Q. What were you thinking that you would have had to do if welfare had not paid for your abortion?
A. Well, when you are in such a situation, you ... do crazy things really, you know, even though you do not have the right to do it or anything. I would have probably done something very dumb.

Q. What would you have done?
A. You know, in Columbia, people do a lot of dumb things that I know. I probably would have. I know people who does this. I would have done it. I could have grabbed a handle and make a wire and put it over there and do something.

Q. You would have tried to abort yourself?
A. I would have done it, yes. I would have tried. I don't know. Because you have to do something if it was going to be a torment. I was not physically ready to have a baby. And, it was going to be a big, big, problem. I don't know how I would have handled it, but I would have done something real bad. [FN1]

*100 I. Introduction

A central premise of my work has been that reproductive freedom cases should be decided from a gender-based equality perspective rather than from a privacy perspective, because privacy doctrine has been essentialist in that it has not been able to protect the most disadvantaged women in society. [FN2] Surprisingly little has been written about what an equality perspective would look like in the area of reproductive freedom. Moreover, little of this writing is consciously antiessentialist. In this essay, I will survey the existing literature on equality theory and reproductive freedom and then suggest a new direction for the development of a reproductive freedom equality theory which will be sensitive to the antiessentialist critique. A new, antiessentialist, equality-based rationale for reproductive freedom would constitute a vast improvement over the current case law in the area of reproductive freedom.

The federal courts have virtually never applied gender-based equality doctrine to reproductive freedom cases. In Planned Parenthood of Southeastern Pennsylvania v. Casey, [FN3] Justice Blackmun furnishes the first mention of gender-based equality theory in a Supreme Court reproductive freedom case:

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption--that women can simply be forced to accept the "natural" status and incidents of motherhood--appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.... The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution." [FN4]
Blackmun's summary of equality theory is sketchy. I will focus on one defect in his analysis--that he does not respond to the existing pregnancy-based equality case law. In particular, he does not try to confront Geduldig v. Aiello, [FN5] in which the Supreme Court ruled that pregnancy-based discrimination is not per se gender-based discrimination. Blackmun does not cite Geduldig, much less attempt to distinguish it.

Blackmun does refer, however, to some legal scholarship on equality theory in the abortion context. This scholarship merits examination to see if it does a better job than Blackmun of distinguishing Geduldig and offering a comprehensive explanation for why pregnancy-based discrimination should be viewed as gender-based discrimination. Blackmun cites Cass Sunstein's article in the Columbia Law Review [FN6] and Laurence Tribe's treatise on American Constitutional Law [FN7] in his discussion of the equality argument. Interestingly, aside from Reva Siegel's article in the Stanford Law Review, [FN8] Blackmun fails to discuss any of the feminist writings on this subject, including Sylvia Law's early article in the Pennsylvania Law Review [FN9] and Ruth Bader Ginsburg's article in the North Carolina Law Review, [FN10] both of which argue forcefully that pregnancy-based discrimination is gender-based discrimination. [FN11] These feminist *102 writings on the subject would have provided a much stronger foundation for Blackmun's argument.

II. The Academic Commentary

A. Cass Sunstein

Justice Blackmun's opinion in Casey relies heavily on Cass Sunstein's article, Neutrality in Constitutional Law. [FN12] Sunstein attempts, however, to address what Blackmun ignores in his opinion: he would dismiss discussion of Geduldig by saying that it is not useful to inquire about "pregnant men." He argues that such counterfactual questions are not helpful or relevant because they rely on changing one part of reality while keeping the rest the same. [FN13] Such a transformation in men's abilities would change fundamentally all of reality, according to Sunstein. [FN14] In addition, he argues, the question is somewhat meaningless because, if men could get pregnant that they would not be men (as the capability to become pregnant is the basis of our sex-based classification system). [FN15] Rather than respond to the problem of having little evidence about how society might treat "pregnant men," Sunstein simply "fights the hypo."

Sunstein's concededly accurate observation that it is not plausible for men to become pregnant and for society to maintain its current structure does not compel the conclusion that the counterfactual question is entirely useless. The usefulness stems from practical rather than theoretical considerations. It is helpful, I believe, for us to explore the situations in which men and women are similarly situated in the reproductive health context to uncover society's systematic valuation of men's well-being over women's well-being. As I argue below, Sunstein overemphasizes the distinctiveness of pregnancy to make his point--as do some courts. Unlike Sunstein, however, when courts overemphasize the distinctiveness of pregnancy, they often do so to deny women rights in the reproductive health context. [FN16] Because Sunstein's point can be used so easily to refute equality-based arguments, I suggest that we should welcome the opportunity to discuss situations in which men are "almost pregnant" in order to demonstrate how much better these men are treated than similarly *103 situated women. Equality theory should not prevent us from engaging in such an inquiry if it is to be useful.

B. Laurence Tribe

Laurence Tribe offers an equality theory that does purport to distinguish Geduldig, [FN17] but it still suffers from major problems. Tribe tries to use some of the insights of relational feminism to make his argument [FN18] and, therefore, suffers from some of the essentialism that is inherent in that branch of feminist theory. [FN19] In his treatise, Tribe describes the abortion issue as embedded in relational concerns--"those between women and men, and between pregnant women and the fetuses they carry." [FN20] Unfortunately, he tends to see the class of pregnant women as monolithic, without exploring the

variety of responses that women have to their pregnancies. Tribe argues that restrictions on abortion require "women to sacrifice their liberty in order to ... create lifelong attachments and burdens." His use of statistics in this way, however, is very misleading in terms of the realities of women's lives. Both married and unmarried women often become pregnant unintentionally yet choose to give birth because their unintended pregnancies become wanted pregnancies. Tribe's analysis is insensitive to the range of responses that women have to an unintended pregnancy; not all of those pregnancies are carried to term due to coercion. Tribe's problem is one that is intrinsic to relational feminism--he wants to describe all women monolithically rather than confront the variations in women's lives. It is certainly reasonable to argue that women should be able to choose abortions because unintended pregnancies are also sometimes unwanted pregnancies, but there is no need to ignore the fact that for many women unintended pregnancies become wanted pregnancies. We need to respect the lives of both sets of women by making genuine choice possible, so that women have the financial resources to afford abortions as well as the financial resources to afford childbirth and motherhood. By treating women monolithically, Tribe does not present arguments that will effectively motivate the public to respect all pregnant women's lives.

