

NOTE

LAUREL GRELEWICZ*

Equality & Abortion in Post-Apartheid South Africa: Inspiration for Choice Advocates in the United States

I.	Abortion in South Africa	103
A.	Victory of the African National Congress and the Transition to Democracy	105
B.	The Choice on Termination of Pregnancy Act.....	106
C.	Challenges to the Choice on Termination of Pregnancy Act.....	107
D.	Improved Access to Abortion	111
E.	South Africa’s Larger Reproductive Policy Changes and Moves Toward Equality.....	112
II.	Abortion in the United States and the Call for Equality.....	113
III.	The Importance of Equality to Abortion Jurisprudence.....	116

Abortion jurisprudence in the United States focuses largely on the concepts of privacy and a woman’s autonomy over her body using a substantive due process analysis.¹ While these are undoubtedly important concepts, in U.S. abortion law they overshadow another essential concept related to abortion:

* I thank Professor Merle Weiner, Lindsay Day, Rebecca Bateman, Alexandra Brandes, Gabriel Green-Mitchell, and my loving family, for their support and contributions to this Article.

¹ See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985).

women's equality with men. *Roe v. Wade*² and its progeny have ignited huge public debate and academic criticism about abortion, while gender equality and equal protection cases have been less provocative.³

A more thorough and persuasive legal justification for abortion is found in South Africa's abortion jurisprudence. South Africa's approach to abortion rights is one of the most comprehensive in the world,⁴ and this approach is based on a progressive and equality-driven Constitution adopted after the end of apartheid.⁵ The newly democratic political climate in South Africa contributed to this progressive Constitution, and consequently shaped South Africa's abortion law.⁶ Frustration from years of oppressive apartheid rule was fresh in the minds of the abortion law reformers, and the reformers sought to promote equality by providing the right to early and safe abortions to all women.⁷ The poor and oppressed female population in South Africa had meager rights,⁸ so this was an important expansion of rights for that population.

South Africa's history of oppression and its post-apartheid autonomy and equality approach to abortion jurisprudence gives insight into how rights can be developed over time, and provides potential strategies for U.S. abortion law reformers and feminist thinkers. This Article examines the legal justifications for reproductive rights in South Africa and discusses how South Africa's comprehensive, autonomy and equality-based abortion jurisprudence offers more protection for a woman's right to abortion than the United States' liberty and privacy justifications for a woman's right to choose. Specifically, I will argue that South

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ Ginsburg, *supra* note 1, at 376.

⁴ UN Population Division, Country Profiles, 97, 99, <http://www.un.org/esa/population/publications/abortion/doc/southafrica.doc> [hereinafter Country Profiles].

⁵ Penelope Andrews, *The Stepchild of National Liberation: Women and Rights in the New South Africa*, in *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW* 326, 335-39 (Penelope Andrews & Stephen Ellmann eds., 2001).

⁶ See Diane Cooper et al., *Ten Years of Democracy in South Africa: Documenting Transformation in Reproductive Health Policy and Status*, 12(24) *REPROD. HEALTH MATTERS* 70, 71-72 (2004).

⁷ Michael O'Sullivan, *Reproductive Rights*, in 3 *CONSTITUTIONAL LAW OF SOUTH AFRICA* ch. 37, at 26 (Stu Woolman ed., 2008) (2002).

⁸ Andrews, *supra* note 5, at 327.

Africa's expanded conception of equality shaped South Africa's abortion jurisprudence and allowed for a stronger foundation for a woman's right to abortion.

Part I provides a brief history of abortion law in South Africa, discusses the current state of South Africa's abortion law and challenges to the law, and discusses South Africa's reproductive health policies and legal justifications for abortion. Part II explains the liberty and privacy grounds for abortion jurisprudence in the United States, and discusses several proposed sex-equality based arguments for reproductive rights. Part III discusses the importance of equality to abortion jurisprudence and shows how South Africa's comprehensive approach to abortion is more protective of women's rights than the United States' liberty and privacy justifications for a woman's right to choose.

