Association's view of women is strikingly similar to that adopted by Justice Bradley in 1873, 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."[48] This Court has now come to see this view as part of our "long and unfortunate history of sex discrimination," and as constitutionally illegitimate.[49]

This vision of woman-as-reproductive-vessel was expressed in a range of legal restrictions that enforced a married woman's dependence on her husband. Under the common law, indeed well into this century, a married woman's body and reproductive capacity were subjected to her husband's control.[50] Common law provided the husband a remedy for interference with his right to sole possession of his wife's body and services. The early writ of "ravishment" listed the wife with the husband's chattels. Until recent years, the action for criminal conversation allowed the husband to maintain an action for trespass, not only when his wife was raped, but even when the wife had consented to extramarital sexual relations, "since it was considered that she was not more capable of giving a consent which would prejudice the

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[48] *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

[49] *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). In *United Automobile Workers v. Johnson Controls*, 111 S.Ct. 1196 (1991), this Court struck down a sex-specific fetal-protection policy, noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal economic opportunities." *Id.* at 1210.

[50] For the classic statement of the theory of "coverture" followed in the United States, see 1 W. Blackstone, Commentaries *442. On the legal disabilities associated with coverture, see M. Abramowitz, *Regulating the Lives of Women* 54 (1988); Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L. J. 1359, 1366 (1983); E. Pleck, *Domestic Tyranny* 88 (1987); Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255, 1256 (1986).

husband's interests than was his horse."[51] At common law a husband could sue a third party for rendering aid to his wife without his permission – a privilege that strikingly resembles the cause of action conferred upon unconsulted husbands against doctors by the Pennsylvania law at issue in this case.

By the middle of the nineteenth century, such privileges were widely regarded as corrupt and illegitimate impositions of domestic slavery – and not just by women's rights activists. In 1864, for example, the New York Court of Appeals overturned a common law rule allowing a husband to sue for "enticement" any person who helped his wife to leave him, stating: "[A married woman may] invoke and receive aid, shelter and protection from others, even strangers, against the oppression and cruelty of her husband," even if the wife was acting directly contrary to her husband's wishes. "[A stranger] may in such a case treat the wife as a person, an individual entitled to credit, and invested with the rights and claims of, and upon, our common humanity."[52]

Against what they saw as an inequitable vision of gender relations, the women's movement of the nineteenth century affirmed that women – even married women – should have basic rights of self-governance, including the right to decide whether to bear a child. Early feminists sought to enhance women's control of reproduction through a campaign for "voluntary motherhood," ideally to be achieved through periodic abstinence from sexual relations.[53] They attempted, with

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[51] W. Prosser, *Law of Torts* 877 (3d ed. 1971).

[52] *Barnes v. Allen*, 1 Keyes 390, 392 (N.Y. 1864) (neighbor who provided wagon ride to wife from her husband's house to her father's house not liable to husband).

[53] *See* L. Gordon, *supra* note 23, at 93-113. During this period, much scientific and folk wisdom held a flatly inaccurate view of the cycle of female fertility, which made periodic abstinence an unreliable form of contraception. *Id.* at 99. This inaccurate belief, when viewed in light of hard data on declining birthrates, *see* text at notes 17-19 *supra*, underscore how common abortion must have been.

limited success, to analogize women's control over reproduction to the structure of rights that had overturned chattel slavery. Indeed, it was precisely women's outrage at their sexual subordination that led some feminists to oppose abortion – not on moral grounds, but as an object example of women's victimization at the hands of men.[54] The recently adopted Reconstruction Amendments were a central text in the opposition of women's rights advocates to the social and legal covenants binding women to the marital relation.

Opposition to abortion and contraception were closely linked,[55] and can only be understood as a reaction to the uncertainties generated by changes in family function and anxieties created by women's challenges to their historic roles of silence and subservience. These challenges were critical factors motivating the all-male state legislatures that adopted restraints on women, including restrictions on abortion.[56] In opposition 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[57] restricted not only medical information on abortion and contraception, such as a medical text on

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[54] L. Gordon, *supra* note 23, at 108; Siegel, *supra* note 38, at 304-308; Gordon, "Why Nineteenth Century Feminists Did Not Support 'Birth Control' and Twentieth Century Feminists Do," in *Rethinking the Family* 40, 43 (B. Thorne & M. Yalom eds. 1982).

[55] "Anthony Comstock had labeled as abortionists everyone who advocated or dealt in family-limitation materials and services." M. Grossberg, *supra* note 10, at 193.

[56] C. Smith-Rosenberg, *supra* note 3, at 218.