Tribe's more recent writings on abortion are somewhat less essentialist. He nonetheless uses a narrow prochoice perspective which looks at abortion rights in isolation from reproductive health and women's lives in his book, Abortion: The Clash of Absolutes. The purpose of Tribe's book is to examine the highly rhetorical abortion rights debate to see if there is any common ground on abortion. He examines proposed areas for compromise, such as waiting period rules and parental consent, and concludes that these purported areas of compromise are not really compromises at all, because they would take away abortion rights for certain groups of women. His recognition of this disproportionate impact is an important antiessentialist insight that was missing from his prior work. Nevertheless, in searching for common ground, Tribe starts from a very narrow premise regarding the concerns of the prochoice movement--that it simply wants to make abortion more accessible to women who face unwanted pregnancies. His discussion is focused almost entirely on the choices available to women after they have already experienced an unwanted pregnancy. By starting at that point, and focusing very heavily on the possibilities of medical technology, Tribe entirely forgoes a discussion of the social conditions that force some women to conclude that they cannot afford to carry the fetus to term and others to experience an unintended pregnancy resulting from rape or sexual abuse. Tribe sees the existence of unwanted pregnancies as a given, not as a problem linked to the abortion issue. Writings by women of color on the abortion issue, however, have repeatedly emphasized that it is important that we look at reproductive freedom in the entire context of women's lives so that arguments for abortion rights are not simply a subterfuge to compel poor and minority women not to bear children. Given the history of sterilization abuse that has existed in this country, it is essential that prochoice arguments be developed in as broad a framework as possible. By accepting unintended pregnancies as a given, and by relying heavily on the possibilities of expensive medical technology which is unlikely to ever be available to poor women, Tribe makes an argument that is based on the lives of privileged rather than disadvantaged women.

Unlike Sunstein, however, Tribe makes a modest attempt to compare men and women with respect to the burdens imposed upon women by society through compulsory childbirth. He argues, for example, that "the law nowhere forces men to devote their bodies and restructure their lives even in those tragic situations (such as organ transplants) where nothing less will permit their children to survive." Nevertheless, Tribe recognizes that there are no perfect analogies between pregnant women and nonpregnant men. For instance, whereas men are not required to take affirmative steps to save a fetus, Tribe observes that a pregnant woman is not being asked to take affirmative steps to save a fetal life; instead, she is being asked to refrain from extinguishing life. Tribe responds to the lack of a perfect analogy by noting that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." It should be sufficient to prove discrimination, he argues, to note that the state is indifferent to the "biological reality that sometimes requires
women, but never men, to resort to abortion if they are to avoid pregnancy and retain control of their own bodies.” [FN34] He not only argues that the state is indifferent but also observes, citing Ruth Bader Ginsburg, that the state exploits this special vulnerability to reinforce women's subordination in society. [FN35] He argues that one can find proof of this intent to subordinate by examining early antiabortion laws, enacted in the late nineteenth century to keep women in their place. [FN36]

In response to arguments about the fetus' vulnerability and dependence, Tribe notes that the relationship of woman and fetus is unique. He argues that, until the fetus is viable, "only the pregnant woman can respond to and support her fetus' 'right' to life." [FN37] Thus, he argues that the state of medical technology is a relevant moral and constitutional fact. Tribe contends that, as technology enhances the point at which a pregnant woman can be relieved of the "burden of her pregnancy and transfer nurture of the fetus to other hands, the state's power to protect fetal life expands--as it should." [FN38]

Although Tribe makes some important and intriguing observations, he does not really attempt to deal with the equality-based case law in the area of reproduction. Despite his fondness for extensive footnoting, he never mentions Geduldig. His argument that restrictions on reproduction are an attempt by society to perpetuate women's subordination is based on an historical argument that is not relevant to many contemporary restrictions on abortion. For example, waiting period requirements impose substantial burdens on women who fear physical abuse from their partners. Those restrictions, which are becoming increasingly common, are quite modern. Despite the enormous burdens that they will impose on some women's lives, they cannot be invalidated under Tribe's historical analysis.

Finally, Tribe's reference to the moral significance of viability makes little sense in the lives of women. One could easily reverse Tribe's argument by saying that a woman only has a responsibility to maintain her pregnancy until the fetus is viable; at the point of viability, she can choose to abort it, and the state can decide whether it wants to take steps to maintain the fetus' life. In other words, Tribe's "moral" solution leaves women, rather than the state, with all of the responsibilities to maintain a fetus' life, both before and after viability. The fact of viability does not answer the moral question of who should take responsibility for maintaining that viability.

I would suggest, in contrast, that the state should never be able to impose all of the responsibility of sustaining fetal life (and born children) on women, because those burdens are enormous. Thus, a state may not pass all of those burdens on to women by regulating abortion when it is not willing to offer free prenatal care, paid pregnancy leave, free child care, and compensation for the physical burdens of pregnancy. Rather than look historically at why a state chose to criminalize abortions, I believe that we should look at contemporary society and the state legislatures to see how insincere the state has been when it says that it values prenatal life or children. Why is the United States the only industrialized country without any paid or even, until recently, unpaid pregnancy leave? How can a society that is so willing to impose the costs of waiting period rules on disadvantaged women legitimately say that it would be too expensive to impose the costs of maternity leave on employers? Why are the states that refuse to increase funding for women and children under Medicaid also the states that restrict abortions substantially? [FN39] Interestingly, under the Clinton-Gore administration, we probably can expect the state to provide more services for pregnant women and their children, while also liberalizing abortion law. Only by asking questions such as these and looking at the larger picture--funding of services for pregnant women and their children as well as restrictions on abortion--can one ascertain whether the state respects women's lives. Although Tribe sees the historical picture, he misses the contemporary picture and provides an argument against abortion restrictions that is not relevant to the modern restrictions that states have recently imposed on women.