I

ABORTION IN SOUTH AFRICA

Until 1975, South Africa's abortion law was governed by Roman-Dutch common law and authorized abortion only when continuing a pregnancy threatened the life of a woman.⁹ During this time, abortion was considered a crime except when absolutely necessary, such as to save a woman's life.¹⁰ In 1975, South Africa enacted the Abortion and Sterilization Act of 1975 and extended grounds for abortion¹¹ in an attempt to medicalize the abortion decision and allow abortions when a doctor determined that continued pregnancy posed a "serious threat" or caused "permanent damage."¹² The act provided for abortion in four circumstances: when continued pregnancy endangered the woman's life, when continued pregnancy constituted a serious threat to the woman's physical or mental health, when there was a serious risk the child would suffer from a physical or mental defect causing the child to be seriously and irreparably

⁹ Country Profiles, *supra* note 4, at 98.

¹⁰ Najma Moosa, *A Descriptive Analysis of South African and Islamic Abortion Legislation and Local Muslim Community Responses*, 21(2) *MED. & L.* 257, 258 (2002).

¹¹ Country Profiles, *supra* note 4, at 98.

¹² Barbara Stark, *Crazy Jane Talks with the Bishop: Abortion in China, Germany, South Africa and International Human Rights Law*, 12 *TEX. J. WOMEN & L.* 287, 297 (2003).

handicapped, or when the pregnancy was the result of unlawful intercourse such as rape, incest, or intercourse with an imbecile.¹³

While the act purported to legalize abortion under broader circumstances, there were still many barriers to a legal abortion.¹⁴ For example, for abortions on the grounds of the last category, the unlawful intercourse had to be documented.¹⁵ In some cases this meant that the district magistrate where the unlawful intercourse took place had to provide the hospital superintendent with a certificate showing the unlawful intercourse was reported to the police.¹⁶ Or, if the woman did not report the unlawful intercourse, there must be a good and acceptable reason for not reporting.¹⁷ Further, during the 1980s, 60 percent of women who sought abortions were denied,¹⁸ and those who were granted abortions were “overwhelmingly white.”¹⁹ Class, privilege, and race largely influenced a woman’s ability to obtain an abortion.²⁰ The various strict procedural requirements of the act were not impossible for women with money, skill in handling government bureaucracy, and “access to urban medical facilities.”²¹ However, the requirements posed heavy burdens for the few black women who might have qualified to have an abortion.²² In any case, the Abortion and Sterilization Act of 1975 failed to improve women’s access to safe abortion or control the number of illegal abortions.²³ The act was passed without consulting the South African women²⁴ and clearly did not reflect women’s interests or rights.

¹³ Country Profiles, *supra* note 4, at 98.

¹⁴ *Id.*

¹⁵ Moosa, *supra* note 10, at 259.

¹⁶ Country Profiles, *supra* note 4, at 98.

¹⁷ *Id.*

¹⁸ Stark, *supra* note 12 at 297.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Country Profiles, *supra* note 4, at 98.

²² Moosa, *supra* note 10, at 260.

²³ *Id.*

²⁴ *Id.* at 259.

A. Victory of the African National Congress and the Transition to Democracy

The 1990s brought change to South Africa with negotiations about government and ending apartheid.²⁵ In 1994, the African National Congress (ANC) was elected in the first multi-racial and fully democratic elections in South Africa.²⁶ The ANC was a breath of fresh air for women's rights in South Africa, with strong feminist support and a large feminist constituency within the organization.²⁷ The ANC actually campaigned with a platform for promoting human rights, and used the liberalization of abortion law as part of that platform.²⁸ When campaigning, the ANC promised to decriminalize abortion and to eliminate the onerous procedures that essentially made legal abortion impossible for most South African women.²⁹ And once in power, the ANC itself led the effort to rewrite the law and legalize and decriminalize abortion.³⁰

South Africa's new government was sincerely committed to expanding human rights and liberating South Africa's formerly oppressed populations,³¹ and this commitment positively shaped abortion law reconstruction in South Africa.³² As part of its efforts, the new government appointed the Ad Hoc Select Committee on Abortion and Sterilization to review abortion in South Africa and the Abortion and Sterilization Act of 1975.³³ Fifteen women were appointed to the committee³⁴ out of twenty-six members total.³⁵ This was an impressive feat, considering no women were consulted for the 1975 act.³⁶ In 1995, the committee recommended the Act of 1975 be repealed.³⁷

²⁵ Penelope Andrews & Stephen Ellman, *Introduction: Towards Understanding South African Constitutionalism*, in *THE POST-APARTHEID CONSTITUTIONS*, *supra* note 5, at 1.

²⁶ Country Profiles, *supra* note 4.

²⁷ Stark, *supra* note 12, at 305.

