

東京大学 21世紀COEプログラム

先進国における《政策システム》の創出

University of Tokyo 21st Century COE program

"Invention of Policy Systems in Advanced Countries"



2005

Occasional Paper

21st Century COE program "Invention of Policy Systems in Advanced Countries"

## Gender and Politics

加藤 淳子 (編)

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はじめに

本稿は2005年11月28日（月）に開催したCOE「先進国における《政策システム》の創出」セミナーの成果である。本セミナーは本COE拠点事業推進担当者である加藤淳子教授の司会により行われた。

2006年1月

# **Gender and Politics**

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## Overview

### Junko Kato\*

Both Professors Frances McCall Rosenbluth and Ian Shapiro presented on the relationship between gender and politics. \*\*

Professor Rosenbluth, writing with Torben Iversen (Harold Hitchings Burbank Professor of Political Economy, Harvard University), tackles head on effects of patriarchy on gender socialization and tries to explore why the patriarchal values emerged in the first place. Their paper starts from comparing the mobility of male economic assets with the one of female economic assets. The loss of women's economic independence, for example, is observed in agricultural economies: due to an efficient division of labor women specialized in bearing and rearing children and house-keeping while relying on men's physical strength to cultivate food. This makes a sharp contrast with the absence of division of labor in hunter-gatherer economies that resulted in high gender quality. They argue that the division of labor affects intra-family bargaining power and ultimately shapes social norms. A sharp division of labor resulting from increasing return to human capital in industrialization has turned into post-industrial employment that does not penalize women and thus allows more female bargaining power and more gender equality. It is curious to see that hunter-gatherer economies and post-industrial service economies served to provide more bargaining power with women for different reasons - inefficiency in division of labor and availability of general skills job, respectively - while both agrarian and industrial societies deprived women of economic independence as a result of strict division of labor.

Professor Shapiro presented on the role of constitutional courts in politics focusing on the issue of abortion. He has published a lot on this issue including the book titled "Abortion: The Supreme Court Decisions 1965-2000." The court system plays a much more important role in American politics than in other countries. However, even in the United States Professor Shapiro is exceptional

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\*\* 28 November 2005, COE 'Invention of Policy Systems in Advanced Countries' Seminar/ 184th Comparative Law and Politics Seminar

in the sense that he has boasted his expertise in law among political theorists who focus on normative problems. He has followed the history of constitutional politics of abortion since the 1960s and illuminated the interaction between Congress and the court systems by referring a variety of cases. He argues that constitutional courts successfully intervened in the legislative process only when appreciating democratic ways as he has specified in a democratic theory of jurisprudence.

Both topics were not necessarily familiar with scholars and students in political science in Japan. After their presentation, many questions and comments came from the floor and both professors responded to them carefully until time was over.

# **Gender Socialization: How Bargaining Power Shapes Social Norms and Political Attitudes**

**Torben Iversen**

**Frances Rosenbluth\***

## **Abstract**

Most studies of gender socialization start with patriarchy and explore its effects on female social, economic, and political status. In this paper we turn the causal arrow the other way to understand where patriarchal values come from in the first place. We argue that the relationship between the mobility of male economic assets to the mobility of female economic assets goes far in explaining intra-family bargaining power, and by extension, in explaining the norms that become societally dominant. We investigate this proposition empirically by looking at mate choice preferences between agricultural, industrial, and post-industrial societies, and by looking at the gender gap in political attitudes.

## **1. Introduction**

Patriarchy—the dominance of males in social, economic, and political organization—characterizes much of human history. Indeed, its very universality has made it invisible to otherwise perceptive philosophers and social critics from ages past. Jean Jacques Rousseau, an early modern champion of equality, applied his logic only to men. Not only did Rousseau fail to argue for gender equality, but as Nannerl Keohane has pointed out, he elevated the power differential between men and women “into a ‘moral’ principle that becomes the foundation of an immense and complicated argument about how men and women should behave in all aspects of their lives” (Keohane 1980: 139). We single out Rousseau not because he was unusually chauvinistic. Our point is rather that his disparaging attitude towards women was so utterly common that he mistook convention for natural law.

Much of the literature in gender studies is concerned with explicating patriarchal conventions and exploring their effects on all aspects of women’s lives. We do not deny the importance of social construction, but are dissatisfied with much of the existing theorizing about the origin and stability of social values. In this paper, we turn our focus backwards through time to understand where patriarchal norms came from in the first place, and why they are both ubiquitous and persistent.

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\*Professor of Political Science, Director, Georg W. Leitner Program on Comparative and International Political Economy, Yale University

We argue that there is both an efficiency and bargaining power basis for patriarchy in labor-intensive agriculture: the premium to male brawn in such an economy encourages a gendered specialization of labor that gives males command over assets that are more mobile than the female's family-specific investments. Regardless of the importance of the woman's contribution to the family wellbeing, the man is in a position to appropriate the returns of her work because his assets—his farming ability and experience—is more mobile than her family-specific investments, particularly her children. Our analysis therefore suggests a giant U-shape curve of gender equality in human history, starting with relatively egalitarian hunter-gatherer societies in which females were economically self-sufficient from their gathering role; falling into a trough of inequality when females became specialized in family work in agrarian societies; and then moving into more equality as females gained access to market opportunities for which brawn was no longer at a premium. Contrary to a similar U that Friedrich Engels drew (1884), we do not believe markets and commodification to be the culprit, but the way particular kinds of markets allocate bargaining power across the sexes.

In the section that follows, we lay out our argument about differential asset mobility within families and the implications of that differential for societal norms. This model has a timeless quality, though the differences in asset mobility between men and women are starkest in agricultural societies. In Section 3 we therefore focus on how we expect different modes of economic production shapes the intra-household bargaining environment and, by extension, how they are likely to influence gender socialization. In Section 4, using data from David Buss's research on mate selection preferences, we present evidence that families choose to socialize their daughters in more gender-neutral ways in post-industrial societies, as our model would predict. Section 5 extends the logic to policy preferences, demonstrating the political implications of our argument. Section 6 concludes.

## **2. Efficiency, Bargaining, and Patriarchy**

It is tempting to think that men, on account of their strength advantage over women, have been able collectively to write the rules of the game in their favor. While there may be some truth to this belief, a collective action account based on brute strength fails to explain the stability of that equilibrium given that males compete with each other for females. Males competing with other males may use various strategies to appeal to potential female mates, of which forcible sex or female subordination more generally is only one. Since females bear by far the larger burden from sexual reproduction than males, females should be the choosier sex by Trivers' law (1971); and, as Adrienne Zihlmann (1989) writes, female selection could well favor kind, nurturing males. The stability of patriarchal values that valorize female subordination against the backdrop of female-led sexual selection is therefore a puzzle and not as obvious as many writers assume.



Arguably, patriarchy—along with, perhaps, respect for authority more generally—is the most encompassing and persistent set of social conventions that has governed human society. Our contribution to this line of analysis is to consider how patriarchal norms became virtually universal, and to explore the conditions under which patriarchy remains stable. John Tierney, in a recent *New York Times* article, resurrected an old argument about “tastes”: perhaps women are less successful in the professional world because they have less appetite for competition than men do. This is an ancient proposition, but one endorsed in 1985 by economists who suggested that “equally qualified men and women may evaluate the same job characteristics differently when choosing jobs” (Corcoran and Courant 1985). Furthermore, one economic model reviewed by Corcoran and Courant posits that under conditions of costly job search, individuals will be influenced not only by tastes, but also by perceptions of possible discrimination in the workplace under consideration. These taste and perception hypotheses operate on the supply-side (employee side) of the labor market. A complete model explaining labor market outcomes should also allow for the impact of employer preferences and prejudices (the demand-side of the market).

Our argument begins with an observation that, in agricultural society, households could secure efficiency gains by organizing themselves around a gendered division of labor in which males specialized in labor-intensive agriculture and females specialized in family work including, primarily, the bearing and rearing of children (Becker 1964, 1965, 1971, 1981, 1985).

### **Conceptualizing Power between the Sexes**

Bargaining theory implies, and casual observation confirms, that power often flows from the ability of people to credibly threaten to walk away from a deal. This is true whether we talk about haggling over the price of a used car, bargaining over wages, or deciding the division of household labor in the family. In bargaining theory the ability to walk away is captured by the concept of “outside options.” and the outside options of bargainers define the bargaining space within in which the outcome will be found. Between otherwise identical individuals, those with the better outside options can more credibly threaten to walk away from a deal unless it is tilted towards them. This is not the whole story about power, because it also depends on who gets to make the first offer, how patient people are, and, less easy to pin down, norms of fairness as well as ability to manipulate or persuade others. Still, we are likely to learn a lot about power, especially over long stretches of historical time, if we can identify variables that affect the relative ability of people in a bargaining relationship to walk away.

The bargaining relationship that concerns us in this paper is that between the male and female in the household, and, by implication, the relationship between men and women in the broader economy

and the polity. In modern times, the obvious equivalent of “walking away” from a family is divorce, and much recent scholarship is in fact centered around that notion (Braunstein and Folbre 2001; Lundberg and Pollak 1996). But marriage is not a precondition for forming households, and nor is divorce the only way to walk away from a marriage. In hunter gatherer societies, men and women formed households, or families, but they did not get married in the modern meaning of the term. Still, they were clearly in a bargaining relationship. In agricultural societies marriage was ubiquitous, and the norm against divorce was strong. Still, it was common for men to withdraw from their family responsibilities, not merely through infidelity and diversion of time and resources, but sometimes by altogether leaving the family to its own devices, physically and economically.

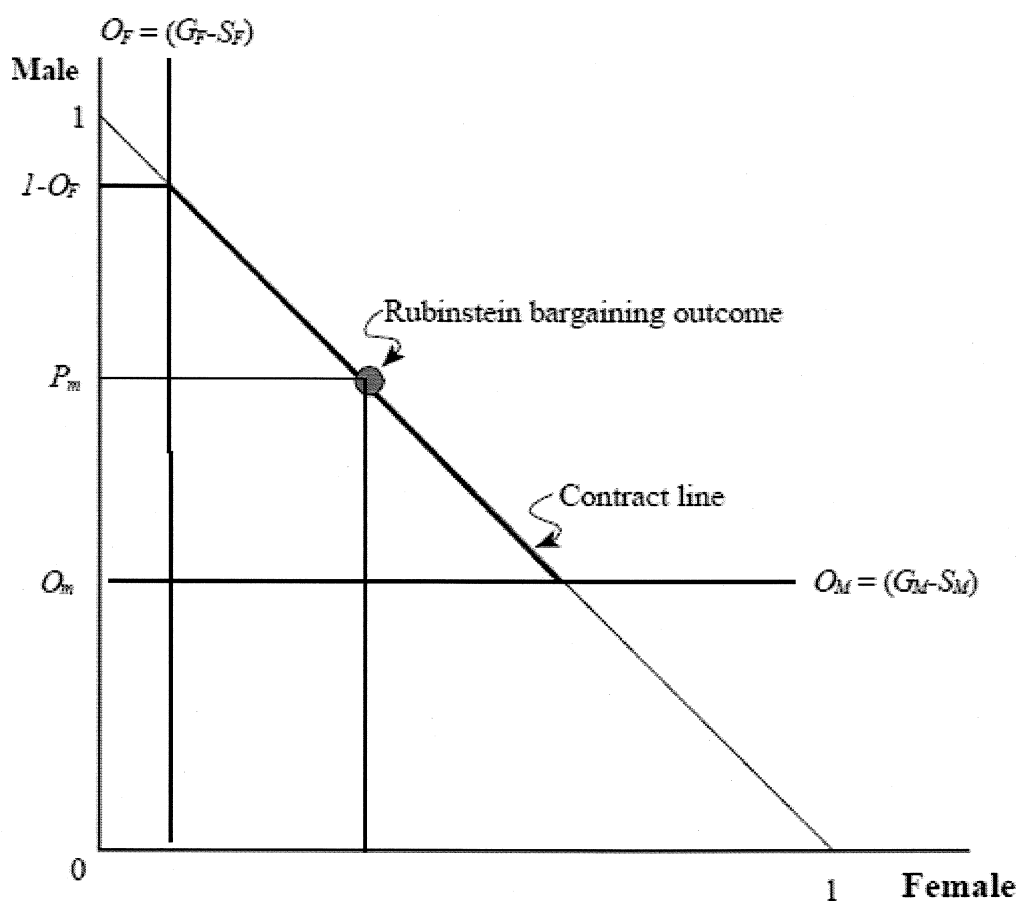
The ability to walk away in this sense depends critically on having skills and assets that can be applied easily outside the household. If all of one’s assets are tied to the family, the loss of leaving can be prohibitive. In agricultural societies, as we have argued, physical capacity for hard labor is an asset that can be applied outside the household as well as inside it, whereas investments in children are specific to the household (certainly until children are old enough to work for others). Leaving or neglecting the family, however, also means that any household-specific investment will be lost, or at least seriously devalued. Whatever time and money the male has spent on the family in the past is not likely to yield much of a return in the future unless he remains in the household. To the extent that children’s economic or emotional stability requires continuous investment through a certain age, the departure of their father prior to that age reduces all previous investment in their wellbeing.

Figure 1 shows the logic we have in mind using a very simple bargaining game between a male and a female in a household. It is assumed that The household produces a surplus that is divided through bargaining (or through norms of division that are sustained because they produce the same outcome as bargaining). The thick contract line is the feasible set of bargained outcomes – or divisions of the surplus. It is bounded by the “outside options” of the male and female, which are the payoffs for each “spouse” if he or she leaves the household. The outside options, in turn, can be conceptualized as the returns on mobile or general assets (which are marketable) *minus* forgone returns on any household-specific assets (which are not marketable). If the first mover advantage is small (which is a reasonable assumption in ongoing relationships), and if there are no systematic differences in the rate that household members discount the future, the Rubinstein bargaining solution is simply the midpoint on the contract curve. This point is this a function of the outside options, and it can be viewed as a measure of the relative bargaining power ( $P$ ) of the male or female. Because of the symmetry of the game this can be expressed in a very simple equation (the terms are shown in Figure 1):

$$(1) \text{ Power of male } (P_M) = \frac{1}{2} [1 - O_F - O_M] + O_M = \frac{1}{2} [1 + (G_M - G_F) + (S_F - S_M)],$$

where  $G_M$  and  $G_F$  are the mobile or general assets of the male and female, respectively, and  $S_M$  and  $S_F$  are the household-specific assets for the male and female, respectively. If the general and specific assets are identical, each member gets an equal share of the household product ( $P=1/2$ ). If the male has only general assets and the female only family-specific ones,  $P$  can approximate one (while it would be zero for the female).<sup>1</sup>

**Figure 1. A simple household bargaining game**



Assume now that men have an advantage in physical capacity for hard labor, which is a mobile asset, while women have a comparative advantage (not necessarily absolute advantage) in

<sup>1</sup> We can introduce concavities in the utility functions by taking the log of  $G$  and  $S$ . We then get the

power equation as a fraction instead of a sum:  $P_M = \frac{G_M \cdot S_F}{S_M \cdot G_F}$ . But the logic is not altered.

household-specific assets. This will give males better outside options and therefore a bargaining advantage (assuming that there is some demand for hard manual labor). This advantage will be magnified by specialization because such specialization, using standard economic theory, will produce a larger surplus. In Becker's famous model of the family, *any* differences in comparative advantage will produce a complete gender division of labor. But note that if the efficiency gain from specialization (which is all that matters in Becker's model) is not sufficient to outweigh the loss in bargaining power, the women will resist a complete division of labor. *The division of labor, and bargaining power therefore depends on the extent to which the prevailing production technology generates high demand for labor in which males or females have a comparative advantage, as opposed to demand for labor in which neither has an strong comparative advantage.*

Specifically, a mode of production that generates high demand for hard physical labor and a premium on having many children, as in agricultural societies, the gain from having a more or less complete division of labor is high and bargaining power will heavily advantage males. Male bargaining power is also favored if production is based on firm-specific skills because these require uninterrupted careers that are more difficult for women to commit to (Estevez-Abe 1999; Estevez-Abe et al. 2001; Iversen 2005). By contrast, there is no reason that either sex should have a comparative advantage in mobile assets which require little or no hard physical labor. Social and intellectual skills that are used intensely in most service production are obvious examples. The gain from a complete division of labor in this world will be much smaller, and because women have bargaining reasons to avoid such a division the result is less specialization and a more even division of bargaining power. This also has implication for socialization, because whereas in world of complete division of caring parent will prepare their children for their subsequent roles, in a world with less inequality and specialization girls who are brought up to believe that they should participate on an equal footing with men in the labor market will tend to do better. Caring parents will therefore socialize their children to have more equitable gender norms.