[57] 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).

physiology written by an eminent Harvard scientist, but also literary depictions, such as Leo Tolstoy's disapproving tale of infidelity, *The Kreutzer Sonata*, and moral literature, including a pamphlet urging total sexual chastity.[58]

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

Nativism, notably anti-Catholicism, had been part of American politics and culture as early as the Jacksonian period. The Civil War and Reconstruction Era dramatically raised social fears about national identity and citizenship. Social conservatives in the 1850s articulated an "organicist" ideal in which social unity should predominate over diversity. By the 1870s social thought was turning the insights of Charles Darwin toward racist ends. The political ideology of "free labor," forged in the nascent Republican Party in the years preceding the Civil War,[59] was severely challenged by an influx of foreign labor in the latter part of the nineteenth century.[60] The discriminatory immigration policies and nativist fears of the late nineteenth and early twentieth centuries fanned movements against women's reproductive freedom.

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

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[58] *See* M. Grossberg, *supra* note 10, at 190; *United States v. Foote*, 25 Fed. Cas. 1140, 1141 (S.D.N.Y. 1876) (rejecting claim that physicians should have right to distribute information concerning contraceptives); L. Gordon, *supra* note 23, at 164-66.

[59] E. Foner, *Free Soil, Free Labor, Free Men* (1970).

[60] D. Davis, *From Homicide to Slavery* 137-54 (1986). *See also* S. Lipset & E. Raab, *The Politics of Unreason* (1970); G. Frederickson, *The Inner Civil War* (1965); R. Hofstadter, *Social Darwinism in American Thought* (1955); J. Higham, *Strangers in the Land* (1963).

suicide."[61] 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.[62] Anxiety over the falling birth rates of Protestant whites in comparison with other groups helped shape policy governing both birth control and abortion.[63] 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."[64]

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[61] *See* L. Gordon, *supra* note 23, at 133-55. 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.

[62] *See* C. Degler, *supra* note 15, 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 20-34 was over twice that of native white women, *id.* at 134, raising concerns about disparities in relative population growth. *See also* Weisbrod, *Birth Control and the Black American: A Matter of Genocide?*, 10 Demography 571 (1973).

[63] J. Reed, *From Private Vice to Public Virtue* (1978); D. Kevles, *In the Name of Eugenics* (1985); D. Kennedy, *Birth Control in America* (1971).

[64] *See* J. Mohr, *supra* note 2, at 167. Horatio Robinson Storer, who spearheaded the American Medical Association's mid-nineteenth century anti-abortion campaign, frequently referred to racial themes. *Id.* at 180-90; H. Storer, *Why Not? A Book for Every Woman* 85 (1866) ("[S]hall the great territories of the Far West be filled by our children or by those of aliens?"). Carl Degler also documents that physicians of the 1850s and 1860s expressed particular concern that abortion was increasingly sought by married women of "high repute." C. Degler, *supra* note 15, at 229.

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

The statutory restrictions on abortion remained virtually unchanged from the early twentieth century 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.[65] Most abortions were performed illegally.[66] Legal restrictions did not stop abortion, but made it humiliating and dangerous.

The dangers of illegal abortion were exacerbated by law enforcement abuse. Leslie Reagan's study of the regime of criminalized abortion in Chicago in the late nineteenth and early twentieth centuries chronicles the inevitable abuses of police and prosecutorial power that attended efforts to enforce restrictive abortion laws. As Reagan notes, "Popular tolerance of abortion tempered enforcement of the criminal abortion laws. Prosecutors discovered early the difficulty of winning convictions in criminal abortion cases. Juries nullified the law and regularly acquitted abortionists."[67] Faced with these

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

[66] *See* K. Luker, *Abortion and the Politics of Motherhood* 38-54 (1984).

[67] Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940*, 77 J. Am. Hist. 1240, 1247 (1991). *See generally* L. Reagan, *When Abortion Was a Crime*, Ph.D. dissertation, University of Wisconsin-Madison, 1991.

obstacles, prosecutors routinely resorted to enforcement tactics that were at best questionable and at worst grotesque: They extracted "dying declarations" in hospitals from women dying from poorly administered abortions in order to secure evidence needed to prosecute abortionists.

This practice not only subjected dying women to cruel and humiliating interrogations; it also drew reluctant doctors into the web of criminal investigation and encouraged doctors to violate patient confidences in exchange for their own exculpation. A doctor who tried to save the life of a woman dying from an abortion could himself be subjected to harassment or even criminal prosecution as an accessory. But if he managed to secure a "dying declaration" from the woman that named the abortionist, the doctor might hope to perform his medical duties without fear of prosecution. Some doctors, of course, rebelled against a regime that required them to harass sick and dying women. "The business of the doctor is to relieve pain, cure disease and save life, not to act as a bloodhound [for] the state," one Illinois doctor protested in 1933.[68] But such practices seemed inevitable if the laws against abortion were to be enforced in a climate of tolerance for routine violation of those laws.