²⁸ Country Profiles, *supra* note 4, at 98.

²⁹ Stark, *supra* note 12, at 306.

³⁰ *Id.* at 305–06.

³¹ *See id.*

³² *See id.*

³³ Country Profiles, *supra* note 4.

³⁴ Stark, *supra* note 12, at 306.

³⁵ Moosa, *supra* note 10, at 306 n.33.

³⁶ Moosa, *supra* note 10, at 259.

³⁷ *Id.* at 263.

Following the Ad Hoc Select Committee on Abortion and Sterilization's report, the ANC proposed draft legislation to Parliament that allowed abortions on demand for the first fourteen weeks of pregnancy.³⁸ Both pro-choice and pro-life organizations testified in public hearings about the law.³⁹ Polls suggested that a large majority of the population was against the draft legislation, and the draft provoked "heated debate between pro-choice and pro-life groups."⁴⁰ Ultimately the proposed legislation, with some changes, became the Choice on Termination of Pregnancy Act, and was enacted when President Nelson Mandela assented to the law on November 12, 1996.⁴¹

B. The Choice on Termination of Pregnancy Act

South Africa's final reformed abortion law, the Choice on Termination of Pregnancy Act (COTPA), was and is among the most liberal abortion laws in the world.⁴² The law is based on a time-frame model and provides for unconditional abortion on request for women during the first twelve weeks of pregnancy.⁴³ After twelve weeks and before twenty weeks of pregnancy, a woman can get an abortion in four circumstances: (1) when a medical practitioner believes continued pregnancy poses risk of injury to a woman's physical or mental health, (2) when there is a substantial risk that the fetus would suffer from severe physical or mental abnormality, (3) when rape or incest caused the pregnancy, or (4) when "continued pregnancy would significantly affect the social or economic circumstances of woman."⁴⁴ After twenty weeks of pregnancy, a woman can get an abortion only if two medical practitioners, or one medical practitioner and a midwife, believe that continued pregnancy "would endanger woman's life, would result in severe malformation of the foetus, or would pose a risk of injury to the foetus."⁴⁵ For all abortions in

³⁸ Country Profiles, *supra* note 4.

³⁹ Moosa, *supra* note 10, at 263.

⁴⁰ Country Profiles, *supra* note 4.

⁴¹ Moosa, *supra* note 10, at 263.

⁴² Country Profiles, *supra* note 4, at 99.

⁴³ Country Profiles, *supra* note 4, at 98; Choice On Termination Of Pregnancy Act 92 of 1996.

⁴⁴ *Id.* at 99.

⁴⁵ *Id.*

2011] *Equality & Abortion in Post-Apartheid South Africa* 107

South Africa, the procedure must take place in a government-designated medical facility.⁴⁶

“Women were deliberately made part of the drafting process” for COTPA.⁴⁷ The Act does not textually provide a health care worker’s right to refuse to perform an abortion through what is known as a “conscience clause,” because the drafters believed a “conscious clause” would be redundant when the right to refuse to perform an abortion is already protected by the Constitution.⁴⁸ Instead the Act creates a crime for obstructing legal abortion, and provides that any person who “prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy” may be imprisoned for up to ten years for the offense.⁴⁹

C. Challenges to the Choice on Termination of Pregnancy Act

Polls showed that a majority of South Africans did not want the COTPA.⁵⁰ Further, the black majority in South Africa was more likely to be pro-life than the white minority.⁵¹ Shortly after the law was enacted, the Christian Lawyers Association of South Africa along with various right-to-life groups filed a lawsuit challenging the constitutionality of the act.⁵² The plaintiffs alleged that allowing abortion violated the right to life of human beings, and that the life of a human being begins at conception.⁵³ This claim was based on Section 11 of South Africa’s Constitution, which provides that “everyone has the right to life.”⁵⁴ The plaintiffs argued that Section 11 applies to unborn children

⁴⁶ *Id.*

⁴⁷ Stark, *supra* note 12, at 306.

⁴⁸ Moosa, *supra* note 10, at 263–64.

⁴⁹ Choice On Termination Of Pregnancy Act 92 of 1996 (S. Afr.).

⁵⁰ See Stark, *supra* note 12, at 306 (citing Najma Moosa, *The Experience of Islamic Minorities in Non-Islamic States*, 21 *MED. & L.* 257, 259 (2002) (citing F.A. Althaus, *Work in Progress: The Expansion of Access to Abortion Services in South Africa following Legalization*, 26 *INT’L FAM. PLANNING PERSPECTIVES* 84 (2000). <http://www.jstor.org/stable/2648272>)).