The "mode of production" argument can be summarized in the following table, which distinguishes political economies according to their demand for assets in which males and females hold a comparative advantage as opposed to demand for general assets in which neither sex enjoy an advantage. The argument implies a curvilinear relationship between economic development and gender equality. Historically there was a sharp rise in inequality from hunter-gatherer societies to agricultural societies, and then a gradual reduction of inequality as we move to industrial and then postindustrial societies. We do not deny, of course, that political mobilization or institutions are unimportant. Indeed Section 5 underscores their importance for modern democracies. But in the long sweep of historical time, this line of argument emphasizes the political and institutional effects of

underlying power relationships between men and women.

		Demand for non-manual, general skill, labor	
		Low	High
Demand for hard physical labor ("brawn") and (household-)specific skills	Low	<b>Hunter-gatherer:</b> High equality between the sexes ( $P \sim 1/2$ )	<b>Postindustrial society:</b> High equality in bargaining power ( $P \sim 1/2$ ). Modest division of labor, and equitable gender norms
	High	<b>Agricultural society:</b> Male dominance (high $P$ ). Sharp division of labor, and patriarchal norms.	<b>Industrial society:</b> Sharp division of labor, but emerging opportunities for women outside the family (intermediate $P$ )

### 3. Modes of Production

In this section, we consider in more detail how different modes of production affect inter-gender bargaining power, and by extension, we propose, the evolution of social norms. As we have argued, both the male and female roles may be equally vital to the survival of the family but the relative bargaining power of the man and the woman is shaped instead by the reversion point for each in the event of family dissolution. Agrarian production generates sharp asymmetries between the sexes in life prospects upon the break down of a family, which should lead to pronounced differences in gender norms. These asymmetries are less pronounced in hunter-gatherer and in industrial and post-industrial economic systems, leading us to expect gender norms to be the most stark in agrarian societies. We consider the bargaining implications of each type of economic system in turn.

#### Hunter Gatherer Economies

Our knowledge of hunter-gatherer systems is limited to archeological evidence and ethnographic reports of times past, and to information about a few extant hunter-gatherer societies that survive at the edges of agrarian communities in Africa, Asia, and Latin America. But from what we have gleaned about these societies, women seem to have had the ability to survive independently of a male provider (Leacock 1978; Zihlman 1989). In their book *Woman the Gatherer* (1981), Frances Dahlberg and her collaborators revised the conventional wisdom that *Man the Hunter* (Lee and Devore 1968) provided the food, pointing out that women typically provided three quarters or more of the daily caloric intake of the community with the tubers and other plant foods they gathered. The protein provided by men might have been particularly desirable, and men might have been able to gain status and access to women by sharing meat; but the meat was not strictly necessary for survival,

particularly in areas with protein-rich pulses. Moreover, because meat would have been hard to store, hierarchies among men are likely to have been relatively flat and fluid, and based on hunting skill or (with population density) warrior prowess rather than on heredity.

Physical anthropologists characterize hunter-gatherer family structure as serial monogamy, in which a couple might break up at the instigation of either side and either partner may remarry several times in a life time. Divorce does not seem to be particularly discouraged or uncommon in the hunter-gatherer societies we know about, and divorce does not lead to a sharp drop in the woman's livelihood. Women share child care duties among themselves, and grandmothers, by providing supplemental childcare and food gathering, may be more important than husbands to the survival of the young (Hawkes 1993; Hill and Murtado 1997; Hrdy 1981, 1999; Pinker 1997).

For the purposes of our bargaining model, it is crucial that divorce has a roughly symmetrical effect on both members of a couple in a hunter-gatherer society. The woman's livelihood and child care arrangements would be largely unchanged, though she might have an incentive to remarry to have privileged access to meat. She continues to rely on her gathering work for nourishing herself and her children, and having existing children does not seriously damage her chances in the remarriage market because she and her circle of female kin and friends continue to bear primary responsibility for their care. Neither does the presence of these children seriously impede her ability to gather food.

Although this picture is somewhat idealized, the crucial point is that, to the extent that women are, along with men, economically viable outside of marriage, the bargaining relationship between men and women is likely to be relatively equal within marriage. Both have investments—he in hunting, she in gathering and child care—that are more or less equally mobile across family units. Although a new husband will not likely value her children from a previous marriage, she retains the ability to provide for them and for herself across marriages.

To the extent that women are economically viable without a male patron, we expect parents to have no particular reason to socialize their daughters to behave differently from their sons, apart from the economic specialization entailed in hunter-gatherer societies. Where marriage is not necessary for livelihood, it need not last a life time; and parents worry less to ensure that their daughters marry the best possible mate. Because female economic autonomy puts males in a weaker position to demand the “female virtues” of virginity, chastity, and quiet subservience, we expect social norms will less likely form around these male preferences.

### **Agrarian Economies**

Though gradual, the shift from hunter-gatherer to sedentary agriculture introduced a profound shift in the bargaining relationship within families. By extension, we argue, the Neolithic revolution set the stage for a very different set of social norms. With population growth and land scarcity, cultivation of food became more labor-intensive, bringing with it a premium on male brawn in plowing and other heavy farm work. Within the family unit, an efficient division of labor utilized the man's physical strength to cultivate food, while the woman specialized in bearing and rearing children, processing and preparing food, making clothes, and other family duties. Though a woman's work was crucial to the survival of the family, her role no longer gave her economic viability on her own.

We argue that it was the loss of economic independence that gave rise to social norms that made marriage the ultimate goal for a woman, for without marriage, a woman's survival was at risk. If the family were to break up, the man could take his brawn and start a new family. The women, having invested her human capital in children specific to that marriage, would have less rather than more value on the marriage market after making her investment. While the male's human capital increases with the experience of farming, the external value of the female's human capital declines with every child.

This bargaining power differential translates into norms as parents socialize their children to make the best use of opportunities available to them. In an agrarian society where male brawn commands a premium, a family would risk genetic obliteration in one generation if it reared daughters to resist male authority and to enjoy their sexuality on their own terms. Because in an agrarian society a woman's peak value is when she is young, fertile, and unencumbered with another man's progeny, parents would want to instill in their daughters the importance of preparing for the marriage market, for that is her single chance to secure her livelihood. Where economic efficiency gives males a bargaining advantage on account of greater mobility of their human capital from a gendered division of labor, families do best by socializing their daughters to cultivate the femininity that will help her win her a good man, and the docility that will help her to keep him. Because human history has been agrarian for most of recorded time, these are the values—let's call it patriarchy--most familiar to humanity.

### **Industrialization**

Mechanization and the widespread introduction of labor saving devices have ushered in a new era of complex and interdependent markets; but for our purposes, the most important effect of industrialization has been to increase female bargaining power by reducing the premium to brawn.

Claudia Goldin (1991) has shown, however, that early industrialization may actually *reduce* rather than increase female labor force participation, if we include piece work by farmers' wives as market labor, and given that in early stages of industrialization the available work is often loud, dirty, and dangerous—perhaps still claiming a premium on male brawn. Goldin describes a gradual process by which the emergence of more varied kinds of market work eventually draws women into the labor market, particularly with the rise of service jobs in retail, banking, insurance, and clerical work that accompany later phases of industrialization. In time, the opportunity costs of keeping women at home overwhelm the inertial attachment to a gendered specialization of labor.

We take the growing acceptance of gender equality in industrialized societies to reflect the diminution of the male brawn premium that existed for millennia of agrarian history. By the late 19th and early 20th centuries, women in developed countries were no longer owned, literally, by their fathers and husbands; and they were given the right to vote. As women moved increasingly into labor markets, the idea that both parents are responsible for child rearing has gained acceptance, and views that women are less capable than men have become taboo. According to Geddes and Lueck (2002), men finally found it in their interests to allow women to work in order to supplement the family income as remunerative opportunities for female labor increased. We would stress, in addition, the growing female bargaining power in families as their exit options to marriage have improved. In response to this different opportunity structure for females, parents have responded by providing their daughters with more educational preparation and by teaching girls how to survive in a competitive labor market, not just to snare a husband for life.

A male premium lingers, however, in industrial societies. Not only do some manufacturing processes utilize human strength; more importantly, many manufacturing processes can make use of increasing returns to human capital where, the longer one does the job, the better they get at it. Firms may want to exploit this phenomenon by committing to long term employment contracts and investing in the employee's on-the-job training and skills acquisition. This can hurt the employment chances of women, given their higher probability of quitting or reducing their hours to bear and rear children. Elsewhere, we have argued that economies with strong specific-skills production processes will discourage women from the labor market by increasing the costs to the employer and employee of career interruption on account of family work (Iversen and Rosenbluth 2006; Iversen, Rosenbluth and Soskice forthcoming). We expect that subtle differences in social norms might follow from these differences in opportunities across the sexes. Japanese girls, for example, are still taught to speak in a feminine and deferential way—two characteristics that remain virtually synonymous in Japan. This is not surprising given the expectation of lifetime employment in Japan's labor markets, and therefore the strong preference for employees that will not burden the company with time off for



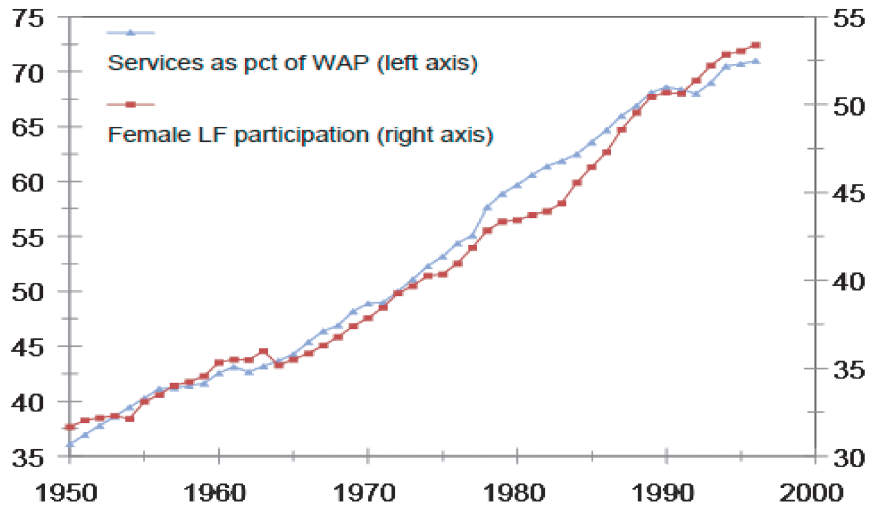
child birth and rearing.

### **Post-Industrial Service Economies**

Women's work opportunities expand even further in post industrial service economies with the availability of general skills jobs not characterized by increasing returns to human capital and that therefore do not penalize women for career interruption on account of child bearing and rearing. Post industrial employment includes for us both jobs in the service sector, such as retail, finance, insurance, health care; as well as clerical work in the manufacturing industry. But whereas industrialization was accompanied by an expansion of service employment, the rise of post-industrial societies is characterized by service sector employment growth – especially social and personal services – while industrial employment declines (a pattern we document below). Female clerical work in the manufacturing sector may be suppressed in countries with strong labor protections, because companies need to deploy the males to whose employment they are committed. Much of Japan's clerical work, for example, is done by men in "lifetime employment" careers (Brinton forthcoming). But the move towards a post-industrial economy creates an irresistible force of change: when employing women became as efficient as hiring men—or more to the point, when not employing capable women became inefficient— women began to move into the work force.

The following figures and tables illustrate the close connection between service sector employment and female labor force participation. Figure 1 shows how the rise in female labor force participation very closely tracks the rise in service employment – a pattern that is replicated in other advanced economies. The link between service employment and female labor force participation is also clearly evident in the crosssectional data in Figure 2. We have explained this in terms of two factors: a smaller brawn premium in the services industry, and the general skills required in much of the services industry which reduces the costs to employers of career interruption associated with specific skills manufacturing.

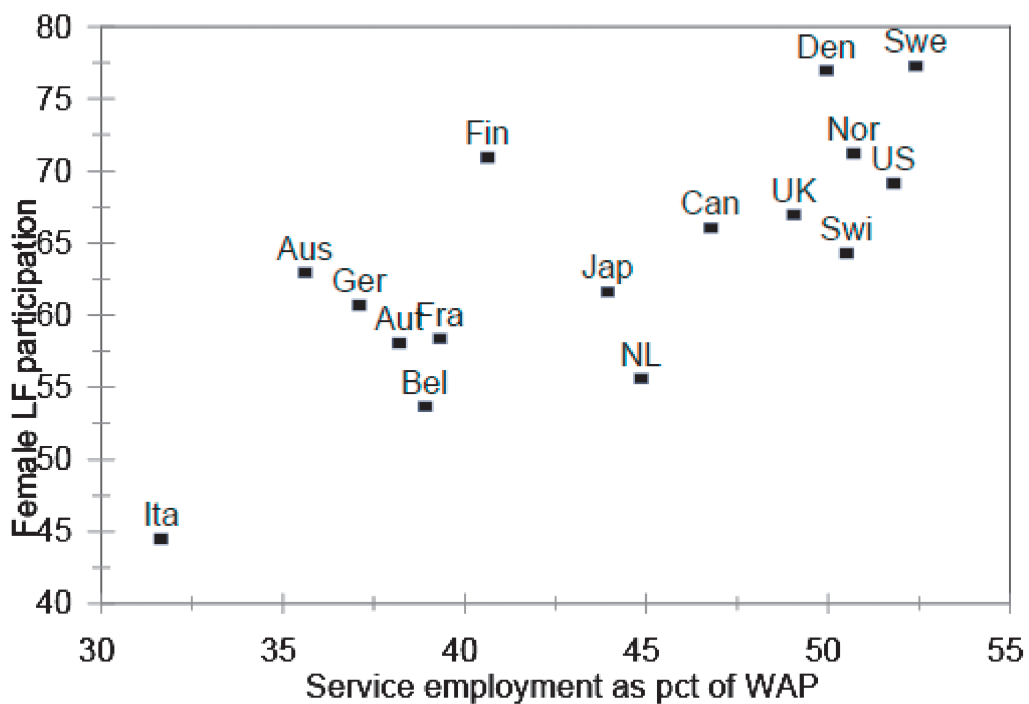
**Figure 1. Service employment and female labor force participation, 1950-1995 (US)**



Source: OECD, *Labour Force Statistic* (Paris: OECD, various years).

**Figure 2. Service employment and female labor force participation (1990s)**

Source: OECD, *Labour Force Statistic* (Paris: OECD, various years).



The clearest evidence for the latter thesis comes from data on the gender composition of particular occupations, based on ILO's standard classification of occupations (ISCO-88). Ignoring military personnel, ISCO-88 contains nine broad occupational groups, which are subdivided into numerous sub-groups depending on the diversity of skills represented within each major group. The number of detailed groups (called "unit groups") in each major group varies according to a) the size of the labor market covered by that major group, and b) the degree of skill-specialization within each group. By dividing the share of unit groups in a particular major group by the share of the labor force in that groups we can get a rough measure of the degree of specificity of skills represented by each major group.<sup>2</sup> In Figure 3 we have related this measure to the percent share of women in the different occupations for the most recent year available (2000). The numbers are averages for the 13 countries where we have comparable ISCO-88 data. Bolded occupations are those that have disproportionately large numbers of low-skilled and low-paid jobs.

Note the strong negative relationship with men dominating occupations that require highly specialized skills – a pattern that is repeated in every one of our 13 cases. These jobs are in agriculture and manufacturing rather than in services. Conversely, while men on average participate more in the labor market than women, women are relatively overrepresented in service sector jobs that require general skills – a clear sign of comparative advantage (even as many of these jobs are low skill as indicated in bold). The link to the previous two figures is straightforward: the occupations in which women are well represented are the ones that have expanded most rapidly over the past 30-40 years, propelling women into the labor market and unambiguously improved their economic independence from men, as argued by Goldin and others.

We should note that some service sector employment, like public sector employment, is clearly politically constructed, as we will discuss in Section 5. The point we wish to make here is that the jump in female employment between manufacturing and services may be as large as that between agriculture and manufacturing, with profound implications for social values.

