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COMMENT

An Opportunity for Feminist Constitutionalism: Abortion Under State Equal Rights Amendments

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Abstract. Long before the abortion right fell, many people lacked meaningful access to reproductive care. Now, state high courts have an opportunity to revisit their constitutional guarantees with vigor and creativity. Instead of mirroring the Supreme Court's pre-*Dobbs* conception of the abortion right, these courts can identify a new abortion right—one based on express guarantees of gender equality, which, though absent in the federal Constitution, lies untapped in many state constitutions in the form of an equal rights amendment (ERA).

Drawing on feminist legal scholarship, this Comment first demonstrates the shortcomings of substantive due process—the Court's former approach to the abortion question—and argues for a state constitutional right to abortion based on feminist principles. Next, this Comment analyzes pre-*Dobbs* cases in which states used their ERAs to address abortion questions, before offering a proposal for the interpretation of these amendments. The proposed rule proscribes any law that creates or reifies social inequality based on childbearing capacity.

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Introduction

Following the Supreme Court's decision to eliminate the federal constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*,[1] state constitutional law has become the primary battleground for reproductive freedom. As a result, many state high courts are now tasked with the question of whether their constitutions enshrine a right to abortion. Progressive state courts can look beyond the decisions of the Supreme Court, whose enforcement of the abortion right has steadily waned over the past decades, and whose conceptual basis for the right in the Due Process Clause has never fully aligned with the values of gender justice. These courts may turn instead to sources of state constitutional protection and enforce a guarantee of reproductive freedom grounded in feminist principles.

This Comment illustrates one possibility for the role of state constitutionalism in promoting reproductive justice: the use of state equal rights amendments (ERAs) to enshrine the right to abortion. These ERAs offer states an opportunity to surpass the protections of the federal Constitution and enshrine an abortion right based on express gender equality rather than tenuous substantive due process. Such an abortion right could exceed prior federal protections by encompassing a right to actually *access* abortion—not just a nominal right to abortion—and by including essential services beyond abortion. First, I critique the use of substantive due process as a basis for the right to abortion. Next, I argue that reimagining the abortion right by enshrining it as an equality right, rather than a liberty or privacy right, reflects a feminist constitutional ethic. It remediates abortion stigma, counters paternalistic arguments for abortion restrictions, and reflects the values of reproductive justice. I then outline the advent of state ERAs, present four pre-*Dobbs* cases in which states have applied their ERAs to the question of an abortion right, and offer a critique of each. I conclude with a proposal for the interpretation of these amendments.

I. Background

The federal right to abortion, when it existed, was not based on a constitutional sex-equality guarantee.[2] Instead, the Supreme Court in *Roe v.*

1. 142 S. Ct. 2228 (2022).

2. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("[The] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."), *overruled by Dobbs*, 142 S. Ct. at 2228; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime,
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Wade and *Planned Parenthood of Southeastern Pennsylvania v. Casey* embedded the right to abortion in the liberty and privacy protections of the Due Process Clause.[3] When the *Dobbs* Court overturned those cases and eliminated the federal abortion right altogether, it addressed the sex-equality arguments that might have been:

> We discuss [the due process] theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications.[4]

At the same time, the *Dobbs* Court directed pro-choice advocates to state law.[5] State constitutions can extend protections far beyond federal law, even where a state constitution mirrors the language of the federal Constitution exactly.[6] Thus, state high courts can interpret their constitutions to enshrine a different right to abortion—a right based not on liberty or privacy, but on gender equality. These decisions could inform the development of feminist constitutionalism, the project of rethinking constitutional law to achieve gender justice.

States may embark on this project using portions of their constitutions with direct federal parallels, such as equal protection clauses. But states with ERAs, which expressly proscribe sex discrimination, have a particularly strong argument for deviation from the federal example. By adopting a feminist constitutional ethic built on notions of bodily self-determination and awareness of the economic barriers to medical care, progressive states can enforce an abortion right stronger than the federal one ever was.[7]

In this Part, I argue that the Supreme Court's substantive due process reasoning reinforced patriarchal notions of the public-private distinction and stigmatized those seeking reproductive care. I highlight the fact that state

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choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."), *overruled by Dobbs*, 142 S. Ct. 2228.

3. 410 U.S. at 153; 505 U.S. at 851.

4. *Dobbs*, 142 S. Ct. at 2245 (citations omitted).

5. *Id.* at 2257 ("In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized.").

6. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977).

7. While this opportunity may strengthen the abortion right in states with progressive courts, it remains true that a federal abortion right is necessary for the many individuals who are unable to travel for abortion care. Bolstering reproductive justice in a patchwork fashion is only a temporary solution, and advocates should strive to lay the groundwork for a future federal right.

courts need not follow this approach; in grounding the abortion right in constitutional doctrines of gender equality, state courts can develop a more enduring and meaningful right to abortion by countering paternalism and including public funding in their constitutional mandates.

A. Substantive Due Process as the Basis for a Federal Right to Abortion

The Supreme Court's decision to rest *Roe* on substantive due process grounds rather than gender-equality grounds was not a necessary result. In the decades leading up to *Roe*, feminists raised equality arguments in their district court challenges to abortion bans.[8] In *Abele v. Markle*, for example, lawyers led by Catherine Roraback recruited plaintiffs by arguing that a Connecticut abortion restriction disadvantaged women and disproportionately harmed poor women.[9] Similarly, one amicus brief for *Roe* argued that abortion prohibitions violated the Equal Protection Clause, highlighting "the unequal position of women with respect to the burdens of bearing and raising children and the fact that they are robbed of the ability to choose whether they wish to bear those burdens."[10] The primary focus of *Roe* advocates, however, was not on constitutional principles of gender equality.[11] Thus, the *Roe* Court did not address the equal protection question. Instead, it relied on the right of privacy, "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[12]

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8. Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2048-49 (2021).