⁵¹ *Id.* at 307.

⁵² *Christian Lawyers Ass’n of SA v. Minister of Health*, 1998 (11) BCLR 1 (T), 1998 SACLR LEXIS 58 at *9–11 (S. Afr.).

⁵³ *Id.*

⁵⁴ *Id.*

because the phrase “everyone” was used rather than “every person,” which is used in other parts of the Constitution.⁵⁵

The Transvaal Provisional Division of High Court dismissed the suit, holding that an express provision affording fetus or embryo legal personality or protection did not exist, and that interpreting “everyone” to include fetuses would change the word’s meaning as derived from everywhere else in Constitution.⁵⁶ The Court noted that the use of “everyone,” “every person,” and “anyone” is synonymous through South Africa’s Constitution and the use of “everyone” could never “have been intended to introduce a significant new class of rights-bearer.”⁵⁷ The Court went further to say that no express provision giving fetus legal rights or personality existed, and the founders would surely have made an express provision if they intended to create that right.⁵⁸ Finally, the Court engaged in a significant discussion about women’s rights, and how the plaintiff’s interpretation of the Constitution would impede women’s rights. The Court pointed to Section 12(2) of the Constitution which explicitly provides that “everyone has the right to make decisions concerning reproduction and to security in and control over their body” and went further to say that “[n]owhere is a woman’s right[s] in this respect qualified in terms of the Constitution in order to protect the foetus.”⁵⁹ Had the Court agreed with plaintiffs, a fetus would enjoy the same legal protections as its mother, and this would prohibit abortion in all cases, even when pregnancy was dangerous to the mother’s life.⁶⁰ The Court would not accept this result, and reasoned that “the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms.”⁶¹ Finally, the Court discussed the importance of equality in the Constitution, agreeing with defendants that it is “primarily and emphatically” an egalitarian Constitution designed to eradicate disadvantage based on race, gender, and “other grounds of inequality,”⁶² and agreed that “proper regard must be

⁵⁵ *Id.* at *12-13.

⁵⁶ *Id.* at *28-29.

⁵⁷ *Id.* at 13-14.

⁵⁸ *Id.* at *25.

⁵⁹ *Id.* at *26.

⁶⁰ *Id.* at *29.

⁶¹ *Id.* at *29-30.

⁶² *Id.* at 30-31.

had to the rights of women as enshrined in section 9 of the Constitution (the right to equality, which includes the full and actual enjoyment of all rights and freedoms and the protection that the State may not unfairly discriminate against anyone inter alia on the grounds of sex)”⁶³ With impressive dedication to the values of equality and individual rights enshrined in the South African Constitution, South Africa’s Transvaal Provisional Division of High Court supported the COTPA and deflected an attack against the law.

The Court did so again when the plaintiffs brought a second legal challenge to the Act. In 2004, the Christian Lawyers Association and right-to-life groups argued that the COTPA was unconstitutional because women under the age of eighteen were per se incapable of giving informed consent to have an abortion without the guidance of parents or a counselor.⁶⁴ The Court again disagreed and held that the Legislature declined to impose a fixed age for consent, but instead reasoned that informed consent is a threshold inquiry about one’s intellectual and emotional attributes and whether those attributes comprise the capacity to give consent to an abortion procedure.⁶⁵ The Court also pointed out that in any case, the COTPA encourages young women to consult with family or counselors before undergoing abortion.⁶⁶

The Court discussed informed consent in the context of human rights, arguing that informed consent is about “giv[ing] effect to the patient’s fundamental right to self-determination.”⁶⁷ The Court went into a policy discussion about South Africa’s history under apartheid and acknowledged that South African law is moving away from paternalism and toward individual autonomy and self-determination.⁶⁸ The Court’s greatest emphasis was certainly on the concept of autonomy, or self-determination, and the Court went as far as saying “[t]he fundamental right to individual self-determination itself lies at the very heart and base of the constitutional right to termination of pregnancy.”⁶⁹

⁶³ *Id.*

⁶⁴ *Christian Lawyers’ Ass’n v. Nat’l Minister of Health*, 2004 (10) BCLR 1086 (T), at *13 (S.Afr.).

⁶⁵ *Id.* at *25.