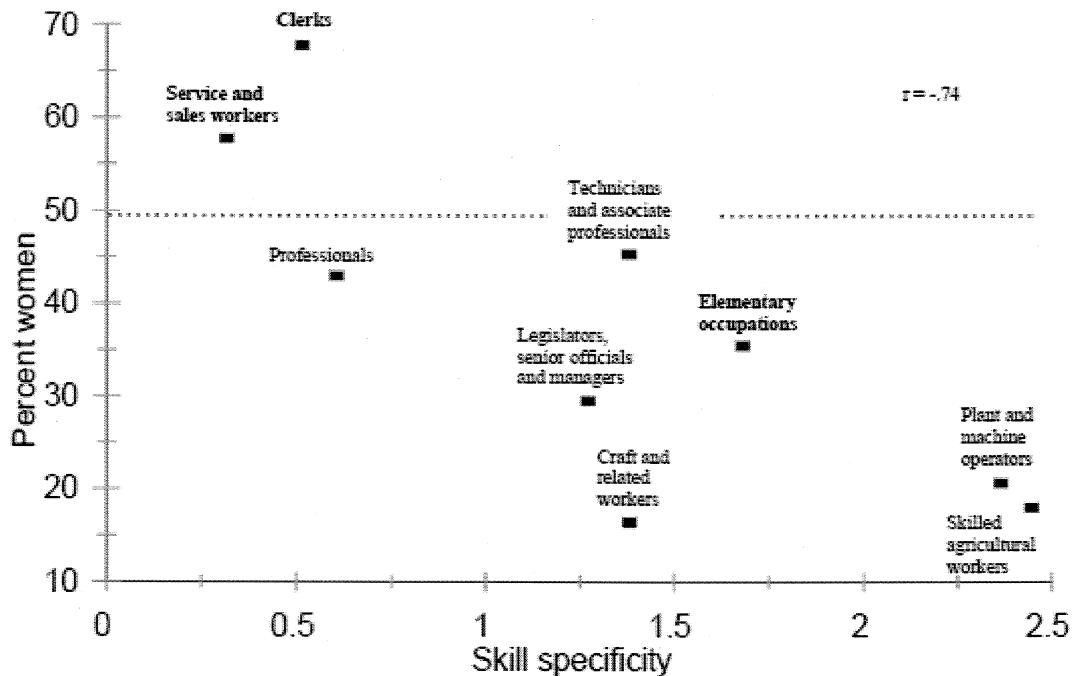
As with the other economic systems we have reviewed, post industrial societies tend to have a set of gender norms that reinforce the most efficient strategies for securing a stable livelihood for children of both sexes. With the possibility of independent livelihood outside of marriage, the bargaining position of women has improved, leading to a steady assault on patriarchal norms. Parents in developed economies no longer fear that assertive daughters will be consigned to lifelong poverty

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<sup>2</sup> It may be objected that since occupational distribution of workers have changed since the introduction of ISCO-88 the skill-specialization of each group may simply reflect the depletion of some groups and expansion of others. However the patterns present below are very similar if we instead use employment data from the 1980s.

and misery on account of losing out on marriage, no longer a prerequisite to her survival. We expect instead for them to teach their daughters to optimize across the marriage and work markets to ensure their happiness; and for the marriage market to be a smaller part of the happiness equation in the minds of most parents.

**Figure 3. Skill specificity and occupational gender segregation.**



Source: International Labour Organization, "Labour Statistics Database. ILO 1998-2004.

#### 4. Gender Norms and Human Mate Selection

This section introduces empirical data to test the proposition that norms follow economic structure and organization, and the bargaining relationships that accompany it. Ideally, long-run panel data on gender stereotypes would allow us to evaluate how labor market structures shape attitudes towards women and their "proper roles" across countries and within countries over time. No such data exist. Instead, we make use of David Buss's study of human mate preferences in 37 cultures (Buss 1989) to see how labor market opportunities for women affect gender stereotypes with respect to the ideal mate.<sup>3</sup> David Buss, an evolutionary psychologist, used his data to make the point that human mate preferences are hard wired and are therefore remarkably uniform across cultures. While this is

<sup>3</sup> The 37 cultures are: Nigeria, South Africa (whites), South Africa (Zulu), Zambia, China, India, Indonesia, Iran, Israel (Jewish), Israel (Palestine), Japan, Taiwan, Bulgaria, Estonia, Poland, Yugoslavia, Belgium, France, Finland, West Germany, Great Britain, Greece, Ireland, Italy, Netherlands, Norway, Spain, Sweden, Canada (English), Canada (French), USA (mainland), USA (Hawaii), Australia, New Zealand, Brazil, Colombia, Venezuela.

undoubtedly true for many aspects of mate preferences -- including good looks, emotional stability, good health, favorable social status, and even good financial prospect -- some of Buss's variables refer to social aspects of gender relations that are clearly more malleable and that our argument is designed to explain. As the economic independence of women increases, we expect socially malleable norms about desirable mate attributes to change as well.

**Table 2. Mate preferences as a function of economic sector**

	Dependent variable					
	Good cook and housekeeper		Desire for home and children		Chastity	
Industrial employment	-0.003 (0.005)	0.002 (0.008)	-0.004 (0.009)	0.013 (0.013)	-0.018 (0.010)	-0.001 (0.013)
Service employment	-0.014** (0.004)	-0.014 (0.004)	-0.016* (0.006)	-0.011* (0.007)	-0.027*** (0.007)	-0.017** (0.007)
Western culture	-	0.084 (0.170)	-	-0.348 (0.278)	-	-0.923*** (0.280)
Fertility rate	-	0.085 (0.054)	-	0.100 (0.089)	-	-0.069 (0.089)
Constant	2.293** (0.160)	1.858 (0.332)	3.006** (0.259)	2.325*** (0.544)	2.823** (0.289)	2.584*** (0.547)
Adj R-Squared	.451	.481	.262	.297	.576	.651
N	31	31	31	31	31	31

Key: \* Significant at .05 level; \*\* significant at .01 level (two-tailed test)

There are three variables in the Buss data that are particularly good candidates for such an interpretation: chastity, good cook and housekeeper, and desire for home and children. In male-dominated societies, especially agricultural ones, chastity is a norm that restricts the use of the only mobile "asset" of women: their sexuality. An inviolable norm of chastity restricts sex to an activity that can only occur inside the marriage, and thereby also restricts the ability of women to use sex for bargaining purposes. Of course, the limits of norms are constantly tested and sometimes broken – much of world literature would not exist otherwise! – but societies where men hold most of the power can be expected to develop norms of chastity. In postindustrial societies where women have high mobility out of a marriage, on the other hand, chastity is an unsustainable, and inefficient, norm. If men insisted on virginity in this context, they would severely limit the pool of potential mates. Hence, the movement from agricultural to postindustrial economies should be associated with a decline in the importance placed on chastity.

If we are right that females were economically viable without a male patron in hunter-gatherer societies, and this is the "environment" of early evolutionary adaptation, there is also no reason men and women are genetically coded to have mate preferences that reflect a particular sexual division of

labor. It makes good sense for men to seek women who are good cooks and housekeepers, or have a strong desire for home and children, in societies where the structure of the economy induces a strict “traditional” gender division of labor, but not in societies where women have economic opportunities outside the family that rival those of men. In these cases, men who only consider women with traditional homemaker skills will again limit the available market for desirable mates.

The malleability of sexual norms, and certain mate preferences, is reflected in the Buss data. For example, when respondents are asked about the importance of female chastity on a scale ranging from “3” (indispensable) to “0” (irrelevant or unimportant), the average for Yugoslavia is 0.08 while the average for China is 2.61 (referring to the mid-1980s). The variation in the variables “good cook and housekeeper” and “desire for home and children” is somewhat lower, but still considerable: Between 1.1 and 2.1 for the former and 0.9 and 2.8 for the latter (again, the feasible range is from 0 to 3). Variation of this magnitude invites for explanations such as ours that relate variability in gender stereotypes, including mate preferences, to the relative economic resources available to men and women.

The Buss data were collected from 37 “cultures,” which generally coincide with the boundaries of nation-states and represent a range of geographic regions, ethnicities and levels of development. The dataset consists of 10,047 individual-level observations, which are averaged for each of the 37 cultures. We focus on 31 of these cases because they refer to countries (not ethnicities) for which we have comparative data on potential independent variables. In the case of the U.S., Buss, Shackelford, Kirkpatrick, and Larsen (2001) build a data set from existing surveys dating back to 1939, and we will make some use of these longitudinal data to examine cross-time trends. The individual-level data are unfortunately of little use for our purposes because they contain virtually no relevant political economy variables.<sup>4</sup>

Buss and co-authors emphasize the cultural universality of mate preferences (including male preference for chastity and beauty and female preference for males with more resources), while we emphasize the very significant changes in the three variables. Buss, Shackelford, Kirkpatrick and Larsen speculate briefly about the causes of these changes (the pill in the case of chastity and increased use of domestic help in the case of the good cook and housekeeper variable), but we see

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<sup>4</sup> While an invaluable data source, there are other limitations of the data. The samples are not representative of the populations in each country, and rural, less-educated and lower-income areas in particular are underrepresented. Furthermore, sampling techniques varied widely across countries; in some countries only high school students were interviewed. In another, surveys were taken of couples applying for marriage licenses, and in another, respondents were gleaned from newspaper advertisements.

the changes to be closely related to broad structural-economic differences across time and space. In particular, mate preferences are very different in agricultural societies compared to industrial and especially service-intensive economies. These differences, we submit, are systematically related to the economic position of women. Where women face good labor market prospects, they are less reliant on finding a spouse who can support them, and attributes such as chastity or desire to care for the family ought to decline in importance as male mate selection criteria.

Using the sectoral composition of the economy as explanatory variables, the OLS regression results in Table 2 shows how mate preferences change with the structure of the economy. The sectoral variables are the shares of total employment in industry and services. Since those not employed in these sectors are engaged in agriculture, agriculture serves as the reference group. Omitting other controls, industrial and service employment always reduces the emphasis adults place on traditional values, although the effect is much stronger (and statistically significant) for services. While this seems to suggest that it is the service economy, not the industrial economy, that transforms norms, one has to be cautious with such an interpretation because industrial and service employment are compositional variables that change in tandem. As we discuss in a moment, the initial rise of services came *as a result of* the industrial revolution, and it was in fact not until the 1960s that the expansion of services started to be associated with a decline in industry. But the lack of any strong effects of industrial employment *does* tell us something useful about causal mechanisms. As we showed above (see Figure 3), the rise of manufacturing jobs has not been a boon to female employment because these jobs tended to emphasize brawn or specific skills (with the exception of some low-skill occupations). The lack of any significant effect of industrial employment on mate preferences underscores this point.

Note that the results do not change notably when controlling for Western culture (meaning simply countries that are commonly assumed to belong to “the West”) and fertility rates. The first is included because it might be supposed that the decline in traditional gender norms reflects the rise of a secular and decadent Western culture, occasioned not by any economic laws of change but by excessive individualism, an explosion of popular culture, and lack of moral leadership. Yet it is only in the case of chastity that the Western dummy seems to add explanatory power, and even here it does not eliminate the importance of economic sector. Fertility rates seem to matter even less, although it is common to suppose that it is the pill, and the accompanying decline in fertility, is what has caused a transformation in gender norms. In the case of chastity, the effect of the fertility variable is actually in the wrong direction.

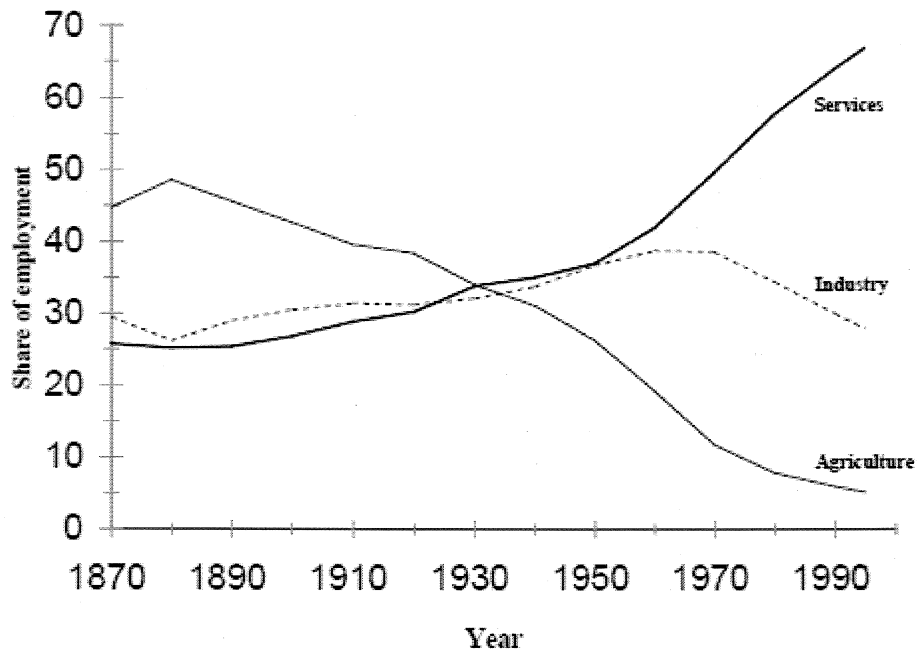
While the importance of the employment structure stands up to these controls, it is true that this

structure is almost perfectly co-linear with economic development, which renders regressions that include controls for development impossible. One may therefore say that a broader process of economic development drives the story, and certainly economic development is correlated with female labor market opportunities. Yet we think it is instructive to distinguish the effects of industry and services on norms because they matter in quite different ways as we have shown. For more than a century, industrialization was the engine of economic development in Europe, but the transformation of gender norms was glacial compared to the effect of postindustrialization in the past four decades. Considering that many manual jobs in manufacturing were as unappealing to women as agricultural labor, this is not surprising, and it shows why it is not sufficient to simply focus on economic development.

Industrialization, however, did not merely replace agricultural labor with tough manual jobs in the manufacturing sector. It also vastly expanded the number of secretaries, retailers, maids, accountants, insurance agents, merchants, and bankers. In other words, industrialization created a range of jobs for which women were as well equipped, in terms of natural ability, as men. This is illustrated by the long-term employment data in Figure 4. Starting around the beginning of the industrial revolution in 1870, the graph shows how the rise of industrial and service employment went hand in hand, at the expense of agricultural employment, until the 1960s. From then on industrial employment begins to decline (along with agriculture), while service employment expands at an even faster rate. Figure 5 illustrates this curvilinear relationship using both the intertemporal data on employment from Figure 4 and the cross-sectional figures from the Buss data. Note how employment in industry and services rise in tandem until industry employs about 40 percent of the labor force. At that point services grow at the expense of industry. Given the very similar pattern for the time-series and cross-sectional data, it is sensible to treat countries in the Buss et al. data as if they are on different developmental stages. We can then use the cross-sectional regression results to simulate mate preferences through time. Since some data on mate preferences are available overtime in the U.S. case, we are able to check the historical simulations against actual data for this country.