9. 342 F. Supp. 800, 802 (D. Conn. 1972) ("The changed role of women in society and the changed attitudes toward them reflect the societal judgment that women can competently order their own lives and that they are the appropriate decisionmakers about matters affecting their fundamental concerns."), *vacated as moot*, 410 U.S. 951 (1973); *see also* Women vs. Connecticut Organizing Pamphlet (1970), *reprinted in* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 174 (2d ed. 2012).

10. Brief Amicus Curiae on Behalf of New Women Lawyers et al. at 26, Roe v. Wade, 410 U.S. 113 (1971) (Nos. 70-18 & 70-40), 1971 WL 134283.

11. *See* Murray, *supra* note 8, at 2049 ("[U]nlike the feminist lawyers who litigated [the pre-*Roe* abortion cases in federal district court], the *Roe* lawyers, Linda Coffee and Sarah Weddington, did not frame their arguments in terms of sex equality or race and class inequality, choosing instead to root their claims in the privacy logic that had undergirded the Court's earlier contraception decisions.").

12. *Roe*, 410 U.S. at 153. In the years after *Roe*, commentators once again pressed the notion of abortion as a sex-equality right until this reasoning became a "dominant rationale for the abortion right in the legal academy." Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 829 (2007); *see* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 962-63 (1984) (arguing that "laws governing reproduction implicate equality concerns"). *See generally* Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and*

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One year after *Roe*, the Supreme Court further foreclosed a federal sex-equality basis for the abortion right in *Geduldig v. Aiello*.[13] In that case, the Court held that discrimination on the basis of pregnancy is not discrimination on the basis of sex because "[w]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[14] Unless the classifications are "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers" may treat pregnancy "just as . . . any other physical condition."[15] With these words, the Court erased reproduction from the federal constitutional framework of gender equality and excluded abortion from the realm of equal protection. Nearly twenty years later, the Court confirmed this conclusion in *Bray v. Alexandria Women's Health Clinic*.[16] In that case, respondents claimed that anti-abortion groups violated 42 U.S.C. § 1985(3), which prohibited conspiracies to interfere with civil rights, by obstructing access to clinics.[17] They argued that "since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class."[18] Citing *Geduldig*, the Court disagreed and held that the demonstrators did not discriminate against women as required by the statute.[19]

This approach has limited the Court's reproductive freedom holdings in ways that are both conceptually problematic and materially harmful—pitfalls that states can avoid when interpreting their own constitutions. Of course, a court's choice of constitutional grounding alone does not transform social relations or achieve gender justice. But as Sylvia Law has observed, "constitutional concepts of equality are important both because of their

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Equality in Relation to Roe v. Wade, 63 N.C. L. REV. 375 (1985) (arguing that the Court should have based the abortion right in sex-equality principles).

13. 417 U.S. 484, 497 (1974).

14. *Id.* at 496 n.20.

15. *Id.*

16. 506 U.S. 263, 269 (1993).

17. *Id.* at 266. 42 U.S.C. § 1985(3) provides, in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

18. *Bray*, 506 U.S. at 271.

19. *Id.*

concrete impact on legislative power and individual right and because constitutional ideas reflect and shape culture."[20]

1. Harms of the public–private distinction

Rooting the abortion right in constitutional privacy principles reinforces the patriarchal idea that there is a rational and implicitly gendered legal distinction between public and private. As Frances Olsen observes, "'[p]rivate' is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation."[21] It is noteworthy, then, that many of the Supreme Court's opinions enshrining the rights of women—decisions about marriage, contraception, sex, family relationships, and child-rearing—derive from a right to privacy.[22] The characterization of these decisions as private is double-edged. On the one hand, it is an effective political strategy, drawing on conservative notions of individual liberty and the limits of state power.[23] On the other hand, it reaffirms the dichotomy at the core of historical sexism: Women belong in the private sphere, whereas men belong in the public. This idea found expression in Justice Bradley's infamous *Bradwell v. Illinois* concurrence in the judgment:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.[24]

By characterizing those issues that primarily affect women as private, the *Roe* Court perpetuated the same distinction that has justified a jurisprudence of gender inequality since *Bradwell*.

In addition to reaffirming gender roles, the public-private distinction shields certain "private" abuses from critique and intervention. Whereas courts

20. Law, *supra* note 12, at 956-57.

21. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 319 (1993).

22. Roe v. Wade, 410 U.S. 113, 152-53 (1973) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)) (marriage), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraception); *id.* at 460, 463-65 (White, J., concurring in the result) (contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (child-rearing and education).

23. *See* WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 109 (2003) (explaining that the reproductive rights group NARAL attempted to persuade moderate Americans to support abortion rights by emphasizing freedom from government interference).

24. 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment).

and lawmakers treat the public sphere as suitable for legal protection and regulation, the domestic realm has historically been sealed off from the protections of the law and left to the private rule of men.[25] This distinction justifies the Court's narrow interpretation of the Fourteenth Amendment as only proscribing *state* action, meaning, for example, that survivors of private gender-based violence lack a federal civil remedy.[26] Much of feminist activism has entailed taking violations that take place in "private," where women are often deprived of rights, and rearticulating these violations as "public." For example, the notion that "the personal is political" challenges the idea that the state cannot intervene in the main arenas of gender-based oppression.[27] Thus, as much as women have benefited from the Court's characterization of a reproductive choice as a private one, the underlying logic undermines the struggle for gender justice.

The characterization of the abortion right as private also stigmatizes those who choose to terminate their pregnancies.[28] As opposed to a gender-equality rationale, which would affirm the social value of reproductive autonomy and self-determination, the substantive due process reasoning suggests that abortions are decisions that ought to be kept private. In this way, the Court has codified its moral qualms about abortion and relegated those who terminate their pregnancies to shame and silence. This stigmatizing logic encourages legislators to pass laws based on the assumption that abortion is an immoral choice. Mandatory waiting periods and ultrasound viewings,[29] for example, presuppose that abortion is not a morally neutral and openly available option, but a decision that must be repeatedly renegotiated behind closed doors. In these ways, the decision to ground the right to abortion in privacy shapes how both individuals and legislative bodies view abortion. A sex-equality basis for the abortion right, by contrast, would celebrate the values of reproductive self-determination as a means to gender justice.