⁶⁶ *Id.* at *18.

⁶⁷ *Id.* at *26.

⁶⁸ *Id.* at *26–27.

⁶⁹ *Id.* at *27.

However, the Court did not end its analysis there. The Court bolstered the right to have an abortion, finding that the South African Constitution recognizes right to abortion in two ways: (1) under section 12(2)(a) providing right to bodily and psychological integrity, which includes right to make decisions concerning reproduction; and (2) under 12(2)(b) that provides right to control over one's body.⁷⁰

Interestingly, the Court discusses justifications for abortion in the United States (and other countries)—namely dignity and privacy—and concludes that it is

not necessary to resort to those general guarantees because section 12(2) specifically guarantees the woman's right "to bodily and psychological integrity" including the right "to make decisions concerning reproduction" and "to security and control over their body." They were clearly designed specifically to protect the woman's right to reproductive self-determination.⁷¹

The Court effectively says the South African Constitution directly addresses reproductive rights and acknowledges them as autonomy rights.

Finally, the Court reflects on its country's progressive law, acknowledging that "[c]ompared to the foreign jurisdictions referred to above, it is clear that ours is the most explicit provision concerning the right," and the Court ties the right to abortion to other important rights:

Her freedom of choice protected under the explicit provisions of section 12(2)(a) and (b) is moreover reinforced by the following constitutional rights: the right to equality and protection against discriminations on the grounds of gender, sex and pregnancy (section 9), the inherent right to dignity and to have her dignity respected and protected (section 10), the right to life (section 11), the right to privacy (section 14) [and] more importantly the right to have access to reproductive health care (section 27(1)(a)).⁷²

Here, the Court ties in other constitutional rights, such as equality, to frame the right to abortion.

However, legal attacks were not the only challenges the COTPA faced. Abortion is a divisive issue in South Africa, as it is in many places, and in South Africa the range of Christian and Muslim

⁷⁰ *Id.* at *27–28.

⁷¹ *Id.* at *44–45 (quoting S. AFR. CONST., 1996).

⁷² *Id.* at 50–51.

beliefs may contribute to the debate over abortion law.⁷³ South Africa also faces a great challenge in the scarcity of healthcare workers who are willing and able to provide abortion procedures.⁷⁴ Among South Africa medical service providers, there are a substantial number of conscientious objectors who hinder abortion by discouraging women from having an abortion despite their legal duty to refer women to willing providers of abortion.⁷⁵ The government has tried to remedy this problem by creating values clarification workshops that serve to promote more tolerant attitudes by medical service providers and by enabling traveling health care providers who visit areas that object to providing abortions.⁷⁶

D. Improved Access to Abortion

Since the COTPA was enacted, “the number of legally performed abortions rose quickly.”⁷⁷ During the first six months (January 1997-June 1997), the number of reported abortions was twice the total number legally conducted in 1984-1991 (an eight year period).⁷⁸ However, just half the population of South Africa was aware of the law one year after it took effect.⁷⁹ Yet before COTPA’s enactment, abortion in South Africa was largely uncontrolled, with an estimated 200,000 illegal abortions occurring annually and many of these abortions being associated with substantial and preventable maternal morbidity and mortality.⁸⁰ Additionally, nearly all of the 1,000–1,500 legal abortions being performed annually before COTPA were for white women.⁸¹ Within two years of COTPA being in place, the number of women with serious abortion-related morbidity reduced by nearly half (9.5 percent in 1999 compared to 16.5 percent in 1994).⁸² Further, a large majority of women admitted to hospitals for abortion showed no signs of infection (91 percent) and

⁷³ Stark, *supra* note 12, at 304.

⁷⁴ Cooper, *supra* note 6, at 75.

⁷⁵ *Id.*

⁷⁶ *Id.* at 76.

⁷⁷ Country Profiles, *supra* note 3.

⁷⁸ *Id.*

⁷⁹ Moosa, *supra* note 9, at 266.

⁸⁰ Cooper, *supra* note 6, at 70.

⁸¹ *Id.* at 71.