**Figure 4 The sectoral composition of employment in 17 OECD countries, 1870-1995.**



**Figure 5. The relationship between service and industrial employment**

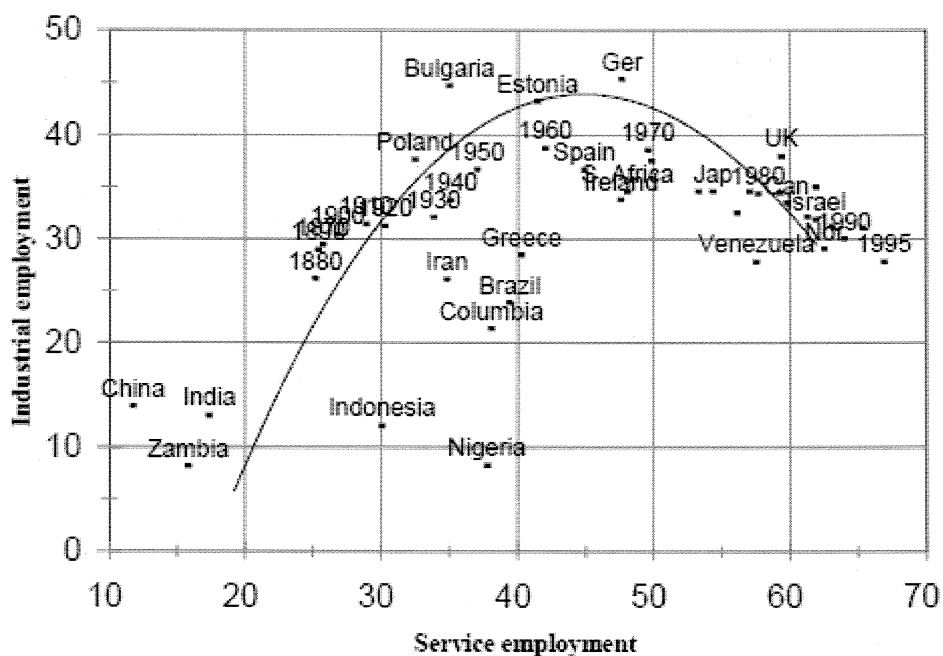
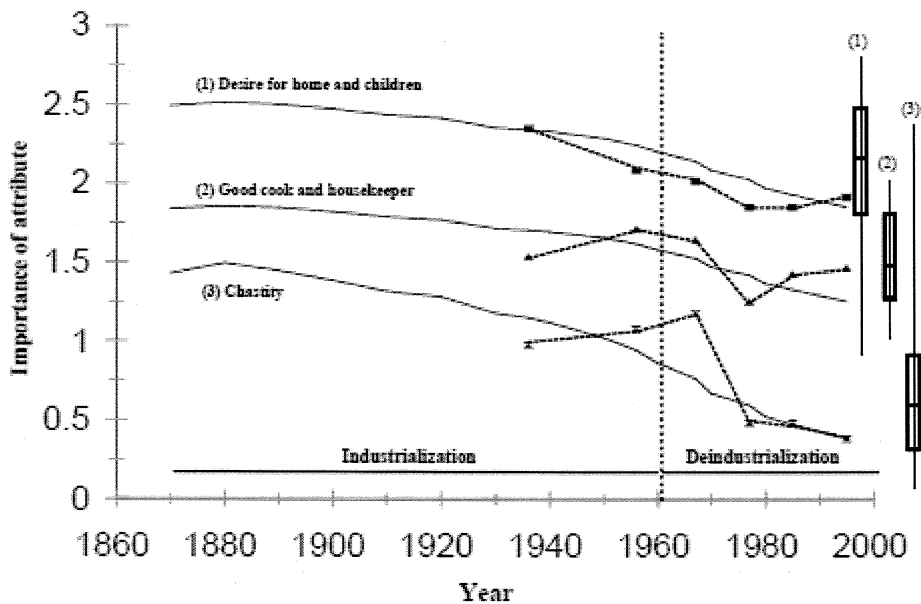


Figure 6 shows the results on this simulation. As can be seen, although manufacturing employment has not been particularly conducive to the economic empowerment of women, or gender equality,

the expansion of services that accompany industrialization has. Roughly half (49%) of the total estimated change in mate preferences since 1870 occurs during the 90 years of industrialization from 1870 to 1960. The rest occurs during the 35 years from 1960 to 1995. So while industrialization helped transform gender norms, this transformation was notably accelerated by deindustrialization. This adds to the recent literature on deindustrialization, which argues that the rise of services has transformed the welfare state and redistributive politics (Esping-Andersen 1990; Iversen and Wren 1998, Iversen and Cusack 2000) and led to a rising gender gap in social policy preferences (Iversen and Rosenbluth 2005). In addition, we argue, deindustrialization has caused a rapid transformation in gender norms and socialization patterns. The total estimated changes in values as a result of changes in the employment structure correspond to roughly one inter-quartile difference on each of the preference variables in the cross-sectional data (see the “box and whisker” plots in Figure 6). Tracking the sectoral structure of the economy thus gives a lot of leverage on predicting mate preferences.

**Figure 6. Simulated mate preferences in 17 countries, 1870-1995.**



*Notes:* The solid lines are the predicted preferences for particular attributes in potential mates based on the regression results in Table 2 and historical data on the average sectoral composition of employment. The dotted lines are the averages for the U.S. based on historical data on the rankings of preferred attributes. The scale on the y-axis uses the entire range of the preference variable. The “box and whisker” plots on the right show the median, the range, and the inter-quartile difference for each variable.

Of course, our simulations assume that the cross-sectional regression results are applicable across time. There are no comparative survey data going back to the previous century that would allow us to test this assumption (what a tantalizing thought!), but we do however have mate preference data for nearly half a century (1939-1996) in the case of United States. The evolution of preferences across the three variables in this case is shown by dotted lines in Figure 6. They generally follow the simulated trend, and one should not make too much of deviations for individual years since the samples are small, unrepresentative, and not consistently polled over time. In 1956, for example, the numbers are based on just 120 undergraduate students at University of Wisconsin at Madison. Other samples have different sizes and are from different universities. What is remarkable is the changes in the US are so similar to the simulated changes based on the cross-sectional data.

It should be added that since the U.S. is an early industrializer, with only 18 percent of the labor force in agricultural employment by 1939, employment in industry and services are almost perfectly negatively correlated ( $r=-.85$ ). We can therefore use service employment as a good proxy for the employment structure in this period, and it turns out to be strongly positively correlated with the dependent variables ( $r=.8$ ,  $.6$ , and  $.9$  respectively). Of course, we cannot exclude other causes based on such a small number of observations, but the combination of evidence tells a story that is very supportive of the view that gender norms change with the relative economic mobility of men and women, which is in turn determined by the skills required to participate effectively in the economy.

We have shown that economic structure, and in particular, the demand for female labor, is linked to changing attitudes about desirable attributes in a marriage partner. This is so, we have suggested, because the availability of remunerative employment for women changes the dynamics of gender socialization. Instead of rearing daughters solely for the marriage market, families begin to think of their children's economic chances more equally. The social glorification of virginity declines as it loses its economic grip. Being a good cook and a good parent, while perhaps also always desirable attributes in a mate, become less the sole province of the female partner.

In the following section, we consider the implications of norm changes for legislative politics. We two related points: that government policies can influence female labor force participation by altering the mix of industrial and service jobs; and that this mix, in turn, shapes the policy preferences of female voters.

## **5. The Politics of Gender: Economic Opportunities and Political Preferences**

It seems clear that economic modes of production, by increasing or reducing the premium on a household sexual division of labor, have exerted a powerful influence on gender norms in historic

time. In the highly interventionist politics of the modern world, a focus on economic structures is likely to miss a big part of the story. We highlight here the importance of government policies, in particular, those that influence the demand for female labor, in shaping women's political preferences. While government policies that protect industrial jobs may depress labor market opportunities for women, government spending on childcare and elderly care and public sector service jobs can offset the weak private sector demand for female labor. This matters for politics: women who work outside the home vote to the left of working men and at-home women because they value the government spending that make their jobs possible. The broader point, for the purposes of this paper, is to highlight the unifying logic underlying gender norms and policy preferences. There is also likely to be a direct link between norms and policy preferences. Not only will those who seek to strengthen the position of women in the labor market be inclined to teach their sons and daughters gender equality. They will also be pre-disposed to favor educational policies that incorporate such equality into the public school curriculum.

As labor economists point out, women are generally at a disadvantage when competing for jobs with men because they are expected to leave the labor market for purposes of child birth and rearing (Mincer 1958, 1978; Polachek 1975, 1981). Employers will therefore be more reluctant to invest in skills of women, and young women are likewise more reluctant to build up substantial employer-specific assets or even invest in the education that is needed for a specific skills kind of job since these may be forfeited with the birth of their first child (Anderson, Binder, and Krause, forthcoming).

How great the motherhood disadvantage is, however, depends on the nature of skills that employers are seeking, as Estevez-Abe (1999) and Estevez-Abe et al. (2001) have argued. If such skills are highly specific to firms, or even to industries, and if a substantial part of training is paid by the employer, there is a strong disincentive to make these investments in female employees where the average time horizon is comparatively short. This is reinforced by women's own decisions because they are disinclined to invest in specific skills for which they are at a disadvantage. Women are therefore more likely than men to invest in general skills and/or in skills that are less prone to deteriorate when not used for some period of time (lower atrophy rates).

We can relate this argument back to our general theoretical model. Recall that the relative bargaining power of the male and female is a function of demand for assets outside the household in which men and women hold a comparative advantage. Women have a comparative *disadvantage* in specific labor market skills just as they have a comparative disadvantage in hard manual labor. Economies that place a premium on specific skills therefore put women at a disadvantage compared to

economies that emphasize general skills (in which women are at an equal footing with men if we assume that labor is not physically highly challenging and that women do not have a strong absolute advantage in household skills). Modern comparative political economy emphasizes that there are indeed cross-national differences in the demand for specific skills. Taking advantage of the international division of labor, some countries have specialized in the forms of production that use specific skills intensely while others have specialized in production that uses general skills intensely (Hall and Soskice 2001; Iversen 2005). Our argument implies that women in the latter are generally better able to compete on an equal footing with men in the labor market because investments in skills are mostly borne by workers rather than by employers (say, through college education) and because general skills do not depend on staying with a particular employer for a long period of time. This implies that, everything else being equal, female labor market participation tends to be lower in specific skills systems.<sup>5</sup>

These effects, however, will be mediated by social and economic policies deliberately designed to counter them. In particular, the extent to which the state supports the ability to form an independent household, especially through publicly provided services such as daycare, and through employment for women in these services, it can compensate for the exclusion of women from good jobs in the private labor market (Esping-Andersen 1999; Orloff 1999). The Scandinavian countries in particular have attained high female participation rates by creating a large, and heavily feminized, public sector.<sup>6</sup> This, then, implies a role for democratic politics in affecting the bargaining power between the sexes, and this in turn suggests that policy preferences between the sexes diverge. With universal suffrage this turns gender politics into a potential independent variable in explaining power between the sexes (Lott and Kenny 1999).

The possibility of a gender gap in political preferences emerges when spouses have conflicting preferences over the household sexual division of labor: whether or not women should work outside the home, and at what cost to the husband's bargaining power and leisure time (Iversen and Rosenbluth, forthcoming; Iversen, Rosenbluth, and Soskice, forthcoming). Starting in the late 1970s in the United States and Scandinavia, and some years thereafter in many other European countries,

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<sup>5</sup> Institutions that protect private sector specific skills, such as high job security, seniority pay, and generous employer-financed benefits, tend to reinforce insider-outsider divisions, and since women are more likely to be outsiders, they are at a greater disadvantage compared to more flexible labor markets where low protection encourages investment in general skills.

<sup>6</sup> Note that the private sector in Scandinavia is a characteristically specific skills economy. One can view the large services component of the public sector counteracting the effects of the private sector specific skills economy, or as pulling the Scandinavian economies into a general skills direction. Although they are analytically equivalent, we adopt the former approach only for ease of presentation.

women have in fact begun moving out of sync with their husbands in their voting behavior, often voting to the left of men in aggregate. Women tend to support activist government across a range of economic policies (Alvarez and McCaffery 2000; Greenberg 2000; Ladd 1997; Shapiro and Mahajan 1986).<sup>7</sup>

We explain this gender gap in policy preferences by way of the distributional effects across the sexes of government spending. With some of her family burden lifted by the public purse, a woman is better able to invest in her marketable skills. By raising her level of economic independence closer to her husband's, a wife reduces her stake in keeping the relationship going closer to his level. In terms of the theory this is the same as saying that the woman increases the mobility of her economic assets, causing her bargaining power to rise.

Since women are much more likely to end up as primary care givers, their welfare is disproportionately helped by the availability of high quality, low-cost daycare. Men may prefer to spare the public purse and hence their tax bill if their wives are default childcare givers. This logic also applies to public care for the elderly and the sick because it helps women escape some of their traditional duties and thereby permit more time to be spent in paid employment. In addition, as we have stressed throughout, the welfare state is an important source of employment for women precisely because so many of the jobs replace caring functions that are otherwise provided "for free" in the family. The importance of public employment is particularly important in specific skills countries where, as we have argued, it powerfully shapes the labor opportunities of women.

An important qualification to our argument is that the gap in gender preferences depends on the extent to which women participate in the labor market, as well as on the probability of divorce. Because nonworking women's welfare depend more on the income of men than is the case for working women's, they have a stronger incentive to support policies that raise the take-home pay of males. Nonworking women may still care about their outside options, but policies that reduce the relative wage of men also reduce the income of families where the woman does not work.

We illustrate our argument by replicating some results from a multi-level analysis of the gender gap in 10 OECD countries (Iversen and Rosenbluth, forthcoming).<sup>8</sup> The data are from the 1996

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<sup>7</sup> This move is striking, because in what Inglehart and Norris term the "traditional gender gap," women typically voted to the right of men in these countries, perhaps because their greater longevity put them in greater numbers in the most conservative age bracket; and perhaps because of their social role as protector of family values and perhaps resulting tendency to be more religious (Inglehart and Norris 1999, 2002; Studlar, McAllister, and Hayes 1998).

<sup>8</sup> Australia, Britain, Canada, France, Germany, Ireland, Norway, New Zealand, Sweden, and United States

International Social Survey Program on the role of government, and we focus on gender preferences for government employment and the political left. The former is measured by three questions that ask whether the government should a) finance projects to create new jobs, b) reduce the working week to produce more jobs, and c) be responsible for providing jobs for all who wants to work. Respondents could express different levels of support or opposition, and we combined the answers into a single public employment support index, which ranges from 1 (strong opposition) to 5 (strong support). The partisan variable is declared affiliation or support for a left or center-left party.<sup>9</sup> The variable is coded 1 for center-left, and 0 for center-right, support.

The gender gap in preferences is modeled simply as the difference in preferences between men and women, estimated by a gender dummy variable (1=women, 0=men). To test whether the gender gap varies across groups and countries, we interact this variable with labor force participation, risk of divorce, and a measure of the skill system which is equal to the mean, after standardization, of national vocational training intensity and firm tenure rates.<sup>10</sup> The risk of divorce is proxied by national divorce rates, defined as the percentage of marriages ending in divorce.<sup>11</sup> In addition, we distinguish between those who are married and those who are not. One might sensibly expect that unmarried people demand more social protection because they are unable to pool risks within the family. But this should be particularly true of women who tend to be in more vulnerable labor market positions. One can loosely think of being unmarried as a *realized* risk of having to rely on outside options.

The gender gap is estimated using multilevel regression with country-specific intercepts, including a number of plausible controls. The full set of results is in Appendix A.<sup>12</sup> Here we focus on the effect of the key variables mentioned above, which are illustrated in Figure 7. For each of four different combinations of marital status, labor market participation, divorce rates, and skill system the figure shows the gender gap in support for public employment policies and left parties. The gap is measured in standard deviations on the dependent public employment variable, and as the

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<sup>9</sup> One could also focus on declared voting choices, but expressed support for a party arguably captures a more stable underlying preference that are not affected by short-term political issues for which we have no measures.

<sup>10</sup> Vocational training intensity is the share of an age cohort in either secondary or post-secondary (ISCED5) vocational training. *Source*: UNESCO (1999). Tenure rates are the median length of enterprise tenure in years, 1995 (Norwegian figure refers to 1991). *Sources*: OECD *Employment Outlook*, 1997, Table 5.5. For Norway: *OECD Employment Outlook*, 1993, table 4.1.

<sup>11</sup> The data are from “Society at a Glance: OECD Social Indicators” OECD 2001.

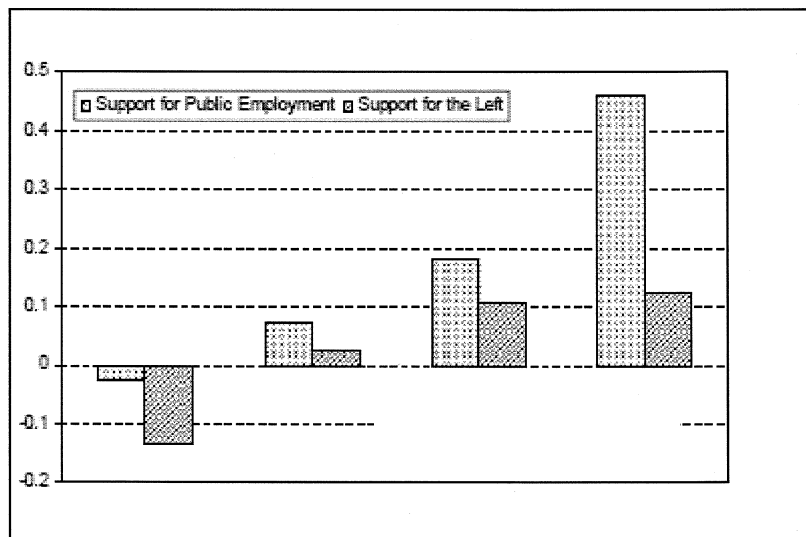
<sup>12</sup> We used maximum likelihood regression with robust standard errors, assuming a normal density function for the disturbances. We obtained the estimates in Stata using the `ml` procedure for survey data (countries are treated as clusters).

probability of supporting a left or center-left party. We see that a married woman outside paid employment living in a country with low divorce rates, or a general skills economy, may well be more conservative in their political preferences than men. Certainly that is the case in terms of left party support. With labor market participation, however, preferences for a more active government intensify, and unmarried women are also notably more “left-leaning” than men. At least for preferences over employment policies the gender gap is particularly large in specific skills countries with high divorce rates. Here married women in paid employment are estimated to be nearly one half a standard deviation more supportive of an active role of the government in employment creation than men, and they are 13 percent more likely to support a left or center-left party than men (compared to 13 percent *less* likely when women are married, not working, and living in a general skills or low divorce country).

The results are thus consistent with the argument that the gender gap varies across countries according to how conducive the economy and public policies are to female labor market participation. When women are exposed to the risk of divorce, they rationally favor policies that increase the demand for assets in which they have a comparative advantage – which means general skills with no premium on brawn. As we have argued, and as Figure 3 above nicely illustrates, such jobs are much more prevalent in services, especially in social and personal services. Women, therefore, tend to support policies that promote such services. They also do this because availability of caring services outside the household reduces their reliance on household specific assets -- SF in the theoretical model – increasing their bargaining power vis-à-vis men.