25. *See* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 20-21 (2000) (explaining how the nineteenth-century doctrine of coverture, under which husband and wife were considered one legal person, limited protections for women in the domestic realm).

26. United States v. Morrison, 529 U.S. 598, 620-27 (2000).

27. Olsen, *supra* note 21, at 322-24.

28. For more on abortion stigma, see Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 295-96 (2013).

29. *See, e.g.*, KAN. STAT. ANN. § 65-6709 (2022) (Kansas 24-hour waiting period); KY. REV. STAT. ANN. § 311.727 (West 2023) (Kentucky ultrasound-viewing requirement).

B. The Abortion Right Reimagined

States that embrace an equality-based abortion right can exceed the protections of the federal Constitution. They can avoid the strain of paternalism that has permeated the Supreme Court's abortion decisions, and in doing so, can strike down restrictions that make it more difficult to access abortion in states where it remains legal. They can also enshrine a right to access public funding for abortion care.

1. Countering paternalism

Equality-based arguments for reproductive rights can counter the strain of "woman-protectivist" arguments that anti-choice advocates have used to justify restrictions on abortion.[30] This paternalistic reasoning justifies anti-choice laws as necessary to safeguard the interests not of fetuses, but of women. The Supreme Court endorsed woman-protectivist logic in *Gonzales v. Carhart*.[31] In that case, the Court upheld the Partial Birth Abortion Act of 2003, a federal law criminalizing the performance of abortions using the "intact" dilation and evacuation method:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child . . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow . . . . The State has an interest in ensuring so grave a choice is well informed.[32]

In other words, the Court concluded that abortion restrictions are necessary to protect women from themselves. In doing so, it relied upon assumptions about women's natural roles as mothers and their inability to make decisions in their own best interests. It also reinforced an unfounded notion that all abortions are painful moral decisions. Indeed, the Court's holding ensured not that pregnant individuals would receive better information about the dilation and extraction procedure, but that they would be unable to access the procedure altogether. In a dissent, Justice Ginsburg rejected some of the Court's gendered assumptions, observing that "[t]his way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[33]

30. For a history of the anti-choice movement to restrict abortion access by framing these restrictions as beneficial to women, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1023-29.

31. 550 U.S. 124, 159 (2007).

32. *Id.*

33. *Id.* at 185 (Ginsburg, J., dissenting).

Nonetheless, the woman-protectivist argument has proliferated. In 2008, the U.S. Court of Appeals for the Eighth Circuit relied on *Carhart* to uphold a South Dakota abortion restriction, echoing the Supreme Court's claim that depression is a "known medical risk" of the procedure and thus implying that biased counseling provisions are necessary to save women from the consequences of their own decisions.[34] And in striking down federal constitutional protections for abortion in *Dobbs*, the Supreme Court cited "the protection of maternal health and safety" as a legitimate state interest supporting restrictions on reproductive care.[35]

If the constitutional right to abortion were grounded in sex-equality principles, courts could not use paternalistic reasoning to justify restrictions on access to reproductive care. Instead, laws that rely on assumptions about women's natural role, their capacity for moral decisionmaking, or their ability to determine their own best interests would invite judicial intervention.[36] Using a sex-equality basis, then, advocates for reproductive autonomy could attack many restrictions on abortion access—from waiting periods to counseling provisions to outright bans.

2. Equality arguments and the reproductive justice framework

A sex-equality basis for the abortion right could also incorporate a more expansive vision of reproductive justice. According to the SisterSong Women of Color Reproductive Justice Collective, one of the first groups to define and advocate for a broader vision of the abortion right, reproductive justice is "the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities."[37] This framework emphasizes not only the right to terminate a pregnancy, but also the right to have children. Further, it focuses on the material realities of accessing reproductive care—not just the existence of a "right to choose" in the abstract, but the social, political, and economic inequalities that prevent people from controlling their reproductive futures.

34. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 734-35 (8th Cir. 2008) (en banc). The counseling provision at issue in that case required patients to sign an "informed consent" document that included information such as "[the fact] [t]hat the abortion will terminate the life of a whole, separate, unique, living human being." *Id.* at 726.

35. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

36. *See* Siegel, *supra* note 12, at 836 (explaining that, under an equality framework, "[w]oman-protective restrictions on abortion, like any other seemingly benign form of sex-based state action, may neither reflect nor enforce stereotypical assumptions about women's capacities as decision makers or their role as mothers").

37. *Reproductive Justice*, SISTERSONG, https://perma.cc/FD6C-8CZK (archived Apr. 18, 2023).

The Court's substantive due process analysis in *Roe* and its progeny did not sustain a reproductive justice framework. In practice, protecting the constitutional right to abortion as the right to make a private choice ignores the structural factors that often determine this choice, including barriers to abortion access. In other words, as Melissa Murray describes the Court's reasoning in *Roe*:

> It offered no quarter to those women whose reproductive "choices" were shadowed by economic insecurity, the absence of safe and affordable childcare, and racial and gender injustice. Nor did *Roe* venture beyond the issue of terminating a pregnancy to consider the conditions necessary to exercise the "choice" to bear and raise a child to adulthood.[38]

These limitations present themselves in the public funding context. In *Harris v. McRae*, the Supreme Court upheld the Hyde Amendment, a law that prohibits the use of public funds for most abortions.[39] After the passage of the Hyde Amendment, the Committee for Abortion Rights and Against Sterilization Abuse argued that the law was not only aimed at hindering women of color from accessing abortion, but also at coercing poor women and women of color into accepting sterilization.[40] Nonetheless, the Court reasoned that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[41] In other words, the constitutional right to choose abortion does not imply a constitutional right to *access* abortion—a conception of rights that disproportionately excludes the most marginalized people who seek reproductive care.