When advances in medical science in the 1930s and 1940s reduced the number of deaths due to improperly administered abortions, Chicago authorities shifted their enforcement strategy from securing "dying declarations" to more direct but equally coercive means of securing convictions. The 1947 investigation and prosecution of Chicago midwife Helen Stanko, for instance, was replete with instances of forced gynecological examinations and humiliating interrogations of Stanko's patients.[69] The aggressive efforts of Chicago police in the 1940s to enforce criminal statutes that reached

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[68] L. Reagan, *When Abortion Was A Crime*, *supra* note 67, at 180-81.

[69] *Id.* at 277-83. *See People v. Stanko*, 402 Ill. 558 (1949); *People v. Stanko*, 407 Ill. 624 (1951).

into the heart of women's intimate lives and medical relationships led inexorably to law enforcement practices that in retrospect seem medieval.

In the first half of the twentieth century, a two-tiered abortion system emerged in which quality of medical care depended on the class, race, age and residence of the woman. Poor and rural women obtained illegal abortions performed by people (including some physicians) willing to defy the law out of sympathy for the woman or for the fee. More privileged women pressed private physicians for legal abortions and many obtained them. Some doctors could be persuaded that a delivery would endanger a woman's health. The dilation and curettage procedure effective for abortion was indicated for numerous other gynecological health problems, allowing the word "abortion" to remain unspoken between patient and doctor – even as the procedure went forward.[70]

Shifts in the definition of "therapeutic" abortion responded to larger social forces.[71] Early in the century, "race suicide" fears fueled efforts to suppress both abortion and birth control. During the Depression, abortions increased as the medical profession recognized impoverishment as an indication for therapeutic abortion.[72] In the 1940s and 1950s the definition of therapeutic abortion expanded to include psychiatric indications.[73] Physicians were caught in a double bind: abortion was criminal, but the reasons women sought the

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[70] *See generally* K. Luker, *supra* note 66.

[71] L. Reagan, *When Abortion Was a Crime*, *supra* note 67, at 284-312.

[72] 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).

[73] K. Luker, *supra* note 66, at 45-47, 54-57.

procedure were so multiple and compelling that doctors found requests for abortion difficult to resist.[74]

In the 1950s, more restrictive attitudes toward both legal and illegal abortions[75] were part of a conservative response to growing female labor-force participation and independence.[76] The movement to legalize abortion in the 1960s arose in response to this rather brief wave of anti-abortion enforcement. Physicians, particularly those who worked in public hospitals and clinics, saw women who needlessly suffered and died as a consequence of illegal abortions.[77] Others were disturbed that most of those women were poor and Black. Many were distressed by the class bias inherent in the psychiatric indications for therapeutic abortions.[78] In the late 1960s, concerned physicians were joined by women who had come to understand that control of reproductive capacity is at the heart of women's self-governance and moral personhood.[79]

As a number of states acted to legalize abortion in the late 1960s and early 1970s, there was pressure for recognition of constitutional protection for the basic right of abortion choice. Class and regional differentiations were accentuated as it became possible for women with resources to travel to

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[74] For example, Luker, *id.*, discusses the early 1960s scare over the fertility drug Thalidomide, which caused crippling fetal deformities. The scare underlined the inadequacy of a narrow definition of therapeutic indications for abortion: American women carrying severely deformed fetuses were forced either to carry to term or to travel overseas to find abortion access. *Id.* at 62-65 (case of Sherri Finkbine).

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

[76] M. Ryan, ed., *Womanhood in America* 198-215 (1975); R. Baxandall, L. Gordon & S. Reverby, eds., *America's Working Women* 299-308 (1976).

[77] *See, e.g.*, Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 Ia. L. Rev. 915, 924-927 (1990) (impetus for Connecticut doctors' campaign in 1940s-1960s to legalize birth control in the state was threat to life and health of married women from medically-dangerous pregnancies).

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

[79] K. Luker, *supra* note 66, at 92-125.

states where abortion had been made legal. In its 1973 decision in *Roe v. Wade*, this Court responded to these forces in holding that constitutional rights of liberty and privacy protect the right of the woman and her physician to choose abortion.

VI. EMPHASIS ON THE FETUS BECAME CENTRAL TO CULTURAL AND LEGAL DEBATE OVER ABORTION 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.[80] Yet until the late twentieth century, this concern was always subsidiary to more mundane social visions and anxieties. The mid-nineteenth century physicians' campaign against abortion was directed at botanic medicine and homeopathy, as well as at abortion. Similarly, those who opposed abortion and birth control as a means of preventing "race suicide" sought to protect the privilege of elite white Protestants, not to protect the racially mixed universe of fetuses.