**Figure 7. The Gender Gap in Support for Public Employment and Left Parties**



*Notes:* The bars show the predicted difference between men and women in their support for public employment policies and left parties, where a positive gap means greater support among women. The gap in support for public employment is measured in standard deviations of the dependent variable. The gap in support for the left is measured in differences in the probability of voting for a left party.

Using the logic developed in this section we can revisit some claims that are sometimes made about the gender and political preferences. Orloff (1993, 1999) and O'Connor, Orloff, and Shaver (1999), for example, strongly suggest that women are most disadvantaged in countries, such as those in southern Europe and East Asia, where female labor force participation rates are low, stratification on the labor market high, and the distribution of domestic work very unequal. If access to paid work and the ability to form autonomous households are fundamental interests of women, as Orloff and others argue, one would expect gender conflicts to be most intense in these countries. Yet, these are countries in which the policy preferences of men and women appear the most *similar*, and where there does not appear to be a strong gender gap in electoral politics. An explanation for this puzzle is that the family as an institution is heavily protected through labor market conditions, and reinforced by legislation and norms against divorce. The likelihood of a first marriage ending in divorce in Italy is less than one in 10—even lower than the 1950s United States. In addition, female labor force participation rates are very low, which also help to align the interests of men and women.

Another controversy surrounds the role of the public-private sector division in Scandinavia.

According to some, this division—which concerns issues of public sector size, relative pay, and public sector job protection—has emerged as a salient cleavage in electoral politics. But, as Pierson points out, since men in the private sector tend to be married to women in the public sector, there is no compelling reason that spouses should quibble over issues of relative pay (2000, 807). At the end of the day, the income of both spouses simply adds to family income. But this logic only applies when husband and wife have few reasons to concern themselves with outside options. And since pay in the public sector is financed by taxing the private sector, policies affecting relative pay are a perfect example of an area where gender conflict is likely to be intense.

A third puzzle concerns the persistent and widespread tendency of women to be less likely than men to support global economic integration. In a very careful empirical paper, Burgoon and Hiscox (2004) suggest that the “gender gap” in trade preferences might reflect economic illiteracy of women compared to men, and that the trend towards education equality might, in time, eliminate the gap. Our analysis of the political gender gap, which includes a control for education, invites skepticism about this conclusion. We expect that the gender gap in trade preferences reflects, as we have suggested, a greater likelihood that women are employed in the public sector. Whether or not it is sensible to think that economic integration will hurt public employment, it seems that both men and women tend to think that this is the case, suggesting that the gap is due to differences in policy preferences rather than in macroeconomic theorizing.

## **6. Conclusions**

Patriarchal values, we have suggested, may be thought of as an internalized reckoning of relative bargaining power. When the alternatives to marriage are systematically weaker for females than for their male partners, it does not require a brutish man to keep his wife in submission. If her parents and social community have done their job, she will have learned as a girl the importance of virginity until marriage (though she may not think of it as a strategy for marrying “up”) and she will have cultivated many qualities to keep her husband pleased with her (though she may not consider these qualities as a means to maintain her livelihood). For her, as perhaps for her forebears, these are not schemes but are normal, commonsensical, perhaps even morally mandated ways to live. Patriarchy, when other options are unworkable, does not require a big stick.

The ability to walk away from the status quo confers bargaining power that is not available to women in agricultural economies where the premium to male brawn makes inefficient, perhaps even unviable, female employment on a par with a man’s. We have argued that industrialization, and even more dramatically, the rise of the service sector, are transforming social values by providing women with alternatives to unsatisfying marriages. Once employment opportunities for women have

approached those of men in quantity and quality, socialization has begun to shift away from “playing the marriage market.” The declining importance of virginity, along with lower male expectations of homemaking skills in a spouse, reflect a change in the way parents are preparing their children for life and livelihood.

The gender gap in policy preferences reflects the same logic, for working women rely on government services, and in some cases government employment, to maintain their bargaining position in marriage. Because of democracy and universal suffrage, coupled with the rise of state power, gender relations have become politicized. While mate preferences in agrarian societies seemed to reflect an inevitable female resignation to their subordination, modern mate preferences are more egalitarian, and the gender gap in policy preferences suggest that many women are hoping to use the democratic state to make them more egalitarian still.

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**Appendix A**  
**The Gender Gap in Social Preferences and Left Party Support**

	Public employment				Left partisanship			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Female	0.174*** (0.032)	0.057 (0.041)	-0.039 (0.111)	-0.022 (0.050)	0.154 (0.133)	-0.552** (0.222)	-0.896 * (0.467)	-0.563* (0.304)
Female x Labor force participation	-	0.113** (0.037)	0.115** (0.048)	0.124** (0.050)	-	0.729*** (0.188)	0.753*** (0.191)	0.731*** (0.191)
Female x unmarried	-	0.066** (0.029)	0.064** (0.029)	0.062** (0.030)	-	0.315** (0.111)	0.312** (0.112)	0.314** (0.113)
Female x divorce	-	-	0.001 (0.002)	-	-	-	0.007 (0.006)	-
Female x skill skill-specificity	-	-	0.162 (0.125)	-	-	-	0.006 (0.373)	-
Female x divorce x skill specificity	-	-	-	0.298** (0.117)	-	-	-	0.038 (0.482)
Labor force participation	0.077 (0.045)	-0.017 (0.044)	-0.032 (0.048)	-0.041 (0.050)	0.514** (0.214)	-0.049 (0.292)	-0.071 (0.303)	-0.052 (0.296)
Unmarried	0.057*** (0.016)	0.024 (0.023)	0.025 (0.023)	0.026 (0.023)	0.175* (0.091)	0.011 (0.106)	0.013 (0.104)	0.011 (0.103)
Income (log)	-0.003*** (0.001)	-0.003*** (0.0005)	-0.003*** (0.0005)	-0.003*** (0.0005)	-0.003 (0.002)	-0.003* (0.002)	-0.003* (0.002)	-0.003* (0.002)
Individual skill specificity	0.100*** (0.023)	0.100*** (0.023)	0.099*** (0.022)	0.098*** (0.023)	0.240** (0.083)	0.246** (0.084)	0.242** (0.084)	0.246** (0.083)
Age	-0.001 (0.002)	-0.001 (0.001)	-0.001 (0.001)	-0.001 (0.001)	0.002 (0.005)	0.001 (0.006)	0.001 (0.006)	0.001 (0.006)
Education	-0.013 (0.020)	-0.013 (0.020)	-0.015 (0.020)	-0.015 (0.020)	0.080 (0.081)	0.079 (0.080)	0.078 (0.080)	0.078 (0.080)
Retirement	0.066 (0.056)	0.018 (0.052)	0.005 (0.061)	0.0002 (0.061)	0.120 (0.288)	-0.149 (0.309)	-0.164 (0.305)	-0.150 (0.302)
Unemployment	0.197** (0.081)	0.156* (0.086)	0.141* (0.061)	0.135 (0.082)	0.628 (0.420)	0.427 (0.410)	0.417 (0.411)	0.425 (0.410)
Religiosity	-0.012 (0.009)	-0.012 (0.009)	-0.011 (0.009)	-0.011 (0.008)	-0.121* (0.051)	-0.122* (0.050)	-0.122** (0.049)	-0.122** (0.049)
Catholic	-0.019 (0.105)	-0.016 (0.104)	-0.017 (0.105)	-0.017 (0.104)	-0.261 (0.293)	-0.252 (0.293)	-0.257 (0.295)	-0.253 (0.293)
No of countries	10	10	10	10	10	10	10	10
N	7460	7460	7460	7460	5793	5793	5793	5793

Key: \*\*\* p<.01; \*\* p<.05; \*<.10. Note: The entries are maximum likelihood estimates with estimated standard errors in parentheses. Left partisanship was estimated using binominal logistic regression. All models have country-specific intercepts (not shown).



## The Constitutional Politics of Abortion

Ian Shapiro\*

### Abstract

This revised introduction to my *Abortion: The Supreme Court Decisions 1965-2000* (Hackett, 2001) provides the basis for an a democratic theory of judicial review. It rests on the claim that constitutional courts lose legitimacy unless they intervene in the legislative process in democracy-reinforcing ways. This is illustrated by reference to the evolution of abortion jurisprudence since the 1960s. *Roe v. Wade*, decided in 1973, violates the injunctions that follow from my argument. As a result, it remains controversial three decades later and has undermined the Supreme Court's legitimacy. Partly in response to this reality, the Court's abortion jurisprudence has evolved since *Roe* in search of a more satisfactory approach. I evaluate the changes from the standpoint of my democratic theory of constitutional adjudication, arguing in support of Court's reasoning and holding in *Planned Parenthood of Pennsylvania v. Casey* (1992). This leads to a discussion of the Court's application of the *Casey* rule in its subsequent decision on partial birth abortion in *Stenberg v. Carhart* (2000). I conclude with some attention to how the lower federal courts have responded to Congress's attempt to overrule the *Stenberg* with the Partial-Birth Abortion Ban Act of 2003.

The American debate over abortion is both passionate and relentless. Rooted in powerfully held beliefs, it seems to pit irreconcilable world views against one another. Religious convictions that a fetus is a person, and abortion therefore murder, run headlong into the categorical insistence that life begins at birth. Those who believe that global poverty and demographic explosion are mankind's most intractable problems find themselves incredulous at spiritual leaders who travel the world railing against abortion and even contraception. Government policies to limit birth rates through abortion and family planning are seen by some as enlightened and necessary; for others they amount to wanton interference with inviolable human rights. Powerfully held convictions that women are entitled to sovereign control of their bodies collide with equally resolute beliefs that pregnancy brings with it the responsibility---however unwelcome---to carry a fetus to term. Even murder has seemed justified in the eyes of some in order to prevent the performance of an abortion. "No judicial decision in our time," writes Ronald Dworkin of the Supreme Court's 1973 decision in *Roe v. Wade*, which established that women have a constitutionally protected right to abortion in the early stages

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of pregnancy, “has aroused as much sustained public outrage, emotion, and physical violence, or as much intemperate professional criticism.”<sup>1</sup>

Alasdair MacIntyre goes further, remarking that *the* most striking feature of the modern abortion debate is its interminable character. The views that are pitted against one another are “conceptually incommensurable” in that although they are internally consistent, they rest on rival premises which “are such that we possess no rational way of weighing the claims of one as against the other.”<sup>2</sup> The deep ambivalences and conflicting emotions that people feel about abortion were well-reflected in one 1989 *Los Angeles Times* national opinion poll, which reported that although 61 percent of Americans think abortion is morally wrong and 57 percent think it is murder, 74 percent nonetheless believe that “abortion is a decision that has to be made by every woman for herself.”<sup>3</sup>

For all their contradictory impulses---indeed, perhaps partly because of them---it seems that people also expect to resolve the abortion debate. They argue in books, legislatures and the media. They take issue with one another’s reasoning and adduce statistics that they regard as decisive for one or another aspect of the issue. Even as they sense, perhaps, that the abortion debate is beyond resolution, at some level many people cannot accept this. There *must* be a reasonable resolution of the debate, they seem to think; the question is how to arrive at it.

For over two decades the United States Supreme Court has been engaged in a struggle over the abortion question. The 1973 decision in *Roe v. Wade*, supported by a majority of seven to two on the Court, seemed at the time to be a decisive resolution of the controversy. However, those who expected this decision to settle the matter by removing the abortion question from the realm of charged political debate were quickly disappointed; if anything *Roe* seemed to intensify and further polarize the public abortion debate. Nor has there been stability in the Supreme Court’s view of the abortion question in the years since *Roe* was handed down. Although the right recognized in that decision was reaffirmed by a bare majority on the Court in *Planned Parenthood v. Casey*<sup>4</sup> in June 1992, both the content of the right in question and the jurisprudential basis on which it rests have evolved substantially in a number of the Court’s decisions in the intervening two decades. Indeed, as will become plain below, the reasoning on which the original *Roe* decision rested has largely been abandoned by the Court.

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<sup>1</sup> Ronald Dworkin, “The great abortion case,” *New York Review of Books* (June 29, 1989), p. 49.

<sup>2</sup> Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 2d ed., (University of Notre Dame Press, 1984), p. 6-8.

<sup>3</sup> Reported in Dworkin, “The great abortion case,” p. 49.

<sup>4</sup> 112 S.Ct 1791 (1972).

Part of the evolution in the Court's understanding of the right to abortion reflects changes in its personnel. In 1973 Justices Rehnquist and White were the only dissenters from the majority opinion authored by Justice Blackmun. By 1994 Rehnquist was Chief Justice, and most of the original *Roe* majority had departed. Burger, Douglas, Brennan, Stewart, Marshall, Powell and Blackmun had all retired (as had the other dissenter from *Roe*, Justice White), and been replaced by Justices Stevens, Scalia, O'Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer. All the replacements other than Ginsburg and Breyer (appointed by President Clinton in 1993 and 1994) were Republican appointees who were in varying degrees uncomfortable with the reasoning, outcome, or both in *Roe*. Indeed even Ginsburg was known to be uncomfortable with aspects of the reasoning (see below).

The evolution of the right to abortion since *Roe* has also been driven by things other than the changing faces on the bench, however. It is possible to discern in that evolution attempts by various members of the Court to reconcile the apparently irreconcilable, to find a middle ground that could satisfy at least some of some of the contending parties who have sought to influence the Court's handling of the abortion issue. Several Justices have struggled mightily in this regard. How successful they have been will be taken up below. Before getting to that, I begin with a sketch of the right's historical evolution and an examination of the jurisprudential issues that are at stake in the abortion controversy.

### **History of the Constitutional right to abortion**

There is a significant respect in which debate about constitutional protection for the right to abortion on the Supreme Court is detached from the public abortion debate. The slogans and posters at demonstrations outside abortion clinics, at rallies for and against *Roe*, and in much of the discussion in the media might reasonably lead one to assume that the central question at issue is whether or not a fetus is a person. Kristin Luker is surely correct when she says of the public abortion debate that it is fundamentally "a debate about personhood."<sup>5</sup> In fact no Justice on the Supreme Court has ever been committed to the view that the constitution should regard a fetus as a person, and if the Court were ever to embrace it the implications would be more radical than even the most ardent opponents of *Roe* appear to realize.<sup>6</sup> If the Court were to decide that a fetus is a legal person within the

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<sup>5</sup> Kristin Luker, *Abortion and the Politics of Motherhood* (Los Angeles: University of California Press, 1984), p. 5.

<sup>6</sup> Judith Jarvis Thompson has famously argued that the common perception that whether or not one is in favor of abortion depends on whether or not one thinks a fetus is a person is false. She argues that if a woman awoke one day to discover that a brilliant but sick violinist had been attached by tubes to her kidneys and that the attachment must be maintained for nine months if the violinist was not to die, the woman would have no moral obligation to maintain the attachment against her will. "A defense of abortion," *Philosophy and Public Affairs*, Vol. 1, No. 1 (Fall 1971), pp. 47-66. Ronald Dworkin points out that Thompson's argument, although influential among philosophers, is not legally dispositive because "abortion normally requires a physical attack on a fetus, not just a failure to aid it, and, in any

meaning of the Fourteenth Amendment to the US Constitution, this might well bring with it an obligation to *proscribe* abortion as a matter of federal constitutional law, at least a large class of circumstances. Jurists and legal commentators who argue that the decision in *Roe* is unconstitutional and that it should be repealed are not partisans of that view.<sup>7</sup> Rather they are advocates of restoring the status quo-ante that existed before *Roe's* passage, when the law of abortion was regulated differently in different states--sometimes by state legislatures and sometimes as a matter of state constitutional law. This status quo-ante had been quite varied, ranging from liberal states like New York that had permitted abortion, to states like Texas that had blanket prohibitions, to various intermediate regulatory regimes.<sup>8</sup> Opposition to *Roe* from such Justices as Rehnquist, White, Scalia, and Thomas is not, therefore, necessarily tantamount to opposition to abortion rights as such. Rather, it is opposition to federalizing and constitutionalizing the abortion rights question.