In a dissent, Justice Marshall recognized the reproductive injustice wrought by *Harris*, writing that the Court "studiously avoid[ed] recognizing the undeniable fact that for women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether."[42] Justice Marshall went on to illustrate the circumstances of women who would be denied the exercise of their constitutional right as a result of the Court's holding. He named some of the conditions—"cancer,

38. Murray, *supra* note 8, at 2050.

39. Harris v. McRae, 448 U.S. 297, 317 (1980); *see, e.g.*, Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 ("[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service . . . .").

40. Murray, *supra* note 8, at 2051 (citing Brief Amici Curiae of the Ass'n of Legal Aid Attorneys et al. at 15, *Harris*, 448 U.S. at 297 (No. 79-1268)).

41. *Harris*, 448 U.S. at 316.

42. *Id.* at 338 (Marshall, J., dissenting).

rheumatic fever, diabetes, malnutrition, phlebitis, sickle cell anemia, and heart disease"—that can make a pregnancy dangerous, but nonetheless do not justify access to public funds to terminate the pregnancy under the Hyde Amendment.[43] He highlighted the fact that most women whose pregnancies have been caused by rape or incest will not meet the Hyde Amendment's sixty-day reporting requirement to qualify for support, since this requirement "serves to exclude those who are afraid of recounting what has happened or are in fear of unsympathetic treatment by the authorities."[44] Finally, he drew attention to the disparate racial impact of the Hyde Amendment, observing that "[t]he class burdened by [the amendment] consists of indigent women, a substantial proportion of whom are members of minority races."[45]

Justice Marshall's vision of reproductive justice did not come to fruition under the federal Constitution, and now the federal right has been eliminated altogether.[46] But states have an opportunity to revitalize this vision.

Even before *Dobbs*, some state courts began construing the abortion right more broadly using equality reasoning, which they derived from independent sources of state constitutional authority.[47] One such independent source is especially promising when it comes to enshrining a meaningful abortion right based on constitutional equality provisions: ERAs.

II. State Constitutional ERAs and Abortion

The federal Constitution does not expressly proscribe sex discrimination, and efforts to amend the Constitution to remedy this problem have not been successful. However, many state constitutions do include explicit sex-based protections. These constitutional provisions offer state high courts an opportunity to enshrine a right to abortion based on gender equality rather than substantive due process or its state analogs. I will discuss four state decisions on this issue, each in cases pertaining to the public funding of medically necessary abortions.[48] In this Part, I provide background on the advent of state ERAs before outlining the successes and shortcomings of these states' approaches to interpreting them. Based on an analysis of these decisions,

43. *Id.* at 339.

44. *Id.* at 340.

45. *Id.* at 343.

46. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

47. *See, e.g.*, Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 31-32, 37-38 (Ariz. 2002) (interpreting the state's privileges and immunities clause to invalidate a ban on the public funding of medically necessary abortions).

48. *See generally* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Bell v. Low Income Women of Tex., 95 S.W.3d 253 (Tex. 2002).

I propose an alternative rule for the interpretation of state ERAs that would require courts to strike down restrictions on reproductive autonomy when these restrictions perpetuate social inequality based on childbearing capacity.

A. The Advent of State ERAs

Over the course of the past century, several generations of feminists have attempted to ratify the federal Equal Rights Amendment (ERA) to create an explicit gender-equality guarantee in the U.S. Constitution. The proposed amendment mirrors the language of the Equal Protection Clause but explicitly encompasses sex, providing that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any [s]tate on account of sex."[49] So far, these attempts have been unsuccessful. Thirty-five states ratified the amendment after its passage in 1972 and before the subsequent ratification deadline, but advocates ultimately fell short of the requisite thirty-eight states.[50] The Supreme Court instead analyzes constitutional gender-equality claims under the Equal Protection Clause, an amendment never intended as a source of sex-based protection.[51] Absent an express textual basis for constitutional gender equality, the Court's decisions have fallen short of meaningful gender justice—including by divorcing the abortion right from gender-equality principles.[52]

Given the failure to pass the national Equal Rights Amendment and the Court's refusal to enshrine meaningful gender equality through the Equal Protection Clause, ERA proponents increasingly turned to state constitutions, and with much more success.[53] To date, 29 state constitutions have added some form of sex-specific protection and of those, 13 states have constitutional

49. H.R.J. Res. 208, 92d Cong. (1972).

50. MaryAnn Grover, *The Patchwork Quilt of Gender Equality: How State Equal Rights Amendments Can Impact the Federal Equal Rights Amendment*, 30 B.U. PUB. INT. L.J. 151, 155-56 (2021).

51. The Fourteenth Amendment was drafted to enshrine constitutional protection for formerly enslaved men. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161 ("[T]he framers of the fourteenth amendment did not contemplate sex equality."). The Supreme Court did not apply the Equal Protection Clause to invalidate a sex classification until 1971. *See id.* at 165; Reed v. Reed, 404 U.S. 71, 76 (1971).

52. *See* Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (holding that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269-70 (1993) (holding that demonstrators who obstruct clinic access do not display gender-based animus).

53. *See* Grover, *supra* note 50, at 152 ("[W]hen the federal ERA stalled in the mid- to late-1970s, states began taking the matter into their own hands by passing state ERAs.").

provisions that are virtually identical to the national ERA.[54] Courts have relied on these amendments in a number of areas of substantive law, including family law, education, and employment.[55] And claimants have succeeded under state ERAs with arguments that might have failed under the federal Equal Protection Clause.[56] As the battle over the abortion right shifts to the states, these ERAs may prove an essential tool for protecting an abortion right more meaningful than the right ever enshrined by the Supreme Court.

A number of state courts have applied their ERAs to abortion questions. The four cases discussed here concerned the public funding of medically necessary abortions, an area where, even before *Dobbs*, the Supreme Court's lackluster enforcement of the abortion right created a gap for state constitutionalism to fill.[57] In *Harris v. McRae*, discussed in Part I, the Court

54. *Id.* at 178-80. States that have passed at least some form of sex-specific protection are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. *Id.*; *see, e.g.*, Gabe Stern, *Nevada Passes Sweeping Version of Equal Rights Amendment*, AP NEWS (Nov. 10, 2022), https://perma.cc/R8Z5-6JXF. States with gender-based provisions virtually identical to the federal ERA are Colorado, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, Oregon, Pennsylvania, Texas, and Washington. Grover, *supra* note 50, at 178-80.