By contrast, Reva Siegel, whose theories I will discuss below, does an excellent job of collecting evidence that shows contemporary society's failure to value the lives of pregnant women and mothers. [FN40] She points to the following three probative examples: (1) President Bush's veto of the Family and Medical Leave Act, which would have provided parents with
unpaid leave after the birth or adoption of a child; (2) our failure to provide prenatal care to pregnant women who lack health insurance, a factor contributing to our extremely high infant mortality rate; and (3) the fact that more than one-half of the children living in female-headed households are born into poverty. [FN41] Those contemporary facts are much more probative of state legislatures' attitudes about women and children than historical evidence from the nineteenth century. Moreover, she lists in detail all of the burdens of pregnancy and motherhood--burdens that our society takes for granted instead of respecting or compensating. [FN42] Neither Tribe, nor Justice Blackmun in his Casey opinion, discuss any of these contemporary facts or examples.

III. The Feminist Commentary

A. Reva Siegel

Reva Siegel has offered the most comprehensive equal protection analysis of abortion regulations of any of the law review commentators cited by the Supreme Court, although Blackmun incorporated little of her analysis into his opinion. [FN43] Nevertheless, Siegel glosses over the key doctrinal hurdle, Geduldig v. Aiello. [FN44] She blithely states at the outset of her analysis:

I assume, as most commentators have, that when the Court revisits Geduldig v. Aiello, it should modify it to accord with the common social understanding and the amended terms of the Civil Rights Act of 1964, that regulation concerning women's capacity to gestate categorically differentiates on the basis of sex, and so is facially sex-based. [FN45]

In a footnote, she supports her view that Geduldig was wrongly decided: evidence of the sex-based character of abortion regulations lies in the fact that the state does nothing to regulate the conduct of men in order to avoid the need for abortions; instead, it only regulates the conduct of women who desire abortions. [FN46]

In addition, Siegel argues that laws restricting abortions shape "the social horizons of every woman who believes herself capable of becoming pregnant. Thus, for reasons physiological and social, such regulation affects women's lives in ways it simply cannot affect men's." [FN47] Finally, she argues that legislatures "are not interested in regulating the conduct of men except insofar as men are instrumental in effectuating women's decisions respecting abortion." [FN48] How could we expect legislatures to regulate men's lives in ways that would be more parallel to the ways that they regulate women's lives? And, if legislatures regulated men's lives more, would that make restrictions on women constitutional or not sex-based? Unfortunately, Siegel doesn't answer those questions and therefore does not provide us with strong arguments to demonstrate to the Court that Geduldig was wrongly decided.

Like Tribe, Siegel relies on an historical argument to show that abortion restrictions have the purpose of confining women to maternal roles in society. [FN49] She recognizes, however, that "[i]t may be claimed that the gender code informing the nineteenth century campaign was a product of its era, and that today a legislature might restrict access to abortion to protect the unborn without entertaining any similar assumptions about women." [FN50] Although she recognizes that history alone cannot refute that assertion, she argues that the "historical record supplies strong evidence that this argument should not be readily credited." [FN51]

Not relying entirely on a historical argument, Siegel suggests that contemporary abortion statutes are still used to subordinate women and uses the state of Louisiana as an example. [FN52] She examines public opinion polls in which seventy-nine percent of Louisiana's residents reported that they were opposed to abortion "when childbirth might interrupt the woman's career." The poll reported, however, that residents favored the choice of abortion in the case of rape or incest, when the child is likely to have serious birth defects, and when childbirth might endanger a woman's physical or mental health. [FN53] Siegel uses this evidence to argue that opposition to abortion "reflected a judgment ... [that] women's pursuit of career oppor-
tunities [is] in conflict with the maternal role.” [FN54]

Nevertheless, she does not use some of the best available evidence of the Louisiana Legislature’s intent. These public opinion polls did not reflect the actual actions taken by the Louisiana Legislature. The legislature rejected a physical or mental health exception, an HIV exception, an amendment that would have conditioned passage on expanding Medicaid eligibility to 185 percent of the federal poverty income guidelines, and an amendment that would have removed the imposition of capital punishment for the commission of any criminal offense. [FN55] It never seriously considered any other “good cause” exception such as interference with a woman’s career. [FN56] I believe that these rejected amendments were the best available evidence of the legislature’s intent: it wanted to restrict abortion in the way that would impose the maximum harm on the lives of poor women. Accordingly, the legislature rejected all amendments that would have mitigated the impact of the restrictions. Most likely, the legislature did want middle-class women to undergo compulsory childbirth, but it also wanted poor women to forego sexual activity or become sterilized at State expense, rather than bear more children. Thus, Louisiana did nothing to lessen the financial impact on poor women of bearing additional children, while also refusing to fund abortions for them. By failing to apply an antiessentialist perspective, it is easy to miss the disparate impact that this statute would have on women depending on their *111 economic class.

Outside of the context of the Louisiana statute, Siegel recognizes the importance of contemporary evidence of legislative intent, although she does not describe it in class-based terms. Examining Utah’s failure to assist pregnant women and mothers, Siegel comments:

Here the state’s choice of sex-based, coercive means suggests that it is interested in controlling and/or punishing women who resist motherhood: It will promote the welfare of the unborn only when it can use women’s bodies and lives to realize the potential of unborn life—and not when the community as a whole would have to bear the costs of its moral preferences. [FN57]

Apparently, the same sentiment prevails in Louisiana.

A more substantial problem with Siegel’s argument is that it is not likely to be useful in fighting the abortion statutes of the 1990s. In light of the Casey decision, statutes criminalizing nearly all abortions are not likely to be the battleground in this decade. [FN58] Instead, states are more likely to impose waiting period rules, testing requirements, hospitalization requirements, and “informed consent” requirements. Each of these requirements will raise the cost of abortion and, in some cases, will increase the risk of loss of confidentiality. In many cases, states may justify these requirements by arguing that they are beneficial for the pregnant woman as well as her fetus, because they improve her deliberation process or increase the safety of the procedure. These justifications are very different from the ones considered by Siegel, but they are justifications that we must respond to if we are to defeat modern state restrictions on abortion. By focusing so heavily on the nineteenth century, Siegel has lost sight of our challenges in the twentieth century.