That government should regulate or limit women's access to abortion in order to protect the fetus is a relatively recent idea in American law and politics. Historically its emergence seems to have been linked to the increase in abortions sought by white, Protestant, married middle and upper-class women (as opposed to poor women of other races) in the mid to late nineteenth century, and the threat to the existing social order that these developments implied.<sup>9</sup> Prior to this abortion had been regulated, but the argument for regulation was that it protected the health of the mother. Abortion was a dangerous procedure that often led to infection and death. However, as Justice Blackmun noted in his majority opinion in *Roe*, by 1973 medical developments were such that statistically a woman was at greater medical risk if she carried the child to term than if she had an early abortion.<sup>10</sup>

This altered reality set the context for the Court's analysis of the right to abortion in *Roe*, in which a Texas statute that had made it a crime to "procure an abortion" unless the life of the mother is threatened by continuing the pregnancy, was held unconstitutional. For reasons that will be taken up

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case, parents are invariably made an exception to the general doctrine [that one ordinarily has no affirmative legal duty to save a stranger] because they have a legal duty to care for their children." *Life's Dominion: and Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), p. 111. For a more elaborate discussion of the legal implications of Thompson's argument, see Donald Regan, "Rewriting *Roe v. Wade*," *Michigan Law Review* Vol. 77, No. 7 (1979), pp. 1569-1646.

<sup>7</sup> See, for example, Justice Rehnquist's dissent in *Roe*, in which he concedes that he has "little doubt" that statutes proscribing abortion in all circumstances would not survive constitutional scrutiny. 410 U.S. 113, at 173 (1973).

<sup>8</sup> It should be noted that prior to *Roe* no American state had ever regarded the fetus as a legal person. As Dworkin points out, even states with the most stringent anti-abortion laws did not punish abortion as severely as murder, which they ought to have done had they thought a fetus a constitutional person, and nor did they try to prevent women from procuring abortion in jurisdictions where it was legal. Dworkin, "The great abortion case," p. 50.

<sup>9</sup> See James Mohr, *Abortion in America: The Origins and Evolution of National Policy* (Oxford, Eng.: Oxford University Press, 1978), especially chapters 3 and 4.

<sup>10</sup> 410 U.S. 113 (1973), at p. 149.

later, such statutes were held to violate the Due Process clause of the Fourteenth Amendment.<sup>11</sup> First let us get clear on the holding. Blackman's majority opinion deals with abortion differently during the three trimesters of a normal pregnancy:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>12</sup>

This trimester-based test greatly limited the power of states to regulate abortion. Before the end of the first trimester abortion could no longer be regulated at all; prior to the point of viability it could only be regulated in the interests of the health of the mother; and even after viability if a state chose to regulate or proscribe abortion acting on its interest "in the potentiality of human life," this could be trumped if the attending physician made an "appropriate" judgment that this was necessary for the "life or health" of the mother.

In *Roe* the Court acknowledged that the state has an interest in potential human life, but circumscribed that right and effectively subordinated it to the woman's right to an abortion, even (if with qualification) after the point of viability. In the years following *Roe*, various modifications to the constitutional right that it created were added by the evolving majority on the Court. In a number of respects the right recognized in *Roe* was secured and expanded. In *Doe v. Boulton*,<sup>13</sup> also decided in 1973, the Court struck down restrictions on places that could be used to perform abortions, giving rise to the modern abortion clinic.

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<sup>11</sup> The Due Process Clause states: "No state shall....deprive any person of life, liberty or property, without due process of law."

<sup>12</sup> 410 U.S. 113 (1973), at pp. 164-5.

<sup>13</sup> 410 U.S. 179 (1973).

Three years later, in *Planned Parenthood v. Danforth*,<sup>14</sup> the Court denied states the authority to give husbands veto power over their wives' decisions to abort pregnancies, and also held that parents of unwed minor girls could not be given an absolute veto over abortions. In 1979, in *Colautti v. Franklin*,<sup>15</sup> the Court affirmed its intention to give physicians broad discretion to determine when a fetus can live outside the womb. The Justices said that although a state may seek to protect a viable fetus, the determination of viability must be left to doctors. In 1983 the Court placed additional limits on the types of regulations that states may place on abortion. In a trio of decisions, *City of Akron v. Akron Center for Reproductive Health*,<sup>16</sup> *Planned Parenthood of Kansas City v. Ashcroft*,<sup>17</sup> and *Simopolous v. Virginia*<sup>18</sup> by a six to three vote a majority on the Court denied states and local communities the power to require that women more than three months' pregnant have their abortions in a hospital and struck down regulations that, among other things, imposed a twenty-four hour waiting period between the signing of an abortion consent form and the medical procedure. Three years later (this time by a five to four vote that reflected the conservative drift on the court that was by then well underway), a bare majority struck down Pennsylvania regulations that had required doctors to inform women seeking abortions about potential risks and about available benefits for prenatal care and childbirth.<sup>19</sup> In 1987, the Justices split four to four in *Hartigan v. Zbaraz*,<sup>20</sup> thereby letting stand a decision below invalidating an Illinois law that might have restricted access to abortions for some teenagers.

Despite the elaboration and deepening of the woman's constitutional right to an abortion brought about by these decisions, the Court had also begun to limit the right to abortion in various ways long before the *Roe* majority began to erode. One important area of constraint concerned abortion funding. In 1977, the Court ruled, in *Maher v. Roe*,<sup>21</sup> that states have no constitutional obligation to pay for "non-therapeutic" abortions, and three years later a five to four majority held, in *Harris v. McRae*,<sup>22</sup> that even for medically necessary abortions sought by women on welfare, neither states nor the federal government are under any constitutional obligation to provide public funding. In 1979, in the first of what was to turn out to be a string of decisions regulating the rights of dependent minors to abortion, an eight to one majority on the Court held in *Bellotti v. Baird*<sup>23</sup> that states may be able to require a pregnant, unmarried minor to obtain parental consent to an abortion so long as the state

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<sup>14</sup> 428 U.S. 476 (1976).

<sup>15</sup> 439 U.S. 379 (1979).

<sup>16</sup> 462 U.S. 416 (1983).

<sup>17</sup> 462 U.S. 476 (1983).

<sup>18</sup> 462 U.S. 506 (1983).

<sup>19</sup> *Thornburgh v. American College of Obstetricians and Gynecologists*. 476 U.S. 747 (1986).

<sup>20</sup> 484 U.S. 171 (1987).

<sup>21</sup> 432 U.S. 464 (1977).

<sup>22</sup> 448 U.S. 297 (1980).

<sup>23</sup> 428 U.S. 132 (1979).

provides a “bypass” procedure, such as allowing the minor to seek a judge’s permission instead. In 1981 a six to three majority held, in *H.L. v. Matheson*,<sup>24</sup> that states may require physicians approached by some girls who are still dependent on their parents and too “immature” to decide such matters for themselves to try to inform parents before performing abortions. Two 1990 decisions, *Hodgson v. Minnesota*<sup>25</sup> and *Ohio v. Akron Center for Reproductive Health*,<sup>26</sup> further elaborated the law of parental notification. In the Ohio case, a six to three majority upheld the state law requiring notification of at least one parent so long as it provided a judicial bypass, although in the Minnesota case a five to four majority made it clear that statutes requiring both parents to be informed before a minor can have an abortion would not survive in the future.

By the time of the 1990 decisions, much of the reasoning underlying *Roe* had been compromised by the watershed decision in *Webster v. Reproductive Health Services*,<sup>27</sup> handed down by a multiply divided court eleven months earlier. With that decision, majority support for *Roe* on the Court seemed finally to have evaporated, as Justice Blackmun acknowledged in a bitter dissent. In its controlling opinion, the *Webster* Court upheld a Missouri statute requiring that before a physician performs an abortion on a woman whom he has reason to believe is twenty or more weeks’ pregnant, he shall first determine whether the unborn child is viable. More important than this comparatively minor new restriction of a woman’s right to an abortion was that the plurality launched a frontal assault on *Roe*’s trimester-based framework of analysis that had been law for the preceding decade-and-a-half.

Justice Blackmun’s throwaway remark in *Roe* that the state has an interest in “the potentiality of human life” had come back to haunt him. In Chief Justice Rehnquist’s hands it became a stake that he seemed poised to drive into *Roe*’s heart. In an opinion signed also by Justices Kennedy and White, Rehnquist flatly rejected *Roe*’s “rigid” framework as “hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles.” Rehnquist went on to say that the plurality “did not see why the State’s interest in protecting potential life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.”<sup>28</sup>

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<sup>24</sup> 430 U.S. 398 (1981).

<sup>25</sup> 497 U.S. 417 (1990).

<sup>26</sup> 497 U.S. 502 (1990).

<sup>27</sup> 492 U.S. 490 (1989).

<sup>28</sup> 492 U.S. 490 (1989), at 518-9.

Justice O'Connor had announced her opposition to *Roe's* trimester framework as early as 1985<sup>29</sup> and Justice Scalia's only objection to the plurality opinion in *Webster* was that it should have gone further and done explicitly what he insisted it did implicitly, namely overrule *Roe*. This appeared to mean that there were now five votes in favor of overruling *Roe*, even if the five Justices in question were not yet all prepared to reach that matter on the grounds that the Missouri statute in question did not in fact try to regulate abortions prior to viability. The principle had been conceded, even if what Scalia dismissed as the Court's "newly contracted abstemiousness" meant that "the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb."<sup>30</sup> No more impressed than Scalia by what he saw as the plurality's "feigned restraint," Justice Blackmun writing in dissent (also for Brennan and Marshall) declared that it "implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973." Thus, "not with a bang, but a whimper," Blackmun concluded, "the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children."<sup>31</sup>

That some of Blackmun's own formulations in *Roe* could be used to undermine its result in *Webster* is characteristic of the haphazard way in which constitutional interpretation often evolves over time. Perhaps this very fact should have alerted Blackmun to the possibility that all was not lost from his point of view. Although *Roe's* trimester framework had been jettisoned and a majority on the Court had embraced the idea that states may assert an interest in protecting "potential" human life even before the point at which a fetus is viable, this did not necessarily mean that the constitutional protection of a woman's right to an abortion would soon follow the trimester framework into the annals of constitutional history. Everything would now turn on what the nature of states' interest in potential life would turn out to be. Until that was determined, just what the impact of *Webster* would be on a woman's constitutionally protected right to an abortion could not be known. This would remain unclear for the almost three years.

In retrospect we can say that there were clues dating back to the 1970s. In *Maher v. Roe* the Court had declared that the right recognized in *Roe* "protects the woman from unduly burdensome

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<sup>29</sup> See her dissenting opinion in *Thornburgh v. American College of Obstetricians and Gynecologists* 476 U.S. 747 (1985), at p. 828.

<sup>30</sup> 492 U.S. 490, at 537.

<sup>31</sup> *Ibid.*, at 538, 557.



interference with her freedom to decide whether to terminate her pregnancy.”<sup>32</sup> This notion that state interference with a woman’s right to an abortion must not be “unduly burdensome” had first appeared in 1976 in *Bellotti v. Baird*, in which the Court had held that states may not “impose undue burdens upon a minor capable of giving informed consent.”<sup>33</sup> Since that time, various members of the Court, including several majorities, had held that no state may “unduly burden the right to seek an abortion,”<sup>34</sup> that the constitutional right affirmed in *Roe* “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy,”<sup>35</sup> that informed consent requirements for first trimester abortions will be upheld if they do not “unduly burden the right to seek an abortion,”<sup>36</sup> and that the state interest in protecting human life “does not, at least until the third trimester, become sufficiently compelling to justify unduly burdensome state interference...”<sup>37</sup> In 1982 Justice O’Connor made it clear in her dissent in *City of Akron v. Akron Center for Reproductive Health* that, for her at least, the issue of abortion revolved around finding restrictions that do not “infringe substantially” or impose “unduly burdensome” interference on the woman’s right to an abortion,<sup>38</sup> a view that she reasserted in *Hodgson v. Minnesota* in the course of arguing that only when a state regulation imposes an “undue burden” on a woman’s ability to make the abortion decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.<sup>39</sup>

In view of these formulations, it should perhaps not come as a surprise that Justices O’Connor and Kennedy---who had declined Justice Scalia’s invitation to overrule *Roe* in *Webster*---would be part of a centrist bloc on the Court (the other member being Souter) committed to reformulating the constitutional right to abortion by reference to an “undue burden” standard rooted in the Due Process clause of the Fourteenth Amendment. This was the step taken in *Planned Parenthood v. Casey*, handed down in June 1992, in which a once more multiply divided Court reaffirmed *Roe*’s basic holding while detaching it from Blackmun’s now defunct trimester-based framework of analysis, and tethering it instead to the notion of undue burden.<sup>40</sup> The *Casey* decision left many matters unresolved; indeed it created new areas of uncertainty in the constitutional law of abortion as is discussed below. But two fundamental matters about which *Webster* had generated considerable confusion were now clarified. The first was that “the essential holding of *Roe v. Wade* should be

<sup>32</sup> *Maher v. Roe*, 432 U.S. 464, at 473-74 (1977).

<sup>33</sup> 482 U.S. 132, 147 (1976).

<sup>34</sup> *Bellotti v. Baird* 433 U.S. 622, 640 (1979).

<sup>35</sup> *Maher v. Roe*, 432 U.S. 464, at 473-74 (1977).

<sup>36</sup> *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)

<sup>37</sup> *Beal v. Doe*, 432 U.S. 438-446 (1977).

<sup>38</sup> 462 U.S. 416, 461-2 (1982)

<sup>39</sup> 497 U.S. 417, 458-59 (1990).

<sup>40</sup> 112 S.Ct 2791 (1992).

retained and once again reaffirmed.”<sup>41</sup> This meant not only that the constitution guarantees women a right to abortion that no legislature has the power to destroy, but also that Court decided not to divorce itself from Blackmun’s original reasoning that had located the constitutional protection in question in a right to privacy thought to be entailed by the Due Process Clause. This was a notable development, because Blackmun’s reasoning had been much criticized in the academic literature (see below), and several of the newer appointees to the Court---not to mention Chief Justice Rehnquist---were on record as being unimpressed by it. This was perhaps the principal reason that *Webster* was thought by so many to be the beginning of the end of *Roe*, prompting the introduction of legislation intended to reverse *Webster* in Congress and turning abortion into a lightning-rod political issue in the run-up to the 1992 presidential election. In the event, declaring that “[l]iberty finds no refuge in a jurisprudence of doubt,”<sup>42</sup> the plurality invoked the doctrine of *stare decisis*. This doctrine rests on the notion that “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it,” and that consequently once a decision has become part of the law on which people have come to rely it should not lightly be overturned. *Stare decisis* is not an “inexorable command” to uphold every precedent, and it might reasonably be ignored if a rule has “proved to be intolerable simply in defying practical workability,” if it is “subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,” or if “facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>43</sup> But the plurality held that none of these considerations applied in the case of *Roe*, so that it should be upheld, even though “[w]e do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest [in protecting potential life] came before it would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.”<sup>44</sup> By appeal to this reasoning, the plurality in *Casey* held that a woman does have a constitutionally protected right to an abortion until the point of viability, and that after that point states have the power to “restrict abortions,” provided the law contains “exceptions for pregnancies which endanger a woman’s life or health.”<sup>45</sup>

The second matter resolved by the *Casey* decision was that the state’s interest in protecting potential life would be seen as subordinate to the woman’s constitutionally protected right to an abortion. The plurality’s discussion of this issue did not amount to a definitive account of the status of the state’s interest, but it set some limits on what states may do. Following the point of viability, threats to the

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<sup>41</sup> *Ibid.*, p. 2796.

<sup>42</sup> *Ibid.*, p. 2803.

<sup>43</sup> *Ibid.*, pp. 2808-9.

<sup>44</sup> *Ibid.*, p. 2817.

<sup>45</sup> *Ibid.*, p. 2791.

woman's life or health may trump legitimate abortion restrictions rooted in the state's interest in protecting potential life. Depending on how broadly "health" is defined (in particular whether it includes psychological well-being), and bearing in mind that it will generally be a physician of the patient's choosing who decides whether the woman's health is threatened, this might turn out to be a substantial constraint on the state's power even after the point of viability.