55. *See* Judith Avner, Commentary, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL'Y REV. 144, 153-66 (1984).

56. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding that Hawaii's prohibition of same-sex marriage triggered strict scrutiny under the state's ERA), *abrogated in other part by* Obergefell v. Hodges, 576 U.S. 644 (2015). It is worth noting, though, that even states without ERAs may protect gender equality more vigorously than the U.S. Supreme Court when interpreting their Fourteenth Amendment analogs. In the realm of abortion, a number of states have exercised independent judgment to protect an abortion right. *See, e.g.*, Right to Choose v. Byrne, 450 A.2d 925, 934-35 (N.J. 1982) (holding that restrictions on public funding for medically necessary abortions violated the state's equal protection guarantee, even though they did not violate the federal Equal Protection Clause); Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206, 240-41 (Iowa 2018) (holding that imposing a 72-hour waiting period for abortion triggered strict scrutiny under the state's due process provision, even though it only would only trigger the undue burden standard under the federal Due Process Clause); Hodes & Nauser v. Schmidt, 440 P.3d 461, 494 (Kan. 2019) (holding that a legislative ban on an abortion procedure required strict scrutiny under the state's Fourteenth Amendment analog even though it did not require this scrutiny under the Fourteenth Amendment itself).

57. *See generally* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Bell v. Low Income Women of Tex., 95 S.W.3d 253 (Tex. 2002). For pre-*Dobbs* discussion of these cases, see Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 501-10 (2009); and Linda J. Wharton, *State Equal Rights Amendments*

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upheld the federal Hyde Amendment, banning the use of federal funds to pay for abortion with limited exceptions—to save the life of the mother or to end a pregnancy resulting from rape or incest.[58] In doing so, the Court held that a woman's constitutional freedom of choice does not correspond to a constitutional requirement to subsidize abortions.[59] Adopting a strictly negative rights view of reproductive choice, the Court distinguished between those regulations that place a government obstacle in the path of a person seeking an abortion and those that merely fail to remove barriers "not of [the state's] own creation."[60]

ERAs have been applied to some other restrictions on abortion access, such as parental-consent laws,[61] but they have not yet been applied to post-*Dobbs* outright bans. These four cases reveal possibilities and challenges in applying equal rights doctrines to abortion access questions.

B. *Fischer* and *Bell*

1. Analysis

In *Fischer v. Department of Public Welfare* and *Bell v. Low Income Women of Texas*, the high courts of Pennsylvania and Texas, respectively, rejected the premise that restrictions on public funding for medically necessary abortions violated their states' ERAs.[62] The plaintiffs in both cases had argued that their respective states discriminate on the basis of sex by funding all medically necessary services for men while failing to do the same for women.[63] The courts rejected this formulation. In *Fischer*, the court held that the restriction on public funding for medically necessary abortions does not categorically treat women differently from men.[64] Instead, the Pennsylvania court concluded that it "accords varying benefits to one class of women, as distinct

Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination, 36 RUTGERS L.J. 1201, 1248-54 (2005).

58. 448 U.S. 297, 302, 326-27 (1980); *see supra* Part I.B.2.

59. *Harris*, 448 U.S. at 315-16.

60. *Id.* at 316. For a critique of the Supreme Court's choice to frame abortion funding as an extraconstitutional positive right, see generally Laurence H. Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

61. *See, e.g.*, Hope Clinic for Women v. Flores, 991 N.E.2d 745, 769-71 (Ill. 2013).

62. Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 117-18 (Pa. 1985); Bell v. Low Income Women of Tex., 95 S.W.3d 253, 255 (Tex. 2002).

63. *Fischer*, 502 A.2d at 123-25; *Bell*, 95 S.W.3d at 257-58.

64. *Fischer*, 502 A.2d at 125.

from another, based on a voluntary choice made by the women."[65] Similarly, the *Bell* court held that the restriction "is not so much directed at women as a class as it is abortion as a medical treatment."[66]

Fischer and *Bell* also justified the funding restrictions in much the same way as the Supreme Court in *Geduldig*: by holding that regulations based on biological differences do not discriminate on the basis of sex. The *Fischer* court remarked that "[i]n this world there are certain immutable facts of life which no amount of legislation may change."[67] Thus, even if "only women are affected" by a regulation, the regulation does not necessarily discriminate.[68] Instead, its disproportionate impact may be owed merely to the realities of biology for which the state bears no responsibility.[69] For the same reasons, the *Bell* court concluded that even if abortion restrictions deny equal protection of the laws, they do not do so *because of* sex.[70]

2. Critique

These arguments enforce a limited and contradictory understanding of equal rights. In their holdings, the courts ironically concluded that regulations may disadvantage a protected class so long as they are based on a trait that defines membership in that class. Such a conception of equality undermines the purpose of equal rights protections in the first place. Designating a protected class is meaningless when the traits that tend to distinguish that class—such as the ability to bear children—can still be used as a basis for discrimination.[71] The courts' conception is particularly problematic in this context, where "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them."[72] Thus, limiting the reach of ERAs to differences between men and women that are not "natural" is historically suspect. Moreover, the line between regulations based on biology and those that rely on and perpetuate stereotypes is not clearly drawn. Say, for example, that an employer had a policy of undercompensating women employees. The employer could justify the policy by arguing that women employees are more likely to leave the workforce to have children—a result of

65. *Id.*

66. *Bell*, 95 S.W.3d at 258.

67. *Fischer*, 502 A.2d at 125.

68. *Id.*

69. *See id.*

70. *See Bell*, 95 S.W.3d at 258.

71. For further discussion of the fallacy of "real" differences, see Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 412-16 (2015).

72. Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

the so-called immutable, biological differences between men and women. In fact, to avoid stereotyping, the employer could apply a pay-reduction policy to women only once they actually become pregnant. Under the courts' reasoning, this conduct does not violate ERAs because it is based on biology.

Moreover, in removing men from the terms of the comparison, the courts obscured the ways in which restrictions on abortion-seeking individuals nonetheless discriminate on the basis of gender. Inflicting differential treatment based on whether a subgroup wishes to have children is something that the state *does not do to cisgender men*. In targeting "abortion as a medical treatment," then, the state does engage in gender discrimination.

The problem, as Sylvia Law describes it, is that the dominant conception of sex equality under law is an "assimilationist" one—a vision, developed with respect to race, that "it is unjust to distribute rights or responsibilities on the basis of distinctions that do not ever describe relevant differences."[73] This vision does not map neatly onto laws with gendered effects because there are often reproductive differences between women and men.[74] Ignoring these differences by permitting the state to disproportionately burden those who can become pregnant prevents meaningful enforcement of any constitutional sex-equality principle.

Finally, the equal rights carveout for "immutable" biological differences conceals the state's role in creating sexual difference when it restricts access to reproductive care. In *Harris*, the Supreme Court described the indigence of women seeking reproductive care under Medicaid as an already-present obstacle the state had no obligation to remove.[75] In doing so, it disregarded the state's role in creating poverty—both through affirmative acts like redlining and through omissions like failure to provide an adequate social safety net.[76] Most ironically,

73. Law, *supra* note 12, at 963.

74. Of course, this is a generalization. There are women who do not have the ability to become pregnant and there are men who do. No reliable data capture how many transgender men give birth in the United States each year, because medical records often document these patients as female. Julie Compton, *Trans Dads Tell Doctors: "You Can Be a Man and Have a Baby,"* NBC NEWS (updated May 20, 2019, 6:39 AM PDT), https://perma.cc/NNK7-SAZF.

75. Harris v. McRae, 448 U.S. 297, 316 (1980).

76. *See* Heather Hahn & Margaret Simms, *Poverty Results from Structural Barriers, Not Personal Choices. Safety Net Programs Should Reflect That Fact.*, URB. INST. (Feb. 16, 2021), https://perma.cc/3X2B-44JB. It also concealed the state's role in creating this obstacle by taking the affirmative step of enacting the Hyde Amendment. *See Harris*, 448 U.S. at 330 (Brennan, J., dissenting) ("The proposition for which [*Roe* and its progeny] stand thus is not that the State is under an affirmative obligation to ensure access to abortions for all who may desire them, it is that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion. The Hyde Amendment's

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it belied the ways in which the Court's ruling in that very case would reinforce cycles of poverty by denying low-income individuals control over family planning decisions. The courts in *Fischer* and *Bell* engage in a similar concealment as it pertains to sex. By holding that immutable, biological differences between men and women permit the state to deny low-income women access to medically necessary abortions,[77] the courts conceal the ways in which their holdings *produce* sex by denying individuals control over their reproductive destinies and thus exacerbating the social effects of biological difference.[78]

C. *Maher* and *New Mexico Right to Choose*

1. Analysis

Unlike *Fischer* and *Bell*, the courts in *Doe v. Maher* and *New Mexico Right to Choose/NARAL v. Johnson* held that the ERAs of Connecticut and New Mexico, respectively, guaranteed public funding for medically necessary abortions.[79] Nonetheless, the courts could have gone further in enshrining meaningful reproductive justice.

The courts took similar approaches, with *New Mexico Right to Choose* quoting *Maher*.[80] First, both courts held that their state discriminates on the basis of sex when it funds all medically necessary expenses incurred by men, but not those incurred by women. Citing *Maher*, the New Mexico high court held that "[s]ince only women become pregnant, discrimination against

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denial of public funds for medically necessary abortions plainly intrudes upon this constitutionally protected decision . . . .").

77. Bell v. Low Income Women of Tex., 95 S.W.3d 253, 258 (Tex. 2002); Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 125 (Pa. 1985).

78. This argument borrows from Judith Butler's critique of the sex/gender distinction and their theory of the cultural production of sex. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 9-11 (2d ed. 1999) ("Are the ostensibly natural facts of sex discursively produced by various scientific discourses in the service of other political and social interests? If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all. . . . [G]ender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced and established as 'prediscursive,' prior to culture, a politically neutral surface *on which* culture acts."); *see also* Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 33 (1992) ("The recognition of the abortion right might be rooted in a belief that the biological capacity [to bear children] has no necessary social consequences . . . .").

79. Doe v. Maher, 515 A.2d 134, 162 (Conn. Super. Ct. 1986); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 859 (N.M. 1998).

80. *See N.M. Right to Choose*, 975 P.2d at 856.

pregnancy by not funding abortion when it is medically necessary and when all other medical[ly necessary] expenses are paid by the state for both men and women is sex oriented discrimination."[81] The courts went on to apply strict or heightened scrutiny to the funding restriction and concluded that no compelling state interest justifies the regulation.[82] In *Maher*, the court examined the state's interest in protecting the health of the pregnant woman, concluding that it "has no application" to funding restrictions for medically necessary abortions, since those abortions obviously protect health.[83] In *New Mexico Right to Choose*, the court rejected the state's proffered justification of reducing government costs because Medicaid-eligible women would also incur further taxpayer expenses pertaining to pregnancy and childbirth.[84] Both courts considered a third justification as well: the state's interest in protecting potential life.[85] The Connecticut court took a stronger position than that of New Mexico. The *New Mexico Right to Choose* court assumed *arguendo* that the state's interest in potential life may become sufficiently compelling to support the denial of public funding at some point during pregnancy, but concluded that the regulation at issue was not narrowly tailored to serve this interest.[86] The *Maher* court, by contrast, reasoned that the state's interest in potential life "cannot outweigh the health of the woman at any stage of the pregnancy (first, second, or third trimesters)."[87] In this way, *Maher* implicitly enshrined a state constitutional abortion right apart from the public funding question—at least in situations where the mother's health is at risk.