B. Sylvia Law

In contrast to the commentators discussed above, Sylvia Law squarely confronts the role of reproductive biology in perpetuating women’s subordination in society. She criticizes the presumption that sex-based differences are always insignificant. [FN59] She cautions, however, that we need to be careful about creating a legal order that recognizes sex *112 differences between men and women, because that legal order may perpetuate stereotypes about the differences between men and women instead of focusing on real differences. [FN60] She argues that feminists should hold a vision of equality that considers “the appropriate function of the law.” [FN61] This vision would be one in which the law does not attempt “to enforce a general vision of what men and women are really like, but rather ... respect[s] each person’s authority to define herself or himself, free from sex-defined legal constraints.” [FN62] Law provides a strong indictment of Geduldig, noting that even the principal pro-
ponents of its result believe the Court was wrong to conclude that the challenged distinction was not sex-based. [FN63] She argues that:

It is not easy to reconcile the ideal of sex-based equality with the reality of categorical biological difference, but the difficulty is not overcome by denying that laws governing reproductive biology are sex based. Further, because ... it is easy for the Court to confuse real categorical biological difference with sex-based differences that are culturally imposed, an equality doctrine that exempts laws based on real physical differences from its concern is likely to be a weak one. Finally, and most importantly, in a society constitutionally committed to equality, the reality of biological difference in relation to reproduction should not be permitted to justify state action exaggerating the consequences of those differences. This is what happens when those actions escape scrutiny by courts. [FN64]

The elegance of Law's argument is that she squarely confronts Geduldig by recognizing the sincere difficulty faced by the Court--the problem of incorporating the real physical differences between men and women into equality doctrine--and provides a creative answer. Law suggests that the courts articulate a new equality standard to deal with cases arguably involving biological differences between men and women. She argues that laws governing reproductive biology should be scrutinized by the courts to ensure that:

(1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose. Given how central *113 state regulation of biology has been to the subjugation of women, the normal presumption of constitutionality is inappropriate and the state should bear the burden of justifying its rule in relation to either proposition. [FN65]

Law's suggestion is an ambitious one and, if adopted by the courts, would undoubtedly improve our constitutional case law in the area of reproductive rights. The problem, however, is that Law is asking the courts to turn their current jurisprudence on its head. [FN66] Rather than exempt cases involving real physical differences between men and women from gender-based scrutiny, Law is asking the courts to impose the strictest possible scrutiny on such cases.

Even if Law could persuade the courts to accept her framework, it is not clear that the framework would work very well. Law's framework assumes that the courts will be able to distinguish between cases involving biological and nonbiological bases of discrimination. But, as Law herself acknowledges, the courts do not have a very good record of recognizing the difference between nature and nurture. [FN67]

The most fundamental problem with Law's proposal is that she does not adequately explain why she distinguishes between biological and nonbiological sources of discrimination. The test that she posits for biological classifications would seem to work equally well for nonbiological classifications. For example, when trying to determine whether an employer should be allowed to utilize affirmative action to hire more women, it would be useful to ask whether the affirmative action plan perpetuates either the oppression of women or culturally-imposed sex-role constraints. By clumsily using quotas, an employer might perpetuate the view that women are inferior; by creatively assessing female applicants' genuine qualifications, an employer might help redress women's subordination. The issue of pregnancy is not the only one where it is sometimes difficult to distinguish paternalism from genuine assistance.

In addition, by offering a framework that distinguishes between biological and nonbiological classifications, she is offering a bipolar model that is not consistent with reality. Many forms of discrimination are really *114 mixed categories involving both a biological and a nonbiological classification. For example, when an employer fails to provide parental leave upon the birth of a child, is that a biological or a nonbiological classification? It will have a disparate impact on women due, in part, to women's biological capacity to bear children and breastfeed, but it also has a disparate impact because of women's socialized
practice of raising children. Whether such a rule is considered biological or nonbiological should not affect our analysis of its effects on women's employment opportunities.

Despite my misgivings about Law's framework, I do believe that she has identified a core problem--what to do about cases involving biological differences between men and women. She has also offered an important insight about those cases--that we cannot assume categorically that recognizing biological differences is good or bad; we always need to ask the further question of whether the use of such categories furthers the subordination of women in society. Law is one of the few theorists to recognize the complex ways in which the courts have used biological categories to perpetuate as well as to alleviate that subordination.

C. Ruth Bader Ginsburg

Justice Ginsburg does not purport to offer a novel approach to developing an equality perspective in the area of reproductive freedom. Nevertheless, she does offer some interesting insights on the benefits of developing such a perspective. Drawing on the work of Kenneth Karst, Justice Ginsburg describes the inadequacy of Roe's autonomy-based holding:

It is not a sufficient answer to charge it all to women's anatomy--a natural, not man-made, phenomenon. Society, not anatomy, "places a greater stigma on unmarried women who become pregnant than on the men who father their children." Society expects, but nature does not command, that "women take the major responsibility ... for child care" and that they will stay with their children, bearing nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring.

I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm Roe generated would have been less furious. I appreciate the intense divisions of opinion on the moral question and recognize that abortion today cannot fairly be described as nothing more than birth control delayed. The conflict, however, is not simply one between a fetus' interests and a woman's interests, narrowly conceived, nor is the overriding issue state versus private control of a woman's body for a span of nine months. Also in the balance is a woman's autonomous charge of her full life's course--as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen. [FN68]

Although Justice Ginsburg's analysis is not as well-developed as Law's, she also emphasizes the importance of distinguishing between women's intrinsic biology and society's regulation of that biology. [FN69] Justice Ginsburg, however, makes the additional suggestion that equal protection doctrine would better prevent society from stigmatizing women due to their reproductive capacity than would privacy doctrine. [FN70] In particular, she argues that the hostile reaction to Roe has largely affected the poor woman "who lacks resources to finance privately implementation of her personal choice to terminate her pregnancy." [FN71] If the Court had been sensitive to the issue of discrepancies in material resources and [i]f the Court [in Roe] had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have seen the public assistance cases as instances in which, borrowing a phrase from Justice Stevens, the sovereign had violated its "duty to govern impartially." [FN72]

Justice Ginsburg was one of the first commentators to focus on abortion restrictions other than a total ban on abortion in her discussion of the funding cases. Moreover, she is one of the few commentators to apply an antiessentialist perspective and to discern the disproportionate impact of various restrictions on poor women. [FN73] Although Ginsburg's comments from the mid-1980s were brief, they ring as true in the mid-1990s as they did a decade earlier. We can hope that they will ring even louder as she speaks as a Justice of the United States Supreme Court.