The *Casey* decision amounted to a rejection of *Roe's* underlying logic not only because the trimester-based analysis was explicitly abandoned but also because the state's interest in potential life was held unequivocally to begin before the point at which the fetus is viable. The state's interest is conceived of strengthening as the fetus develops, justifying graduated increases in interference by the state with the constitutionally protected rights of pregnant women over the course of their pregnancies. Before the point of viability, the Court's "undue burden" test rules out "[u]necessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion..."<sup>46</sup> But this does not mean that the state is powerless to try to influence a woman's decision to abort in the early stages of pregnancy. "What is at stake," the *Casey* plurality insisted, "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."<sup>47</sup> From the onset of a pregnancy states "may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy."<sup>48</sup> So long as neither the purpose nor effect of the regulations in question is to place an "undue burden" on women by imposing "substantial obstacles" on their choice in favor of abortion, states may try to get women to reflect on that choice and encourage them to consider alternatives.<sup>49</sup>

Just what would count as an undue burden in particular cases was by no means clear and was bound to invite further litigation, as the dissenters in *Casey* were quick to point out. In *Casey* itself, the Court held that a Pennsylvania statute placed an undue burden on women insofar as it required a married woman seeking an abortion to sign a statement that she had notified her husband, but that a variety of the Pennsylvania statute's other provisions could survive the test. These included provisions designed to ensure that the woman was giving informed consent to the procedure by requiring that she receive certain information at least twenty four hours before undergoing the abortion procedure, that for a minor to undergo an abortion there must be informed consent from at least one parent at least twenty-four hours before the procedure (with provisions for a judicial bypass procedure), and that abortion clinics could be obliged to comply with a variety of reporting

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<sup>46</sup> *Ibid.*, p. 2821.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* p. 2818

<sup>49</sup> *Ibid.*

requirements. The spousal notification requirement was thought to differ from the others in that although most women would tell their husbands voluntarily what their intentions were, women who are victims of physical and psychological spousal abuse “may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion.”<sup>50</sup> If the Court was clear that this tipped the scale of “undue burden” while the twenty-four waiting period did not, the reasoning behind the distinction was less than entirely lucid. In particular, the Court seemed to have run together the quite different considerations of trying to ensure that the woman makes an well-thought-out decision (in the sense of not being one that *she* would subsequently come to regret), and the state’s right to further *its* interest in potential life by regulating the woman’s abortion choice. For this and other reasons *Casey* raised as many questions as it settled, as subsequent litigation soon began to reveal.<sup>51</sup>

### **Abortion jurisprudence**

Much of the heat generated by the abortion controversy stems from its symbolic role in American politics; arguments over “life” versus “choice” serve as a proxies for conflicts over the role of women in American society, the controversial status of “traditional” and “family” values, and the place of religion in American politics.<sup>52</sup> However, part of the heat has been internally generated, by the manner in which *Roe* was decided and the privacy argument on which it rested. This stemmed partly from the sweeping nature of the holding in *Roe*, and partly from the fact that the right of privacy on which Justice Blackmun based his argument is not explicitly mentioned in the constitution.

Arguments about privacy and reproductive freedom are rooted in the Supreme Court’s 1965 decision in *Griswold v. Connecticut*.<sup>53</sup> *Griswold* was the culmination of a 50 year battle to organize formal opposition to birth control statutes.<sup>54</sup> By a seven to two majority, the Court struck down an 1879 statute that had made it illegal “to use any drug or article to prevent conception,” holding that a zone of privacy encompasses the marital relationship that outweighs any legitimate state interest in preventing sexual immorality.<sup>55</sup> This decision provided part of the logical foundation for Justice Blackmun’s reasoning in *Roe*, in which he maintained that the zone of privacy encompasses decisions about abortion as well as contraception. But *Griswold* applied to married couples only; by

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<sup>50</sup> *Ibid.* p. 2828.

<sup>51</sup> See *Fargo Women’s Health Organization v. Schafer* 113 S.Ct. 1668 (1993) and *Planned Parenthood v. Casey II* 114 S. Ct 909 (1994).

<sup>52</sup> An excellent treatment of this subject is Luker, *Abortion and the Politics of Motherhood*, especially chapters 3-7.

<sup>53</sup> 381 U.S. 479 (1965)

<sup>54</sup> For an account of this history, see David J. Garrow, *The Right to Privacy and the Making of Roe v. Wade* (New York: Lisa Drew Books, 1993).

<sup>55</sup> 381 U.S. 479-84 (1965).

itself this could not generate the right to *individual* privacy on which *Roe* rests. The bridging argument was supplied in *Eisenstadt v. Baird* in 1972 when Justice Brennan, writing for the majority, observed of the contraception cases that if “the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusions in matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>56</sup>

The *Griswold* result has often been criticized as a poor piece of Constitutional jurisprudence, and Blackmun’s extension of it to *Roe* has never been secure. The principal charge with its defenders have had to deal with is that *Griswold* alleged to be an example of “judicial legislation,” that in deciding it the Court set itself up as a kind of superlegislature. There are two possible responses to this line of criticism for those who support the outcome in *Roe*. One is to insist that what the Court did in *Griswold* is not unusual. Every clause of the Bill of Rights has to be interpreted in light of background philosophical assumptions.<sup>57</sup> Moreover, this line of response goes, few critics of *Griswold* would want to live with the full implications of abandoning the notion that there is a constitutionally protected right to privacy. Indeed critics of *Roe*, such as President Reagan’s solicitor general Charles Fried, usually deny that *Griswold* should be overruled.<sup>58</sup> As Ronald Dworkin---the most articulate defender of *Griswold* and its extension to *Roe*---has noted, it is difficult to discern a principled basis for this view. Once *Griswold* is accepted, it seems inevitably to lead to *Roe*, partly because the technologies of contraception and abortion overlap (and may do so increasingly over time),<sup>59</sup> and partly because it is difficult to articulate compelling grounds for distinguishing the two cases from one another. The Court’s reasoning in *Griswold* was that decisions affecting marriage and childbirth are of such an intimate and personal character that people must in principle be free to make the decisions for themselves. As Dworkin notes, decisions regarding abortion are at least as private as those concerning contraception; indeed in one respect they are moreso because the abortion decision “involves a woman’s control not just of her sexual relations but of changes within her own body, and the Supreme Court has recognized in various ways the importance of physical integrity.”<sup>60</sup> Accordingly, Dworkin defends both *Griswold* and *Roe*, as well as the Supreme Court’s refashioning of the *Roe* doctrine in *Casey* by reference to an “undue burden” standard that places

<sup>56</sup> *Eisenstadt v. Baird* 405 U.S. 453 (1972), emphasis in original.

<sup>57</sup> See Ronald Dworkin, *Taking Rights Seriously*, (Cambridge, Mass.: Harvard University Press, 1977), pp. 14-80.

<sup>58</sup> As he maintained in oral argument before the Court in *Webster* in 1990. The exception here is Robert Bork, who argued in his confirmation hearings for the Supreme Court that both *Roe* and *Griswold* should be overruled. This view has the merit of internal consistency, but it was so far out of the mainstream of even conservative jurisprudential opinion that it led many conservative Democrats and Republicans in the Senate to oppose his nomination.

<sup>59</sup> Some intrauterine devices and many popular birth control pills destroy fertilized ova if they fail to prevent fertilization.

<sup>60</sup> Dworkin, *Life’s Dominion*, p. 107.

gradually more stringent burdens on the women seeking an abortion as pregnancy advances, designed to get her to reflect on the seriousness of her proposed abortion and to further the state's interest in protecting potential human life.<sup>61</sup>

To defend *Roe* on the grounds that it cannot be distinguished from *Griswold* in a principled way is to appeal to what is at bottom an ad hominem argument, as conservatives like Robert Bork are quick to point out. On the left, the *Griswold* doctrine has also been rejected by radical feminists as male ideology that contributes to the subjugation of women.<sup>62</sup> Indeed, in other contexts---such as in arguing for the passage of marital rape statutes---feminists have been concerned to weaken the common law presumption that the marital relationship shields "intimate" behavior from the criminal law.<sup>63</sup> Partly for these reasons, an alternate line of response to the perceived weakness of *Griswold* and *Roe* has been put forward by defenders of the right to abortion, one which jettisons the privacy argument altogether and relies instead on the constitutional commitment to equal protection of the laws, explicit in the Fourteenth Amendment, and implied in the Due Process clause of the Fifth Amendment.

The equality argument turns on the claim that restrictions on abortion discriminate against women by placing constraints on their freedom that men do not have to bear. This was the view defended by then Appellate Court Federal Judge Ruth Bader Ginsberg in her 1993 Madison Lecture at New York University, which prompted some sharp questioning in her confirmation hearings for the Supreme Court because it revealed her discomfort with *Roe's* privacy doctrine.<sup>64</sup> On Ginsburg's account, abortion regulations affect "a woman's autonomous charge of her full life's course---her ability to stand in relation to man, society, and the state as an independent, self-sustaining citizen."<sup>65</sup> In Ginsburg's view the *Roe* court should have "homed in more precisely on the woman's equality

<sup>61</sup> Though Dworkin would apply the standard more permissively than does the Court. For instance, his view is that the court should have struck down the mandatory waiting periods that were upheld in *Casey*. Dworkin, *Life's Dominion*, p. 172-4.

<sup>62</sup> See Catherine McKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987), pp. 93-102 and Robin West, "Jurisprudence and Gender," *University of Chicago Law Review*, Vol. 55, No. 1 (1988), pp. 67-70.

<sup>63</sup> On the changing law of marital rape in the US, see Michael Freeman, "If you can't rape your wife, Who[m] can you rape? The marital rape exception re-examined," *Family Law Quarterly*, Vol. 15, No. 1 (Spring 1981), pp. 1-29, Deborah Rhode, *Justice and Gender* (Harvard University Press, 1989) pp. 249-51, Rene I. Augustine, "Marriage: The safe haven for rapists," *The Journal of Family Law*, Vol. 29, No. 3 (1990-91) pp. 559-90, and Sandra Ryder and Sheryl Kuzmenka, "Legal rape: The marital exception," *John Marshall Law Review*, Vol. 24, pp. 393-421. On the English evolution of the exception, see P.M. Bromley and N.V. Lowe, *Family Law*, 7th ed., (Butterworths, 1987) pp. 109-12.

<sup>64</sup>Ruth Bader Ginsburg, "Speaking in a Judicial Voice," Madison Lecture, New York University Law School, March 9, 1993, *mimeo*. For the hearings, see "Nomination of Ruth Bader Ginsburg to be an Associate Justice of the United States Supreme Court: Report together with Additional Views," Exec Report. 103-6 - 93 - 1 United States Senate, pp. 17-19.

<sup>65</sup> "Nomination of Ruth Bader Ginsburg..." p. 17.

dimension of the issue,” enabling it to argue that “disadvantageous treatment of a woman because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of sex.”<sup>66</sup>

It is true that equal protection arguments have been of declining effectiveness in the Burger and Rehnquist Courts, but Ginsburg points out that in the very term *Roe* was decided the Supreme Court had a case on its calendar that could have served as a bridge, “linking reproductive choice to disadvantageous treatment of women on the basis of their sex.”<sup>67</sup> Accordingly, she saw the decision to opt for the *Griswold* line of reasoning in *Roe* as a missed opportunity to place the right to abortion on a firmer conceptual and Constitutional footing.<sup>68</sup>

Whatever the jurisprudential basis for the right to abortion, it is arguable that it was the manner in which *Roe* was decided--as much as the content of the decision--that was to render its legitimacy suspect. After all, in *Roe* the Court did a good deal more than strike down a Texas abortion statute. The majority opinion laid out a detailed test to determine the conditions under which any abortion statute could be expected to pass muster; in effect Justice Blackmun authored a federal abortion statute of his own. Ginsburg makes a powerful case that decisions of this kind tend to undermine the Court’s legitimacy. Although she thinks that it is sometimes necessary for the court to step “ahead” of the political process to achieve reforms that the constitution requires, if it gets too far ahead it can produce a backlash and provoke charges that it is overreaching its appropriate place in a democratic constitutional order.<sup>69</sup> This line of reasoning about the Court’s role has been more fully developed by Robert Burt.<sup>70</sup> He contrasts the Court’s handling of the abortion question with its approach in the school desegregation cases of the 1950s. In *Brown v. Board of Education* the Justices declared the doctrine of “separate but equal” to be an unconstitutional violation of the Equal Protection Clause,<sup>71</sup> but they did not describe schooling conditions that would be acceptable. Rather, they turned the problem back to Southern state legislatures, requiring them to fashion acceptable remedies themselves.<sup>72</sup> These remedies came before the court as a result of subsequent litigation, were evaluated when they did, and were often found to be wanting.<sup>73</sup> But the Court avoided designing the remedy itself, and with it the charge that it was usurping the legislative function. In *Roe*, by contrast,

<sup>66</sup> Ginsburg, Madison Lecture, pp. 24, 28. For a more elaborate defense of the equality-based view, see Sylvia A. Law, “Rethinking sex and the Constitution,” *University of Pennsylvania Law Review*, Vol. 132, No. 2 (1983-4), pp.1002-1013.

<sup>67</sup> Ginsburg, Madison Lecture, p. 24. The case, *Struck v. Secretary of Defense* 409 U.S. 947 (1973), was remanded for consideration of mootness.

<sup>68</sup> It is of course possible that Blackmun canvassed this possibility and could not find support for it among his brethren on the Court, though---given his failure even to mention it---it seems more likely that, like Ronald Dworkin, Blackmun simply thought *Griswold* compelling.

<sup>69</sup> Ginsburg, Madison Lecture, pp. 30-38.

<sup>70</sup> Robert A. Burt, *The Constitution in Conflict* (Harvard University Press, 1992), pp. 344-52.

<sup>71</sup> *Brown v. Board of Education I* 347 U.S. 483 (1954).

<sup>72</sup> *Brown v. Board of Education II* 349 U.S. 294 (1955).

<sup>73</sup> Burt, *Constitution in Conflict*, pp. 271-310.

as Ginsburg puts it, the court “invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators’ court” by wiping out virtually every form of abortion regulation then in existence.<sup>74</sup>

On the Ginsburg-Burt view, the sweeping holding in *Roe* diminished the Court’s democratic legitimacy at the same time as it put paid to various schemes to liberalize abortion laws that were underway in different states. Between 1967 and 1973 statutes were passed in nineteen states liberalizing the permissible grounds for abortion. Many feminists had been dissatisfied with the pace and extent of this reform, and they mounted the campaign that resulted in *Roe*. Burt concedes that in 1973 it was “not clear whether the recently enacted state laws signified the beginning of a national trend toward abolishing all abortion restrictions or even whether in the so-called liberalized states, the new enactments would significantly increase access to abortion for anyone.” Nonetheless, he insists that “the abortion issue was openly, avidly, controverted in a substantial number of public forums, and unlike the regimen extant as recently as 1967, it was no longer clear who was winning the battle.”<sup>75</sup> Following the *Brown* model, the Court might have struck down the Texas abortion statute in *Roe* (whether by appeal to Blackmun’s privacy argument or to the equality argument favored by Ginsburg, Burt and others) and remanded the matter for further action at the state level, thereby setting limits on what legislatures might do in the matter of regulating abortion without involving the Court directly in designing that regulation. On the Ginsburg-Burt view, this would have left space for democratic resolution of the conflict that would have ensured the survival of the right to abortion while at the same time preserving the legitimacy of the Court’s role in a democratic constitutional order.<sup>76</sup>

### **Future of the constitutional right to abortion**

It is ironic, perhaps, that although *Casey* was decided before Ruth Ginsburg’s elevation to the Supreme Court, that decision brought the Court’s stance into line with the Ginsburg-Burt view of the manner in which the Court should approach the abortion question. By affirming the existence of a woman’s fundamental constitutional right to an abortion, recognizing the legitimacy of the state’s interest in potential life, and insisting that states may not pursue the vindication of that interest in a manner that is unduly burdensome to women, the Court set some basic parameters within which legislatures must now fashion regulations that govern abortion. The *Casey* dissenters were right to point out that there would be a degree of unpredictability and confusion as different regulatory

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<sup>74</sup> Ginsburg, Madison Lecture, p. 32.

<sup>75</sup> Burt, *Constitution in Conflict*, p. 348.

<sup>76</sup> *Ibid.*, pp. 349-52.



regimes were enacted in different states and tested through the courts.<sup>77</sup> Particularly given the developmental dimension to the test---which permits increasingly burdensome regulation as pregnancy advances---this was inevitable. On views of adjudication that encourage efficiency and clarity above all else this may appear as a reprehensible invitation to further litigation.<sup>78</sup> On the Ginsburg-Burt view, however, that *Casey* invites litigation may be a cost worth paying. It places the burden of coming up with modes of regulating abortion that are not unduly burdensome on democratically elected legislatures, and forces them to do this in the knowledge that the statutes they enact will be tested through the courts and thrown out if they are found wanting. This gives legislators incentives to devise regimes of regulation that minimize the burdens placed on women when they seek to vindicate state's legitimate interests in protecting potential life. It also assigns the federal courts a legitimate role in a constitutional democracy. "Without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for social change."<sup>79</sup>

By adopting the Ginsburg-Burt approach to the manner in which abortion regulations are approached, the Court has arguably begun to belie MacIntyre's claim---mentioned at the outset of this introduction---that the different sides in the abortion controversy operate from conceptually incommensurable premises between which it is impossible either rationally to adjudicate or to find common ground. On the contrary, as the debate has moved away from metaphysical imponderables---about when life begins and whether a fetus is a person---and toward consideration of what constitutes an undue burden on a woman's constitutionally protected rights, it has become plain that there is a good deal of room for rational argument about the legal right to abortion. That abortion *can* be a politically polarizing issue does not mean that it *has* to be polarized, and is certainly an advantage of the *Casey* approach that it pushes the debate away from issues that cannot be resolved in a pluralist culture and toward areas where compromise and accommodation are

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<sup>77</sup> In his partly dissenting opinion, Rehnquist---joined by White and Scalia---said of the controlling opinion in *Casey*: "The end result of the joint opinion's paens for praise of legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion---the undue burden standard....*Roe v. Wade* adopted a "fundamental right" standard under which state regulations could survive only if they met the requirement of "strict scrutiny." While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result in the sort of "simple implementation," easily applied, which the joint opinion anticipates." 112 S.Ct 2791, at p. 2866 (1992).