2. Critique

Despite the fact that these states protected access to abortion using their ERAs, a more expansive interpretation of these amendments could have enshrined a more trans-inclusive and constitutionally affirmative abortion right. In premising the claim that abortion funding restrictions constitute sex discrimination on the notion that "only women become pregnant,"[88] the courts take into account only cisgender women. This formulation is problematic because it is untrue: Transgender men and non-binary individuals also become

81. *Id.* (alteration in original) (quoting *Maher*, 515 A.2d at 159).

82. *Maher*, 515 A.2d at 156-57 (strict scrutiny); *N.M. Right to Choose*, 975 P.2d at 856-57 (heightened scrutiny).

83. *Maher*, 515 A.2d at 156-57.

84. 975 P.2d at 856-57.

85. *Maher*, 515 A.2d at 157; *N.M. Right to Choose*, 975 P.2d at 857.

86. 975 P.2d at 857.

87. *Maher*, 515 A.2d at 157.

88. *Id.* at 159; *N.M. Right to Choose*, 975 P.2d at 856 (quoting *Maher*, 515 A.2d at 159).

pregnant. The impulse to center cisgender womanhood may resist "ceding the conversation to the abstract principles of liberty and the balancing of burdens, which have completely failed to protect all people who may become pregnant from . . . dangerous laws restricting abortion access."[89] But excluding transgender individuals from the abortion conversation is harmful. First, this erasure limits the vocabulary and understanding of providers, making it more difficult for transgender people to access and advocate for their own reproductive care.[90] Second, it forms a contradictory and unstable basis for gender-equality arguments. Restrictions on abortion access implicitly rely on a degree of biological determinism and essentialism: the belief that biological differences dictate natural gender divisions, setting predetermined limits to the effect of culture.[91] In other words, both transphobic reasoning and anti-choice reasoning rest on the notion that a person's sex organs at birth should dictate their social experience—whether their gender identity or childrearing decisions. The movements for reproductive justice and trans rights rely on each other, and their fates are intertwined. Arguments in favor of abortion access should counter biological determinism in full, including by rejecting any trans-exclusionary premises. Instead of relying on the idea that only women become pregnant and comparing the treatment of men and women, the court could have reached the same result in a manner that recognizes that not only women become pregnant.[92]

The courts' reasoning also falls short by failing to protect abortion access as a positive right—a right that obliges state *action* rather than prohibits state *inaction*. In this way, the decisions underutilize a distinct progressive advantage of state constitutionalism. The federal Constitution enshrines only negative rights; it generally does not impose any affirmative duties on the government to provide

89. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 233 (2016).

90. *See* Daphna Stroumsa, Elizabeth F.S. Roberts, Hadrian Kinnear & Lisa H. Harris, *The Power and Limits of Classification—A 32-Year-Old Man with Abdominal Pain*, 380 NEW ENG. J. MED. 1885, 1887 (2019) (presenting a case study of a transgender man who went to an emergency room with pregnancy complications, where "the triage nurse did not fully absorb the fact that he did not fit clearly into a binary classification system with mutually exclusive male and female categories . . . [and so d]espite communicating that he was transgender, [the patient] was not evaluated using pregnancy algorithms"); *see also* Strangio, *supra* note 89, at 234-35.

91. Although abortion restrictions do not use this language, lawmakers, in preventing pregnant individuals from terminating their pregnancies, do transform biology into destiny. For more on biological determinism and essentialism, see BUTLER, *supra* note 78, at 9-13; SIMONE DE BEAUVOIR, THE SECOND SEX 44-48 (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 2011) (1949); and Emi Koyama, *The Transfeminist Manifesto*, *in* CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY 244, 249-51 (Rory Dicker & Alison Piepmeier eds., 2003).

92. For a proposed rule, see Part III below.

social services or promote equality.[93] So although government actors before *Dobbs* could not unduly burden access to abortion, they could simply decline to provide funding for medically necessary abortions.[94] Commentators have critiqued this conception of rights protection for "fail[ing] to reflect the distribution of power and the ways in which the government can cause harm in the modern welfare state."[95] By contrast, the constitutions of almost every state protect positive rights—whether or not they contain an ERA.[96] Nonetheless, both *Maher* and *New Mexico Right to Choose* skirted a full-throated embrace of a positive right to abortion, medically necessary or otherwise.

This approach has two harmful implications. First, as a theoretical matter, it could permit the state to stop funding all medical care. So long as indigent men and women are treated the same—unable to access any medically necessary services—such a result would accord with the courts' application of ERAs. A positive-rights interpretation of ERAs would not tolerate a total deprivation of this nature. Instead, it would impose an affirmative duty on the state to combat inequality by facilitating access to the reproductive services that pregnant individuals need to control their destinies. Second, the courts' gender-comparative framework (i.e., comparing the funding of medically necessary services for men with the funding of medically necessary services for women) supports the funding of medically necessary abortions, but not elective ones. Because public funding does not cover all elective treatments sought by men,[97] advocates could not argue that the state treats women worse than men by refusing to fund elective abortions. These abortions, though not necessary to preserve the health of the parent, are nonetheless necessary for

93. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132-35 (1999). For further support that the federal Constitution does not impose any affirmative duties on the government to provide social services or promote equality, see *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (denying a fundamental right to housing); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973) (denying a fundamental right to education); and *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989) (holding that the Fourteenth Amendment Due Process Clause did not obligate a state social service agency to protect a child from domestic violence).

94. Harris v. McRae, 448 U.S. 297, 326 (1980) ("[W]e hold that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.").

95. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2283 (1990); *see also* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1324-26 (1984).

96. Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 927-29 (2011).

97. *See, e.g.*, *What's Not Covered by Part A & Part B*, MEDICARE.GOV, https://perma.cc/Q59P-EGEQ (archived Apr. 21, 2023).

social equality.[98] In this way, a positive reading of the ERA could materially advance gender justice by protecting access to both elective and medically necessary abortions.