The theoretical work on equality doctrine in the reproductive freedom context is not very practical because it does not furnish
the tools needed to argue that Geduldig was wrongly decided. It is only through the use of counterfactual examples that we can begin to persuade the courts that pregnant women are treated much worse than men would be treated if they could get pregnant. As Justice Ginsburg argues, it is crucial that we find ways to use equality doctrine in the reproductive health context in order to \*116 protect the lives of the most disadvantaged women in our society. [FN74] With Justice Ginsburg's assistance, we hopefully will soon be moving in that direction.

IV. A New Direction?

[It] is necessary to consider whether pregnancy-based discrimination is discrimination on the basis of sex. I venture to think that the response to that question by a non-legal person would be immediate and affirmative. In retrospect, one can only ask-how could pregnancy discrimination be anything other than sex discrimination? [FN75]

Despite the weakness of the theoretical work on equality doctrine in the reproductive freedom context, I believe that we can successfully use equality doctrine in a way that is sensitive to the anitessentialist critique. In Canada, for example, women's groups recently persuaded the Canadian Supreme Court to conclude that pregnancy-based discrimination was per se gender-based discrimination in Brooks v. Canada Safeway Ltd. [FN76] In order to reach that result, the Court had to overturn a ten year-old precedent similar to the Geduldig decision. [FN77] As the opening quotation from that case demonstrates, the Court finally adopted the common sense understanding that pregnancy-based discrimination cannot possibly be anything other than gender-based discrimination. Inspired by the Canadian example and the appointment of Justice Ginsburg to the Supreme Court, we should continue to strive to make the courts see that pregnancy-based discrimination is gender-based.

My practice of law has taught me that three criteria are necessary for an effective implementation of equality doctrine. First, I believe that it is crucial that we focus our evidence on the "poorest of the poor" to demonstrate graphically to the courts how restrictions on abortion have a devastating impact on disadvantaged women in society. Experiential and statistical evidence can provide that proof. Such proof was strongly presented in the Brooks case, and the Court assessed it sympathetically, using the insight that antidiscrimination legislation should remove "the unfair disadvantages which have been imposed on individuals or groups in *117 society." [FN78] Second, I believe that we do need to look more closely at contemporary society to show how men who are equivalently situated in comparison with women in the reproductive health context are treated far better than women are treated. Moreover, we need to be quick to point out what kinds of comparisons are not appropriate since the courts are as likely to exaggerate differences as they are to exaggerate similarities to suit their purpose. This evidence can supplement the historical record to demonstrate the continuing disrespect for women's reproductive capacity. In Brooks, the Court powerfully explained how pregnancy-based distinctions undermine women's equality in society and refused to compare pregnancy to nonanalogous aspects of men's lives:

I cannot find any useful analogy between a company rule denying men the right to wear beards and an accident and sickness insurance plan which discriminates against female employees who become pregnant. The attempt to draw an analogy at best trivializes the procreative and socially vital function of women and seeks to elevate the growing of facial hair to a constitutional right. [FN79]

The Canadian Supreme Court, therefore, met the challenge of identifying appropriate gender-based comparisons and dismissing inappropriate ones to further women's equality in society.

The United States' federal courts have not yet engaged in this type of analysis. Examples of such an approach, however, can be found in state court cases. In these cases, plaintiffs have challenged the failure of states to fund therapeutic abortions under Medicaid. [FN80] Because the Supreme Court held in Harris v. McRae that federal law does not require states to provide such funding, [FN81] plaintiffs in these cases have sought remedies under state law.
Doe v. Maher [FN82] is the most successful case using equality theory to gain women greater reproductive freedom. The plaintiffs, a woman and her doctor, brought an action to challenge a state regulation restricting the funding of abortions under Medicaid to those abortions necessary because the life of the mother would be endangered if the fetus was carried to term. Plaintiffs sought to have the state fund abortions necessary to ameliorate a *118 condition that is deleterious to a woman's physical and/or psychological health (therapeutic abortions); they did not challenge the state's failure to pay for nontherapeutic abortions. [FN83]

Plaintiff Rosie Doe was a thirty-five year-old woman who already had five children and was eligible for the state's Medicaid program. [FN84] An abortion was medically necessary so that her cervix could be cut in order to determine whether she had cervical cancer. [FN85] Her pregnancy also endangered the life of the fetus because she was on methadone; her last two children had been born suffering from methadone withdrawal and had required hospitalization. [FN86] In addition, the methadone itself could have caused her severe health problems during her pregnancy. [FN87] Finally, because of her age, the pregnancy posed some health risks for her. [FN88] Even so, she did not qualify for a state-funded abortion.

The court certified two classes: (1) indigent pregnant women who qualify for Medicaid and who desire a medically necessary abortion, and (2) physicians who are certified by the state to provide medical care under Medicaid and who agree to perform or advise women on medically necessary abortions. [FN89] The court described the women in the class as "the poorest of the poor," [FN90] and noted that their income was only sixty-six percent of the federal poverty level. [FN91] After examining the extreme poverty in these women's lives, the court concluded that "there is absolutely no fat in the AFDC grant that would enable a woman to skim enough from her budget for a medically necessary abortion." [FN92] The court also found that poverty caused these women to have more medical problems during pregnancy, thereby causing their pregnancies to be more dangerous. [FN93]

The plaintiffs successfully challenged Connecticut's Medicaid-funded abortion regulation on both statutory and constitutional grounds. First, the court concluded that the regulation exceeded the commissioner's statutory authority and was, therefore, invalid as a matter of law. [FN94] Second, the court found that the regulation violated the due process and equal *119 protection components of the Connecticut Constitution. [FN95] This second step was unusual because a court ordinarily does not reach a constitutional issue if a statutory issue can dispose of the case. [FN96]

The court found that the regulation violated Connecticut's Equal Protection Clause and Equal Rights Amendment (ERA) in three ways: (1) by paying all the medical expenses necessary to restore a male, but not a female, to health; (2) by paying all of a male's, but not all of a female's, medical expenses associated with reproductive health; and (3) by perpetuating women's historical subordination through regulation of pregnancy. [FN97] The court examined the debates concerning the ERA and ascertained that it was the intention of the ratifiers to have pregnancy discrimination come within the purview of the sex discrimination prohibited by the ERA. [FN98] Thus, applying strict scrutiny, the court found that Connecticut could not justify the pregnancy-based discrimination against women. [FN99]