⁸² *Id.* at 75.

maternal deaths from unsafe abortions had also decreased.⁸³ Things continued to improve, as progress in health facilities providing termination of pregnancy increased from 33 percent functioning in 2001 to 48 percent functioning in 2003.⁸⁴ Finally, a more recent study shows that legal abortions steadily increased from 29,375 performed in 1997 to 53,510 performed in 2001.⁸⁵

E. South Africa's Larger Reproductive Policy Changes and Moves Toward Equality

While South Africa's Constitution is neutral toward abortion, it uniquely provides a section on reproductive rights.⁸⁶ As discussed above, the reproductive rights section explicitly provides for the right to "make decisions concerning reproduction" and the right to "security in and control over [the] body."⁸⁷ Going further, the Constitution makes the state responsible for providing "reproductive health to all, contraception and termination of pregnancy services, as well as safe conditions under which the right of choice can be exercised without fear or harm."⁸⁸

The Preamble to the COTPA plainly recognizes that the drafters of the act believed abortion is not a form of population control or contraception, but the remainder of the Preamble's language clearly shows the law is based firmly on the concept of individual human rights.⁸⁹

The right to an abortion is textually supported throughout South Africa's Constitution in a number of ways. The Preamble of the COTPA recognizes the legal roots for the abortion right, listing but not limiting to: (1) the values of human dignity and equality; (2) the constitutional right of persons to make decisions about reproduction and to have security and control over their bodies; (3) that "both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice;" and (4) that a

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Moosa, *supra* note 10, at 262.

⁸⁷ Stark, *supra* note 12, at 306.

⁸⁸ *Id.* at 315.

⁸⁹ Moosa, *supra* note 10.

woman's decision to have children is fundamental to her social, physical and psychological health.⁹⁰ The Constitution even goes so far as to say that de facto inequality is to be addressed by affirmative measures.⁹¹

South Africa's government is supportive of family planning, and the state provides contraceptives free of charge at all government medical establishments.⁹² Early in South Africa's post-apartheid transition the government sought to reform the health care system:

In 1994, the Department of Health adopted the Primary Health Care approach as the philosophical and structural orientation of the South African health care system. This approach emphasized health as a human right, equity in resource distribution, expanded access, decentralized services aimed at promoting local health needs and community involvement through the district health care system, and preventative and promotive health care. Free primary-level health services were introduced, targeting women and children. A key goal was to redress past neglect of the health needs of poor, black women.⁹³

In fact, from 1994 on, laws and policies aimed at reforming gender inequality provided an enabling atmosphere for reproductive health reforms.⁹⁴ "In 1995, a directorate of Mother, Child and Women's Health was established within the National Department of Health" and one of the main objectives was ensuring that approaches to health service delivery "were consistent with the goal of increasing gender equality."⁹⁵ Despite attacks, COTPA's maintenance reflects South Africa's strong commitment to reproductive rights, when reproductive rights are in danger in several places throughout the world.⁹⁶

II

ABORTION IN THE UNITED STATES AND THE CALL FOR EQUALITY

In *Roe v. Wade*, the mother of abortion jurisprudence in the United States, the U.S. Supreme Court recognized a woman's right

⁹⁰ S. AFR. CONST. Preamble.

⁹¹ Stark, *supra* note 12 at 315, citing S. AFR. CONST. § 27.

⁹² Country Profiles, *supra* note 4.

⁹³ Cooper, *supra* note 6, at 72.

⁹⁴ *Id.*

⁹⁵ *Id.* at 73.

⁹⁶ *Id.* at 75.

to an abortion as a liberty right entrenched in the Fourteenth Amendment of the Constitution.⁹⁷ But before *Roe v. Wade* came *Eisenstadt v. Baird*, which used “liberty” from the Fourteenth Amendment to strike down a state law prohibiting the sale of contraceptives.⁹⁸ *Eisenstadt v. Baird* framed the jurisprudence for reproductive rights in the United States in the realm of privacy, saying “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁹⁹ Cases that followed *Eisenstadt* and *Roe* continued to primarily use liberty and privacy to justify the legal right to an abortion, although some cases expanded to include the notion of autonomy.¹⁰⁰ In Justice O’Connor’s opinion in *Planned Parenthood v. Casey*, she uses elegant language to bolster the importance of the abortion right:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁰¹

Although Justice O’Connor alludes to how a woman’s right to abortion is related to her right to self-determination, much of reproductive rights jurisprudence hones in only on the privacy justifications for abortion.¹⁰² Because of the historical identification of pregnancy, contraception, and childbirth as primarily privacy issues, reproductive rights are reinforced as being viewed as best “left to the determination of the married

⁹⁷ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁹⁸ *See Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁹⁹ *Id.* at 453.