<sup>78</sup> See Rehnquist's remarks immediately following those quoted in the preceding footnote. For a more general defense of efficiency in appellate federal adjudication see Richard Posner, *The Federal Courts: Crisis and Reform* (Cambridge, Mass.: Harvard University Press, 1985), pp. 169-315. For criticism of Posner's view see my, "Richard Posner's Praxis," *Ohio State Law Review* Vol. 48, No. 4 (1987), pp. 1009-26.

<sup>79</sup> Ginsburg, Madison Lecture, p. 36.

possible.

Questions of approach aside, the substance of the “undue burden” standard offer possibilities for limiting abortion regulations that may be more robust than critics of *Casey* have realized. Certainly it seems to be a plausible interpretive strategy to claim in the wake of *Casey*, as Dworkin does, that any regulation of abortion decisions should be deemed unnecessarily coercive and therefore “undue” if the same “improvement in responsibility of decisions about abortion could have been achieved in some different way with less coercive consequences.”<sup>80</sup> This line of reasoning suggests that if plaintiffs can show that less restrictive regulations can achieve states’ stated goals in regulating abortion, existing regulations will have to be struck down. Knowing this, legislatures contemplating the passage of abortion statutes will have incentives not to adopt more stringent regulations than those that can be justified as necessary

Yet perhaps the most important and least-noticed feature of the “undue burden” standard around which the constitutional law of abortion has come to resolve since *Casey* is that it has the potential to reinvigorate the egalitarian considerations that Blackmun sidestepped when he looked to *Griswold’s* privacy doctrine as a basis for his decision in *Roe*. The reason is that it will likely prove exceedingly difficult to hammer out a jurisprudence of due and undue burdens without reference to egalitarian considerations. A hint of this can be found in the *Casey* opinions. The dissenters in that case point out that it is difficult to discern a principled basis for the Court’s holding, on the one hand, that spousal notification requirements impose undue burdens on women because some women may face abusive husbands, while holding, on the other, that parental consent requirements do not even though, presumably, some pregnant teenagers will face abusive parents.<sup>81</sup> Dworkin extends this critique, pointing out that it is no less difficult to find a principled basis for the Court’s rejection of the claim that a twenty-four hour waiting period fails the undue burden test, even though it is conceded by the Court to place a heavier burden on poorer women. If a restraint that does not make abortion practically impossible for anyone, nonetheless “makes it sufficiently more expensive or difficult that it will deter some women from having an abortion that they, on reflection, want” it should fail the undue burden test on his view.<sup>82</sup> Dworkin’s logic is hard to resist, once the Court has embraced the idea that a regulation that may impose severe costs on *some* women fails to pass constitutional muster for that reason. Although this argument is not explicitly egalitarian, it is implicitly so because it suggests that in order to survive abortion regulations must not impose burdens on poor women merely in virtue of their poverty.

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<sup>80</sup> Dworkin, *Life’s Dominion*, p. 173.

<sup>81</sup> 120 L Ed 2d 674, at 774-97 (1992).

<sup>82</sup> Dworkin, *Life’s Dominion*, p. 173.

Dworkin's reasoning is rooted in the reality that it is difficult---perhaps impossible---to make sense of the idea of "dueness" without reference to the concept of equality. This is perhaps nowhere better illustrated than in the evolution of the concept of Due Process in American criminal procedure, and it may be illuminating to conclude by mentioning some possible parallels between that history and the future of the undue burden standard in the constitutional law of abortion. The famous 1963 case of *Gideon v. Wainwright* centered on the question whether states must supply indigent criminal defendants in capital cases with legal counsel paid for by the government.<sup>83</sup> The Court held that they must, partly on the grounds that wealthy defendants typically are in a position to hire counsel.<sup>84</sup> In the decades following *Gideon* the notion that the poor should not have to bear burdens in pursuit of their constitutionally protected rights that the rich do not have to bear became embedded in the notion of criminal Due Process. As a result, robust protections were built into the law of criminal procedure in the 1960s and 1970s relating to the right to counsel for appeals as well as trials, for non-capital offenses if a defendant is to be imprisoned if found guilty, and related areas.<sup>85</sup> It is true that egalitarian readings of the Due Process Clause in criminal procedure have been cut back by the Burger and Rehnquist courts,<sup>86</sup> so that it is by no means necessary that robustly egalitarian interpretations of the idea of "dueness" will always prevail in this area or any other. Nonetheless, egalitarian considerations have not been entirely abandoned by the Court in this area, and at times even the conservative courts of the 1980s have expanded upon them---as in the 1985 holding that an indigent defendant who offers an insanity plea should be allowed his own court-appointed psychiatrist at the government's expense.<sup>87</sup> Once again the idea of "dueness" in the Due Process clause was unpacked by reference to the concept of equality.

It does not take great leaps of imagination to discern the creative possibilities for analogous reasoning as the federal courts begin to unpack the meaning of "undue burden" in the constitutional law of abortion. The notion that a burden is less than due if it imposes substantial costs on some women has a foothold in the language of the controlling opinion in *Casey* as we have seen, though, as with the case of due process in criminal procedure, the implications of this are contradictory in the Court's opinions and have yet to be fully worked out. One obvious area that might be explored concerns abortion funding. Just as Clarence Earl Gideon's constitutional right to counsel was held to require the government to appoint counsel at its own expense for indigent defendants in certain circumstances, so one can imagine analogous arguments being explored in the abortion context.

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<sup>83</sup> For an excellent account, see Anthony Lewis, *Gideon's Trumpet* (New York: Vintage, 1966).

<sup>84</sup> 372 U.S. 335 (1963).

<sup>85</sup> For examples, see *Douglas v. California* 372 U.S. 353 (1963) and *Argersinger v. Hamlin* 407 U.S. 25 (1972).

<sup>86</sup> See *Scott v. Illinois* 440 U.S. 367 (1979), *Ross v. Moffitt* 417 U.S. 600 (1974), *United States v. Cronin* 466 U.S. 648 (1984) and *Strickland v. Washington* 466 U.S. 668 (1984).

<sup>87</sup> *Ake v. Oklahoma* 470 U.S. 68 (1985).

What the parallel class of circumstances would turn out to be is difficult to discern in advance, but cases of rape---where the pregnant woman has no responsibility at all for her pregnancy---is an obvious place to start. From the standpoint of radical feminists this might seem like a small potential gain given what has been lost since *Webster* and *Casey*, but since the Court has never looked favorably on plaintiffs seeking abortion funding in the past, a potential gain in this area should not be seen as insignificant from their point of view.

The egalitarian possibilities are not exhausted by playing out the implications of the notion that regulations that impose substantial burdens on some women should fail the “undue burden” test. *Casey* identifies two sources of the state’s interest in regulating abortion: to ensure that the woman has given her informed consent to the abortion procedure, and vindicating its interest in protecting potential life. The first of these interests is individual-regarding in the sense that the state may encourage the woman contemplating an abortion to reflect on the seriousness of her proposed course of action and consider alternatives to it, so long as this does not unnecessarily burden her decision. The state’s interest here is in the quality of the woman’s decision: that it should be authentic and informed. As I have indicated, egalitarian considerations implicitly affect the evaluation of regulations designed to achieve this goal because the same regulations that will not be burdensome to wealthy women may impose substantial costs on poor women. A different---and potentially stronger---type of egalitarian consideration arises, however, once we reflect on the state regulating abortion in order to vindicate its interest in potential human life. This opens up the possibility of reviving the equal protection considerations that Ginsburg, MacKinnon, West and others think were lost when Blackmun decided to base *Roe* on Griswold’s privacy doctrine. Why, it can and will be asked, should states be permitted to vindicate *this* interest in any way that imposes the costs of so doing disproportionately on some women, or, indeed, on women rather than men? The possibilities offered by this line of thinking are difficult to discern in the abstract. Clearly the Court in the 1990s remained unreceptive to the feminist view that virtually all regulation of abortion discriminates against women and should be rejected for that reason.<sup>88</sup> But the possibility of an equal protection argument lurks in the logic of *Casey* if not in its language, and it seems at least possible that this logic might generate substantial constraints on abortion regulations in the future.

It seems safe to conclude that *Casey*’s “undue burden” standard offers possibilities that future generations of creative litigators on both sides of the abortion controversy will likely explore with profit. It would be no small historical irony if the *Casey* decision, which has been criticized by many defenders of constitutionally protected abortion rights for women as substantially weakening *Roe*, turned out to be a vehicle by which the right to abortion actually was actually strengthened in certain

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<sup>88</sup> See footnote 62 above.

respects. But as the tumultuous history of the Supreme Court's abortion decisions since 1973 has revealed, it would not be the first such irony. Nor, most likely, would it be the last.

Eight years after *Casey* there were signs that egalitarian considerations were taking root in the Court's abortion jurisprudence. The opening paragraph of Justice Stephen Breyer's majority opinion in its controversial partial birth abortion decision, *Stenberg v. Carhart*, notes that millions "fear that a law that forbids abortion would condemn many American to lives that lack dignity, depriving them of *equal liberty* and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering."<sup>89</sup> This decision was the Court's first application of the undue burden standard enunciated in *Casey* to a new set of issues, and it illustrates both the strength and limitations of the *Casey* approach.

At issue in *Stenberg* was a Nebraska statute prohibiting partial birth abortion except where this is necessary to save the life of the mother. Partial birth abortion was defined as "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the ... child and does kill the ... child." Violation of the statute was a felony, and led to automatic revocation of a convicted doctor's license to practice medicine. The Eighth circuit Court of Appeals had upheld the District Court's finding that the statute was unconstitutional, and the Supreme Court affirmed this result in a contentious five-to-four decision. Justice Kennedy, who had supported the six-to-three majority opinion in *Casey*, voted now with the dissenters. Justice O'Connor, the main architect of *Casey's* undue burden test, made it plain that although she was voting to strike down this particular Nebraska statute this was because it was overbroad and lacked an exception for the health (in addition to the life) of the mother. Otherwise she would have held it constitutional, which, given Kennedy's stance, means that a five-to-four majority on the Court in 2000 would up hold a more restrictive partial abortion statute with an exception for the mother's life and health. Everything therefore turns on the reasons they thought the Nebraska statute overinclusive, and on just what it means to require an exception for the mother's health.

The two issues are distinct. *Casey* had held that, prior to viability, abortion regulations may not place an undue burden on a women's right to abortion. The challenged statute could be read to include "dilation and evacuation" (D&E) procedures commonly used in previability second trimester abortions as well as the rare "dilation and extraction" (D&X) method, typically used after sixteen weeks, that Nebraska sought to ban. Accordingly, the court applied *Casey's* undue burden test and found the statute wanting because the D&E method is seen as safer than the available alternatives for

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<sup>89</sup>192 F.3d 1142, emphasis supplied.

previability abortions performed between twelve and twenty weeks of gestation. This is the least controversial part of the decision because Nebraska never sought to outlaw the D&E procedure. The issue dividing the majority from the dissenters was whether the court should have construed the statute more narrowly to render it constitutional, or strike it down and in effect require Nebraska to enact a more narrowly drawn statute.

The comparative dangers of different abortion methods for pregnant women is also at the core of the more contentious part of the decision, involving the D&X procedure. This involves certain late term abortions where D&E is no longer effective due to the more advanced pregnancy and where the fetus presents feet first. The doctor pulls the fetal body through the cervix (hence the term "partial birth"), collapses the skull, and extracts the fetus through the cervix. The procedure was defended at trial as safer than the alternatives for the woman in circumstances involving nonviable fetuses, for women with prior uterine scars, or for women for whom induced labor would be particularly dangerous. As a result, the majority found that the lack of a health exception rendered the Nebraska statute unconstitutional.

At issue between the majority and the dissenters here is the status of the evidence that the D&X procedure is the safest available method in some circumstances and must therefore be protected by a health exception. *Roe* had insisted on the inclusion of such an exception when states regulate abortion procedures, and *Casey* had affirmed that there must be exceptions when abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>90</sup> But what constitutes appropriate medical judgment? It had long been a criticism of *Roe* that this escape clause created abortion on demand. "Appropriate medical judgment" had been interpreted as the judgment of the attending physician, and there would always be a physician willing to say that that carrying a pregnancy to term would in some way be harmful to a woman's physical or psychological health. Part of the opposition to *Casey* had derived from its limitation of this escape clause by holding that states may regulate abortion so long as this does not burden women unduly. The dissenters in *Stenberg* differ among themselves as to whether the *Casey* rule should have been adopted. They unite, however, in insisting that *Stenberg* renders the *Casey* rule meaningless because the interpretation of "appropriate medical judgment" seems sufficiently capacious to recreate abortion on demand by creating a physician's veto over all abortion regulation..

The objection here is not to the proposition that part of the idea of an undue burden includes the notion that a woman should not be required to endure a less safe procedure when a more safe one is available. Rather it goes to the question: who should decide safety? Dissenting justice Kennedy

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<sup>90</sup> 505 U.S., at 879.

objected that the majority had deferred to the judgment of the attending physician, recreating abortion on demand and so rendering *Casey's* modification of *Roe* meaningless. Justice Thomas added that the majority did not substantiate its assertion that a "substantial body" of medical opinion supports the proposition that the D&X procedure is safer than the alternative in any circumstances. By what logic or authority, he asked, should the Supreme Court second-guess the judgment of the Nebraska state legislature on this factual question. And in an "I told you so" mood, Justice Scalia, insisted that "those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not have overcome the judgment of 30 state legislatures have a problem, not with the application of *Casey*, but with its existence. *Casey* must be overruled."

This division on the court might seem less than heartening to those who had hoped that the *Casey* undue burden standard would enable the courts to hammer out meaningful constitutional standards for abortion regulation. Such a conclusion would be premature. For one thing, it remains uncontroversial among the six justices who voted for *Casey* that part of the idea of undue burden involves the proposition that no woman should have to endure a less safe abortion when a more safe procedure is available. For another, justice Kennedy's assertions to the contrary notwithstanding, none in the *Stenberg* majority is willing to defer completely to the authority of the attending physician on the relative safety of different abortion procedures. Instead they require that a substantial body of medical authority supports the position of the attending physician.

Admittedly this leaves unanswered the question who should decide what counts as a substantial body of medical authority. Rather than debate the conflicting views about the science with the dissenters, the majority would have done better to take the position that, as a disputed question of fact, this is best settled at the trial court. If the Nebraska legislature had considered the evidence of the relative safety of different procedures, the time to establish this was at trial, and if Dr. Carhart disputed the science on which their judgment was based, he, too, would have had to have persuaded the trial court. Perhaps the Nebraska legislature never considered the matter at all, in which case the notion that it is better placed than an appellate court to make this determination would be beside the point. Reviewing courts do not hear expert testimony or listen to witnesses, are not generally supposed to second guess findings of fact. Unless the record contains evidence so overwhelming that the findings below cannot be believed, the factual findings are generally to be taken as given. And even when there is reason to doubt them, the appropriate remedy is to remand the case to the trial court for rehearing, not to make a different determination of the facts during the process of appellate review. From this perspective it is the dissenters in *Stenberg*, not the majority, who inappropriately relied on their own (lack of) expertise in the adjudication of contested factual questions.

Justice Scalia may ultimately be right that the idea of undue burden involves philosophical choices about which justices will continue to differ, but he is only partly correct. As the jurisprudence is evolving, it seems clear that it also involves propositions that none of the dissenters seeks seriously to challenge, such as the claim that a regulation imposes an undue burden if it requires a woman to undergo a less safe abortion procedure when a more safe one is available. Disagreements over which procedures are safest are hotly contested as we have seen, but the US court system offers ways of dealing with such differences that neither requires appellate justices to set themselves up as arbiters of good science or to defer mindlessly to state legislatures. Appellate courts can require trial courts to follow their own procedures in adjudicating factual disputes, upholding their findings unless the record contains evidence of impropriety below. Knowing that the burdens they place on women will be tested in this way will give legislators incentives to hold the relevant hearings, creating track records that will incline juries and other triers of fact to defer to them rather than their adversaries. This may produce different results in different circumstances, but no more so than is the case with expert testimony in other areas of the criminal law. It is, in any case, an inevitable part of developing, and entrenching, a legitimate conception of undue burden in a constitutional democracy over time.



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