The Doe v. Maher decision is remarkable because of the depth of the court's understanding of the impact of the regulation on the lives of women. For example, in one section, the court summarized what it described as "the poor woman's dilemma": Under the Connecticut Medicaid program, except for abortion, all necessary medical expenses for eligible recipients are paid for by the state. On the other hand, the state pays for all incidents necessary for childbirth.... So if the pregnant poor woman find herself requiring an abortion to preserve her health, she has no place to turn. The state has placed her in a trap. The cash welfare allowance (AFDC) the state grants is barely sufficient to maintain an adequate level of living for her and her family. Her benefits from the state are substantially under the poverty levels, and the cash allotment is hardly enough to cover food, shelter and clothing. Through an intricate network of statutes, she is not allowed to receive funds from other sources without
those funds being deducted from her welfare cash allowance the following month. Thus, even a loan from a friend or family member would not help her, the obligations of repayment notwithstanding. And if she should fail to report the receipt of other income and assets, she could become *120 disqualified for future benefits and subject to criminal charges. Because payments are made directly to the provider and no cash allowance is given for medical assistance, she is not even given the choice of being able to forego other medical necessities in favor of the abortion. In short, the state has boxed her into accepting the pregnancy and carrying the fetus to term, notwithstanding the sometimes substantial impairment to her health. Faced with this dilemma, some women have resorted to desperate and dangerous acts of self-abortion, criminal activity and illegal abortions in order to exercise their constitutional rights. The only legal relief available is to allow the indigent woman's medical condition to worsen to a point where her life is endangered—only then, will the state come to her aid and fund the abortion. By then, however, it may be too late, for even if the medical condition does not kill her, the abortion procedure at an advance stage of pregnancy may. [FN100]

Quite simply, the Connecticut court "got it." It understood the lack of real choices in the lives of poor women, and the way in which discrimination against those women constituted gender-based discrimination.

I would describe the court's approach as antiessentialist because the court focused on the impact on the most disadvantaged women and considered that impact to be gender-based without considering whether all women were affected in the same way. Moreover, the court did not require that a perfect male comparator be available in concluding that the impact was gender-based. The court saw that poor pregnant women bore similarities to poor men who desired reproductive health services, but the court did not require that such similarities be perfect in order to find that gender-based discrimination had occurred. Finally, the court understood that abortion regulations short of a total ban can discriminate against women. Less restrictive requirements, like failing to fund abortions under Medicaid, were found to have an effect similar to a total ban. Such insights were only possible because of an examination of the impact of the statute on the most disadvantaged women in society.

Unfortunately, not all state courts have held that discrimination occurred when presented with similar facts. The Pennsylvania Supreme Court reached a result contrary to Doe in Fischer v. Department of Public Welfare. [FN101] As in Doe, the plaintiffs challenged a state statute that prohibited the payment of state Medicaid funds for abortions except when the pregnant woman's life was threatened by the pregnancy or she was a victim of rape or incest. [FN102]

Despite the fact that Pennsylvania has an ERA, the court concluded that no sex-based discrimination had taken place: *121 The mere fact that only women are affected by this statute does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex.... [T]he E.R.A. "does not prohibit differential treatment among the sexes when, as here that treatment is reasonably and genuinely based on physical characteristics unique to one sex." [FN103]

In reaching this decision, the court had to distinguish Cerra v. East Stroudsburg Area School District [FN104] in which the court had ruled in favor of a woman who had been forced to resign from her teaching job when she was five months pregnant. [FN105] The court found that Ms. Cerra was the victim of a presumption of disability, because men who were temporarily disabled were not treated so harshly. [FN106] The Fischer court distinguished Cerra from the abortion-funding context because "the decision whether or not to carry a fetus to term is so unique as to have no concomitance in the male of the species." [FN107]

Fischer provides a good contrast to Doe v. Maher because it shows how courts can choose whether or not to find a male com-
parator depending on the result they desire. When Ms. Cerra, a middle-class school teacher, was pregnant the court considered her to belong to a broader category of "temporarily disabled" people, a category including men as well as women. Thus, the court could readily see that she was being treated more harshly than other temporarily disabled people. In Fischer, however, when women on welfare were pregnant and in need of an abortion for medical reasons, the court did not find that they belonged to the broader category of "poor people in need of medical treatment." Instead, they became unique women with no male comparator. Thus, the court did not find gender discrimination. In contrast, on similar facts, the Doe court could see the obvious analogy to poor men in need of medical treatment. The Fischer case, therefore, provides an insight into the difficulty of persuading the courts to genuinely compare women and men in the reproductive health context.

The state court cases exemplify the range of responses that are possible when plaintiffs bring reproductive rights cases under equality *122 doctrine. Two funding cases were brought under equality doctrine and two different results were achieved. The promising feature of these cases, however, is that equality doctrine has the potential, as shown by the Connecticut court in Maher, to improve the lives of the most disadvantaged women in society. The Connecticut court appeared to understand the importance of using equality doctrine to reach those women's lives in part because the trial record was filled with compelling stories and statistics about those poor women's lives and their lack of choices. [FN108] For equality doctrine to be successful and for all women to be represented by the courts' opinions, it therefore seems essential to put the lives of the poorest of the poor--the group that has received the least protection under privacy doctrine--before the court.

V. Conclusion

In this essay, I have tried to show that the United States Supreme Court has done a poor job in developing equality doctrine to redress the discrimination that women face while pregnant. Even liberal justices, like Justice Blackmun, have done no more than pay lip service to the concept. Fortunately, a new justice, Ruth Bader Ginsburg, has recently joined the Supreme Court. Her record as both a scholar and a judge demonstrates a strong commitment to developing equality-based doctrine to assist women in all phases of their reproductive lives. Justice Ginsburg understands that, although all women need to be able to choose to terminate an unwanted pregnancy, women also need to have the social and economic support to make that choice truly meaningful.

Examples of useful equality-based arguments in the reproductive freedom context are not limited to law review articles. Both the Supreme Court of Canada and our own state courts have begun to use equality doctrine to help redress women's subordination in the reproductive health context. Compelling factual presentations revealing the impact of pregnancy-based restrictions on women's lives appear to have been highly persuasive to the courts that have chosen to move in this direction. With at least one sympathetic ear now on the Supreme Court, it is crucial that we begin to make these arguments in the federal courts. Hopefully, this article will provide some helpful steps in that direction.

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[FN2]. Gender essentialism is "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN.L.REV. 581, 585 (1990) (noting that feminist legal theory, in purporting to speak for all women, fails to give voice to those who traditionally have been without the power to speak and be heard, i.e. disadvantaged women).