¹⁰⁰ *See Ginsburg, supra* note 1, at 380, 382.

¹⁰¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (O’Connor J).

¹⁰² *See Stark, supra* note 12, at 308.

2011] *Equality & Abortion in Post-Apartheid South Africa* 115

couple.”¹⁰³ That type of thinking about family planning “both reflects and perpetuates women’s subordination within the marriage.”¹⁰⁴

Justice Ginsburg recognized the inadequacies of *Roe v. Wade* in a 1985 essay entitled, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, where she wrote:

I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious. I appreciate the intense divisions of opinion on the moral question and recognize that abortion today cannot fairly be described as nothing more than birth control delayed. The conflict, however, is not simply one between a fetus’ interests and a woman’s interests, narrowly conceived, nor is the overriding issue state versus private control of a woman’s body for a span of nine months. Also in the balance is a woman’s autonomous charge of her full life’s course—as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.¹⁰⁵

Justice Ginsburg¹⁰⁶ points to perhaps the most important shortcoming in U.S. abortion jurisprudence: the lack of weight given to the principle of woman’s autonomy to the abortion right, and the direct relationship between a woman’s autonomy and her ability to achieve equality with men. While opinions like *Planned Parenthood v. Casey* attempted to touch on autonomy and expand the justifications for the right to abortion,¹⁰⁷ *Roe*’s framework of the right to abortion being primarily a privacy-based liberty interest, following *Eisenstadt*’s lead, constricted the jurisprudence thereafter, perhaps closing doors to arguments for rooting the right in equality. Further, the privacy justification perhaps limits thinking about abortion as an issue for the private sphere, therefore justifying federal government failures to provide

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Ginsburg, *supra* note 1, at 383.

¹⁰⁶ “Justice Ruth Bader Ginsburg notes that analysing a woman’s right to terminate [pregnancy] in terms of privacy—an autonomy right—has made it easier for the [C]ourt to justify limiting women’s access to abortion. She suggests that analysing the issue in terms of the right of women to the equal protection of the law—a solidarity right—would have made it “more difficult for the [C]ourt to rule, for example, that neither the [U.S.] Constitution nor federal statute requires state health insurance reimbursements for elective abortions.” O’Sullivan, *supra* note 6, at 37–11.

¹⁰⁷ See *Casey*, 505 U.S. at 833.

funding for abortion or make abortion a meaningful and realistic choice for women who cannot afford the procedure.¹⁰⁸

Yet equality-based arguments for abortion are nothing new among feminist scholars writing about United States abortion jurisprudence. Reva Siegel's article, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, is a lengthy piece assessing the social effects of restricting abortion and how the restrictions can impede women's equality.¹⁰⁹ More recently, Emory Law Journal published articles from a symposium, which included David Gans's article reading the Citizenship Clause, the Privileges or Immunities Clause, and the Due Process Clause together to provide a unitary constitutional authority for the abortion right.¹¹⁰ Reva Siegel writes another article introducing the Emory Symposium, discussing how the various articles use a "sex equality approach" to reproductive rights that encompasses multiple constitutional frameworks.¹¹¹ However, equality arguments for abortion rights were not always as common. In the 1970s, sex equality arguments for abortion were looked down upon politically in efforts to protect the Equal Rights Amendment.¹¹² In the battle over the Equal Rights Amendment, some activists, such as Phyllis Schlafly, characterized the women's liberation movement as "anti-family, anti-children, and pro-abortion."¹¹³ That sentiment was common among opponents to the Equal Rights Amendment, and in fact Equal Rights Amendment opponents were more likely to connect abortion to sex equality than proponents of the Amendment.¹¹⁴

III

THE IMPORTANCE OF EQUALITY TO ABORTION JURISPRUDENCE

After looking at abortion jurisprudence in both South Africa and the United States, it is clear that there are some similarities

¹⁰⁸ O'Sullivan, *supra* note 7, at 37–11–12 (citing June Sinclair at 525).

¹⁰⁹ See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

¹¹⁰ See Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

¹¹¹ *Id.*

¹¹² *Id.* at 826.

¹¹³ *Id.* at 827.