III. A Proposal for the Interpretation of State ERAs

Scholars have set forth a number of approaches for enforcing constitutional sex equality. It is beyond the scope of this Comment to assess each of these proposals comprehensively but studying three examples—all given in the context of federal equal protection—will highlight distinctive opportunities for an effective state ERA rule.

Reva Siegel, in illustrating the advantages of a gender-equality basis for reproductive rights, writes that "[c]ourts can enforce equal citizenship values by evaluating restrictions on reproductive decision making to ensure that such restrictions do not reflect or enforce gender stereotypes about women's agency or their sexual and family roles."[99] The problem with this approach is that it is vulnerable to precisely the sort of reasoning that the courts used in *Fischer* and *Bell*. Courts—particularly those less sensitive to the patriarchal assumptions underlying abortion restrictions—can conclude that these regulations do not reflect or enforce gender stereotypes; they merely reflect biological realities. The U.S. Supreme Court furnished courts with language to this effect in *Bray*. "Whatever one thinks of abortion," the *Bray* Court stated, "it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue."[100] Although not binding on states' interpretations of their own constitutions, these universalizing statements about anti-choice beliefs may dissuade advocates from bringing sex-equality claims under a rule requiring "gender stereotypes."

Instead, to enforce an equity model of reproductive justice, an ERA rule must reflect and remediate the fact that childbearing capacity is a biological

98. *See* Ginsburg, *supra* note 12, at 383 ("[I]n the balance [of the abortion debate] 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.") (citing Kenneth L. Karst, *The Supreme Court, 1978 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-59 (1977)); *see also* Caitlyn Knowles Myers & Morgan Welch, *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?*, BROOKINGS INST. (Nov. 30, 2021), https://perma.cc/A5T6-AGEL ("Multiple teams of authors have . . . [found] that abortion legalization increased women's education, labor force participation, occupational prestige, and earnings and that all these effects were particularly large for Black women.").

99. Siegel, *supra* note 12, at 834.

100. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993).

reality—one that the state has historically used to maintain a regime of gender-based oppression. Recognizing these realities, Sylvia Law proposes a different rule, wherein:

> [L]aws governing reproductive biology should be scrutinized by 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.[101]

Law's rule effectively accounts for biological experiences, but she also adopts the premise that "only women have the capacity to create a human being."[102]

As discussed above, this statement is untrue.[103] Still, laws constraining reproductive freedom are gender-based discrimination, because transphobia and sexism rely on the same premise: that biology is destiny, meaning that the capacity to have children predetermines both gender identity and social status. Similarly to Law, Cass Sunstein formulates a gender-equality basis for the abortion right while relying on a binary conception of gender that is unnecessary in the state context: "The question at hand is whether government has the power to turn that capacity or difference, *limited as it is to one gender*, into a source of social disadvantage."[104] Under an ERA framework, which does not require the gender-comparative approach demanded by federal equal protection, the assumption that childbearing capacity is limited to "one gender" is not necessary.

Moreover, Law's rule includes an unnecessary exception for laws that serve a compelling state purpose. If her rule encompassed laws that treat men and women differently in order to remediate historical oppression or current inequality, such as affirmative action–style policies, then an exception for a compelling state purpose would be appropriate. But because she tailors her rule to laws that oppress women or impose "sex-role constraints on individual freedom,"[105] a state interest exception is inapt.

Thus, I propose that courts find a rule or regulation to violate an ERA when it creates or perpetuates social inequalities based on childbearing capacity. Restrictions on access to abortion, whether parental-consent laws, waiting periods, or outright bans, do just this. In limiting the ability of pregnant individuals to decide whether or not they wish to give birth and become parents, these restrictions create a social and economic underclass

101. Law, *supra* note 12, at 1008-09.

102. *See id.* at 955.

103. *See supra* notes 89-91 and accompanying text.

104. Sunstein, *supra* note 78, at 33 (emphasis added).

105. Law, *supra* note 12, at 1008-09.

based on the ability to bear children.[106] And restrictions on the public funding of abortion may violate this interpretation of ERAs even if they withhold support only for elective abortions. Because this standard would eliminate the need to depict men and women as similarly situated—the framework used by the courts in all four ERA abortion cases[107]—the state could fund elective abortions even if it does not fund all elective medical services for men. In other words, plaintiffs need not resort to the assimilationist and binary formulation "if the state does X for men, it must also do X for women." Instead, they could simply identify the social disadvantages that those with the capacity to bear children incur based on a given regulation.

Moreover, this interpretation could pave the way for reproductive justice advocacy beyond abortion. There are many ways that the state creates social disadvantage based on the ability to have children. Policies that make it difficult for birthing parents to access early childhood education do this, as do those that sanction pregnancy discrimination. Here, too, a comparative formulation that requires using men as the baseline would fail. The state does not treat men and women differently, per se, by declining to fund early childhood education. But because those who bear children are more likely to be primary caregivers, it does transform the ability to have children into a source of social inequality. By interpreting ERAs to strike down any law that creates a system of social disadvantage based on reproductive capacity, then, state courts could make strides toward a feminist constitutional ethic.

Conclusion

As the national abortion right fell, some commentators criticized pro-choice advocates for failing to sustain state-level advocacy after *Roe* and instead shifting disproportionate resources to battles in federal court. Advocates can use this moment to revisit the importance of robust state constitutional protections. These protections are more than a mere backup to federal constitutional rights. Instead, provisions like ERAs task state high courts with a responsibility to protect meaningful gender justice. They provide opportunities to exceed the reproductive protections ever offered by the Supreme Court, as *Maher* and *New Mexico Right to Choose* illustrate. But advocates can also challenge their state courts to go further by embracing an inclusive right to reproductive care and facilitating the development of feminist constitutionalism.

106. *See* Myers & Welch, *supra* note 98; *see also* David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to* Roe v. Wade, 25 J. LAB. RSCH. 503, 503-05 (2004).

107. Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 124 (Pa. 1985); Bell v. Low Income Women of Tex., 95 S.W.3d 253, 257-58 (Tex. 2002); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 856 (N.M. 1998); Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).