[FN4]. Id. at 2846-47 (Blackmun, J., concurring and dissenting) (citations omitted).


[FN6]. Planned Parenthood v. Casey, 112 S.Ct. at 2847 n. 4; see Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 COLUM. L. REV. 1, 31-44 (1992) (arguing that an analysis should be adopted that recognizes the equal protection problems that are created when the state seeks to restrict abortion and forces women to carry fetuses to term).

[FN7]. Planned Parenthood v. Casey, 112 S.Ct. at 2847 n. 4; see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1353-59 (2d ed.1988) (discussing the failure of both courts and plaintiffs to frame the abortion controversy in terms of sexual equality and sexual discrimination). Blackmun also cites Jed Rubenfeld's article in the Harvard Law Review. Planned Parenthood v. Casey, 112 S.Ct. at 2847 n. 4. Rubenfeld does not, however, use an equal protection analysis, so I will not discuss his article. See Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737 (1989) (arguing that a right to privacy analysis must not look to what the law prohibits but, rather, to what degree its consequences dictate a person's future).

[FN8]. Planned Parenthood v. Casey, 112 S.Ct. at 2847 n. 4; see Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 350-80 (1992) (arguing that, once abortion-restrictive regulation is classified as sex-based state action, the intermediate scrutiny standard should be applied to prove constitutionally suspect purposes).

[FN9]. See Sylvia A. Law, Rethinking Sex and the Constitution, 132 U.PA. L. REV. 955, 955 (1984) (arguing that the "development of modern constitutional sex equality doctrine has suffered from a lack of focus on biological reproductive differences between men and women" and that those differences must be recognized).

[FN10]. See Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. REV. 375 (1985) (arguing that had the Roe decision been based upon sex equality considerations rather than personal autonomy it might have been less open to criticism).

[FN11]. See id. at 376-79 (discussing the need to view reproductive autonomy in the choice of abortion as encompassed in sex equality and sexual discrimination constitutional arguments); Law, supra note 9, at 1003-13 (criticizing the Court for ignoring the fact that laws governing reproduction are sex-based and arguing that the legal system must develop equality guarantees if women are ever to attain power similar to that held by men).

[FN12]. Sunstein, supra note 6, at 29-44.

[FN13]. Id. at 35 n. 129.

[FN14]. Id.

[FN15]. Id.

[FN16]. See infra notes 101-08 and accompanying text.

[FN17]. TRIBE, supra note 7, § 15-10.
The root of our difference may be that our lives are relational rather than autonomous, which is reflected in our needs and has its roots in our reproductive role. My proposal is that we address the multiple problems posed by our differences from men by adopting a critical legal method which aims directly for women's subjective well-being... simply to increase women's happiness, joy, and pleasure, and to lessen women's suffering, misery, and pain.


See Harris, supra note 2, at 588 (criticizing much of feminist legal theory for its "gender essentialism" in assuming that "women's experience' can be described independent of other facets of experience like race, class, and sexual orientation"); Pamela S. Karlan & Daniel R. Ortiz, In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda, 87 NW.U.L.REV. 858, 858-59 (1993) (noting that relational feminism tries to describe women generally and thus ignores racial, class, and sexual orientation differences).
ization of young women of color and leading to the creation of stricter governmental regulations concerning when a sterilization procedure will be considered voluntary); Adele Clarke, Subtle Forms of Sterilization Abuse: A Reproductive Rights Analysis, in TEST TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD 188, 191-92 (Rita Arditti et al. eds., 1984) (describing the sterilization abuse that occurred until the mid-1970s and the more subtle forms of abuse that currently occur in the context of the physician-patient relationship); Laurie Nsiah-Jefferson, Reproductive Laws, Women of Color, and Low-Income Women, in REPRODUCTIVE LAWS FOR THE 1990S 23, 46-49 (Sherrill Cohen & Nadine Taub eds., 1989) (discussing some of the reasons why poor women and women of color are more likely to be compelled to submit to an involuntary sterilization).


[FN31] See id. at 1355 (arguing that women and men are differently situated in terms of reproduction and that it is impossible for a woman to "simply and safely decline ... to put her life and liberty at risk in order to come to her fetus' rescue, the way a man could ... refuse to donate blood or a needed organ to save the life of a fetus he had voluntarily fathered").

[FN32] Id.

[FN33] Id. (quoting Jenness v. Fortson, 403 U.S. 431, 442 (1971)).

[FN34] See id. at 1355 (referring to Ruth Bader Ginsburg's view that a woman has a right to autonomy in relation to men and society).

[FN35] Id.

[FN36] Id.

[FN37] Id. at 1357.

[FN38] Id. at 1358.

[FN39] A good example is Louisiana. In 1991, it passed the most restrictive abortion statute in the country while also refusing to increase Medicaid benefits payments to pregnant women and children. La.Rev.Stat.Ann. § 14:87 (West 1991); see Brief for Black Women for Choice et al. as Amicus Curiae Supporting Appellees at 14, A-3, Sojourner T. v. Roemer, 722 F.Supp. 930 (E.D.La.1991), aff’d, 924 F.2d 27 (5th Cir.1992), cert. denied, 113 S.Ct. 1414 (1993) (No. 91-3667) (noting that a Louisiana senator did try to condition passage of the Act so that it would not go into effect until Medicaid eligibility was expanded but that this proposal was rejected); see also Ruth Colker, The Practice/Theory Dilemma: Personal Reflections on the Louisiana Abortion Case, 43 Hastings L.J. 1195 (1992) (describing the Louisiana case and the difficulties involved in writing a brief that opposed the statute as unconstitutional).

[FN40] See Siegel, supra note 8, at 366-67 (concluding that states have been unable to show a real concern for the unborn and for women, as evidenced by the fact that the state does not adequately support women who wish to have children so that the children will be healthy, does not expect men to sacrifice anything on behalf of an unborn child, and does not compensate women for the costs of bearing and rearing children).

[FN41] Id. at 367 n. 419.

[FN42] See id. at 371-80 (discussing the physical and psychological impact of parenting, as well as the limits motherhood
places on educational and career options).