It is significant that there was virtually no religious support for the nineteenth-century physicians' campaign to bar abortion.[81] Physicians tried hard to enlist moral authority

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[80] *See* J. Mohr, *supra* note 2, at 165-66.

[81] 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." *Id.* 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 of interference

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and organized 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."[82]

Further, the limited support offered physicians from Protestant religious leaders appeared to reflect "worr[y] about falling birth-rates among their adherents [more] than . . . the morality of abortion itself."[83] Compared to extensive religious involvement in other nineteenth-century movements for changing social morality, such as temperance, the conspicuous absence of religious support for the physicians' anti-abortion crusade is particularly striking.[84]

Nineteenth-century laws restricting access to abortion did not define the fetus as a human being, nor did courts treat fetuses as legal rights-bearers. 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."[85] Michael Grossberg summarizes the nineteenth-century cases, saying, "[A] fetus enjoyed rights only in property

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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.

[82] *Id.* at 184.

[83] *Id.* at 195.

[84] *Id.* at 182-96; R. Petchesky, *supra* note 17, at 80.

[85] *Cooper v. State*, 22 N.J.L. (2 Zab.) 52, 56-57 (1849) (emphasis in the original), discussed in M. Grossberg, *supra* note 10, at 165.

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."[86] An important illustration lies in Judith Walzer Leavitt's analysis of turn-of-the-century medical decisions about the procedure of craniotomy (a surgical mutilation of the live fetal head to permit vaginal extraction). Leavitt's research shows that the majority of physicians, confronted with a woman whose pelvis was too small to permit delivery, thought craniotomy (which killed the fully-formed fetus) more appropriate than a Caesarean section (with its high risk to the woman) – a revealing comment on the prevailing hierarchy of values.[87]

As this Court observed in *Roe v. Wade*, the pattern of American abortion laws does not support the view that such laws 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 when and if abortion is justified, rebut the assumption that laws against abortion reflect simply a belief in fetal personhood.

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. But this Court should reject state efforts to invoke the protection of fetal life to justify restrictions upon women's access to abortion.

As this brief has demonstrated, the complex historic grounds originally asserted for restricting access to abortion are now either socially irrelevant or recognized as constitutionally illegitimate. Both culturally and legally, it is today

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[86] M. Grossberg, *supra* note 10, at 165.

[87] *See* Leavitt, *The Growth of Medical Authority: Technology and Morals in Turn-of-the-Century Obstetrics*, 1 Med. Anthropology Q. 230, 233-35 (1987).

impossible to defend abortion restrictions as a means of enforcing an absolutist religious belief that intimate relations must always remain open to the possibility of procreation.[88] Similarly, abortion restrictions cannot be justified by the desire to keep women in traditional roles.[89] Likewise, our social consensus, 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 Protestant stock or of diminishing the population of racial or religious minorities. History should make us skeptical, however, of the notion that basic conflicts underlying these earlier social purposes have disappeared as motive forces for the regulation of abortion, to be entirely displaced by moral concern for the protection of unborn life. Sufficient refutation of this notion lies in the "spousal notification" provision of the Pennsylvania law at issue in this case.[90] In historical terms, the spousal notification requirement rests upon and reanimates the traditional notion that married women's bodies, lives and will are submerged in their husband's.[91] That "long and unfortunate history" of the subordination of women has now been firmly – and properly – rejected by this Court.[92]

The extensive factual record developed at trial amply demonstrates that the restrictions of the Pennsylvania law

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[88] *See Griswold v. Connecticut, supra*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[89] Gender-based classifications must be "free of fixed notions concerning the roles and abilities of males and females." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). *Accord Orr v. Orr*, 440 U.S. 268 (1979); *Stanton v. Stanton*, 421 U.S. 7 (1975).

[90] The Circuit Court of Appeals, while concluding that this Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), compelled it to approve most of the restrictions of the Pennsylvania law, held that the spousal notification requirement constitutes an undue burden on women's ability to choose abortion, not narrowly tailored to serve a compelling state interest. *Planned Parenthood v. Casey*, 947 F.2d 683, 711-715 (3d.Cir. 1991).

[91] *Supra* note 50.

[92] *Supra* note 49.

impose heavy burdens and costs on women's ability to choose whether to bear a child, and that these burdens fall most heavily on the most vulnerable women. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F.Supp. 1323, 1329-72 (E.D.Pa. 1990). Similarly, history vividly establishes that the single most obvious and inevitable result of such onerous restrictions is their devastating consequences for the health and autonomy of women.

CONCLUSION

The judgment of the Court of Appeals regarding the spousal notification requirement should be affirmed and the judgment regarding the other provisions of the Pennsylvania act should be reversed. The Court should reaffirm that the Constitution prohibits the state from unduly burdening women's powerful liberty and equality interests in controlling their own bodies and lives.

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