[FN43]. See Planned Parenthood of Southeastern Pa. v. Casey, 112 S.Ct. 2791, 2847 n. 4 (1992) (mentioning the fact that forcing women to accept the burdens of motherhood raises equal protection concerns and noting that Siegel is one of the commentators who has analyzed this issue). Although Blackmun does note that equal protection issues are raised by provisions like those at issue in Casey, he then proceeds in the rest of his opinion to argue that Roe and the right of privacy protect a woman's choice to obtain an abortion. Id. at 2847-53. Blackmun never develops the arguments of Siegel that frame the issue of abortion in an equal protection paradigm. See Siegel, supra note 8, at 261 (arguing that restrictions on abortion involve equal protection concerns as well as privacy issues, and analyzing the equal protection problems).


[FN45]. Siegel, supra note 8, at 354.

[FN46]. See id. at 354 n. 373 (arguing that, for physiological and social reasons, legislatures have adopted abortion regulations to govern women's conduct but not men's, and thus, these policies present a risk of gender bias).

[FN47]. Id.

[FN48]. Id.

[FN49]. See id. at 356-57 (noting that nineteenth century abortion statutes were designed to enforce traditional notions of men's and women's roles and the "sexual division of social life" and then suggesting that perhaps these types of attitudes still influence legislators today).

[FN50]. Id. at 357.

[FN51]. See id. (analyzing how a legislative concern with fetal life and the need to compel pregnancy may be motivated by "constitutionally suspect purposes" such as legislators' attitudes toward women).

[FN52]. Id. at 360-61.

[FN53]. Id.

[FN54]. Id. at 361.

[FN55]. See Brief for Black Women for Choice et al., supra note 39, at 12.

[FN56]. See id. at 12, A-1 to A-4 (discussing the amendments which were considered and ultimately rejected by the Louisiana Legislature).

[FN57]. Siegel, supra note 8, at 366.

[FN58]. See Planned Parenthood v. Casey, 112 S.Ct. at 2803-16 (refusing to overturn Roe v. Wade because it had not proven to be an unworkable standard and because overruling precedent requires that changed circumstances be shown that impose new constitutional obligations on the Court and concluding that there had been no changed circumstances, just a change in the "doctrinal disposition" of the Court).
See Law, supra note 9, at 966 (noting that until technology permits reproduction outside a woman's body, sex-based biological differences cannot be insignificant).

See id. at 958 n. 13 (citing U.S. Supreme Court decisions that reflect stereotypical perceptions of the roles of men and women in society).

Id. at 969.

Id.

See id. at 983-84 (offering examples of supporters who believe that the Court was correct in holding that the classification was reasonable but who also admit that the Court erred by failing to recognize that the classification was sex-based).

Id. at 1003.

Id. at 1008-09.

See Craig v. Boren, 429 U.S. 190, 197 (1976) (adopting the "intermediate scrutiny" standard to analyze sex-based classifications); Law, supra note 9, at 988 ("But present constitutional equality doctrine does not encompass concern with laws that regulate real biological difference.... The Craig standard, condemning explicit sex based classifications based on inaccurate stereotypical views of men and women, collapses when applied to explicit sex-based classifications that are arguably related to real biological differences.").

See Law, supra note 9, at 988-1002 (discussing cases where the courts have failed to draw distinctions between cases that involve real biological differences and cases that involve the social consequences of biology).

Ginsburg, supra note 10, at 382-83 (citations omitted) (quoting Kenneth L. Karst, Foreword: Equal Citizenship under the Fourteenth Amendment, 91 HARV. L. REV. 1, 57 (1977)).

Id.

Id.

Id. at 383.

Id. at 385 (quoting Justice Stevens' dissent in Harris v. McRae, 448 U.S. 297, 357 (1980)).

See id. at 383-85 (noting how poor women have been disproportionately affected by the Court's holding in Harris v. McRae that the exclusion of abortions from Medicaid funding is constitutional and arguing that if the Court had viewed this case from a sex equality perspective, it might not have denied poor women access to abortions).

See id. at 384-85 (noting that financial need alone does not justify close scrutiny by the Court, but that financial need tied to gender discrimination might).


Id. at 1219.
[FN77], Id. at 1243; see Bliss v. Att'y-Gen. of Can., 1 S.C.R. 183 (1979) (upholding a statute that made it more difficult for pregnant women to qualify for unemployment compensation against a sex discrimination claim and stating that the women in question were treated differently because they were pregnant, not because they were women).

[FN78], Brooks v. Safeway, 1 S.C.R. at 1238.

[FN79], Id. at 1249-50.

[FN80], See e.g., Doe v. Maher, 515 A.2d 134 (Conn.Super.Ct.1986) (holding a state statute to be contrary to the Medicaid program and a violation of due process because the statute only provided funding for abortions through Medicaid when it was necessary to save the woman's life or when the pregnancy was the result of rape or incest).

[FN81], See Harris v. McRae, 448 U.S. 297, 308-10 (1980) (holding that Title XIX does not require participating states to provide funding for medically necessary abortions if federal reimbursement is unavailable).


[FN83], Id. at 135 n.4.

[FN84], Id. at 137.

[FN85], Id.

[FN86], Id.

[FN87], Id.

[FN88], Id.

[FN89], Id.

[FN90], Id. at 140.

[FN91], Id. at 141.

[FN92], Id.

[FN93], Id.

[FN94], Id. at 143.

[FN95], Id. at 157, 159.

[FN96], See id. at 145 (noting that deciding the case on statutory grounds allows sensitive constitutional issues to be avoided); see also Jean v. Nelson, 472 U.S. 846 (1985) (holding that when current statutes and regulations provide petitioners with the relief they seek there is no need to address any constitutional issue); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944) (holding that "we ought not to pass on questions of constitutionality ... unless such adjudications are un-avoidable").
[FN97]. Doe v. Maher, 515 A.2d at 159-60.

[FN98]. Id. at 160.

[FN99]. Id. at 161.

[FN100]. Id. at 153-54 (citations omitted).


[FN102]. Id. at 116-17.

[FN103]. Id. at 125 (quoting People v. Salinas, 551 P.2d 703, 706 (Colo. 1976)).


[FN107]. Fischer v. Dep't of Public Welfare, 502 A.2d at 126.

[FN108]. See Doe v. Maher, 515 A.2d at 140-42 (describing the plaintiff class of poor women with reference to income statistics, the testimony of individual plaintiffs, and expert testimony concerning poor women's health conditions).

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