¹¹⁴ *Id.* at 828.

between the two approaches. Both countries rely heavily on the concept of individual autonomy and the right to be free from government. However, South Africa's approach to abortion takes the right much further because of South Africa's equality driven Constitution and government. South Africa's comprehensive approach to abortion law is supported textually in South Africa's Constitution through the Bill of Rights in various sections. First, the right to abortion is explicitly justified in Section 12 (2)(a) in the Bill of Rights, which provides the right to bodily and psychological integrity, including the right to make decisions concerning reproduction.¹¹⁵ Second, Section 12 (2)(b) of the Bill of Rights provides the right to security in and control over one's body, creating a second constitutional justification for abortion.¹¹⁶ Both of these primary justifications for abortion are reinforced by other South African constitutional rights such as the right to equality and freedom from discrimination based on sex, gender, or pregnancy, the right to dignity, the right to privacy, the right to life, and the right to health care.¹¹⁷ Recognizing pregnant women as members of a consistently disadvantaged group whose past and present condition require increased judicial care¹¹⁸ speaks to South Africa's dedication to equality. Further, South Africa's High Court has recognized that the right to abortion is part of a woman's larger right to determine the fate of her pregnancy.¹¹⁹ All of these rights are framed by Founding Provision 1 of South Africa's Constitution, which provides:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b. Non-racialism and non-sexism.
- c. Supremacy of the constitution and the rule of law.
- d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic

¹¹⁵ *Christian Lawyers*, 2004 (10) BCLR 1 (T) at *50-51.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ O'Sullivan, *supra* note 7, at 37-13, 14.

¹¹⁹ *Christian Lawyers*, 2004 (10) BCLR 1 (T) at *50-51.

government, to ensure accountability, responsiveness and openness.¹²⁰

The South African Bill of Rights exists to support the Constitution's values and further the goals of human dignity, equality, and freedom.¹²¹ After years of apartheid and oppression of so many of South Africa's citizens, particularly black women,¹²² and because human dignity and equality are so important to democracy in South Africa, discussing abortion in South Africa without reference to gender equality is insufficient.

Discussion about abortion in any country becomes more meaningful when equality is part of the discourse. If women are not viewed as equals within marriages or within society, reproductive rights are likely to be exercised by husbands and doctors.¹²³ Reproductive rights are illusory when a woman cannot support herself or make her own choices,¹²⁴ and South Africa's comprehensive abortion jurisprudence recognizes the importance of a woman's autonomy as a means to her equality. South Africa's awareness of these important concepts is reflected in its Constitution, case law, and legislation. By acknowledging pregnancy, sex, and gender as prohibited grounds of discrimination in its Constitution,¹²⁵ South Africa goes further than many countries in providing textual constitutional support for the right to abortion. And by providing health care and contraception services to women,¹²⁶ South Africa effectuates the values its Constitution stands for. And by providing those services, South Africa also supports the idea that "[b]ecause reproductive autonomy is a precondition for the sexual and social equality of women, women ought to be entitled to claim state resources in that choice safely and securely."¹²⁷

South Africa's comprehensive, equality- and autonomy-driven approach to abortion is more protective of a woman's right to choose abortion than the United States' privacy justification for

¹²⁰ S. AFR. CONST. § 1.

¹²¹ *Id.*

¹²² Cooper, *supra* note 6, at 72.

¹²³ See Stark, *supra* note 12, at 303.

¹²⁴ *Id.*

¹²⁵ O'Sullivan, *supra* note 6, at 37.4; S. AFR. CONST. § 9(3).

¹²⁶ Country Profiles, *supra* note 3.

¹²⁷ O'Sullivan, *supra* note 6, at 37.4, 37-12, 13; see also *Christian Lawyers*, 2004 (10) BCLR 1 (T) *passim*.

2011] *Equality & Abortion in Post-Apartheid South Africa* 119

abortion because it (1) recognizes the discrimination and inequality that can occur when women do not have autonomy over their bodies, and (2) allows for the state to provide women with the medical services required to help them realize those rights. While South Africa can more actively assist women in terminating pregnancy, thereby helping women avoid the social, economic, or health consequences of pregnancy (i.e., lost jobs or promotions, no maternity leave or low-paid maternity leave, lack of adequate childcare, interrupted careers or education),¹²⁸ publicly-funded medical care for abortion is much harder to come by in the United States.¹²⁹ South Africa's comprehensive abortion jurisprudence reflects that access to early and safe abortion is highly important to issues of sexual equality, individual conscience, and social justice.¹³⁰

¹²⁸ O'Sullivan, *supra* note 6, at 37.4, 37-13.

¹²⁹ See Ginsburg, *supra* note 1, at 382 (citing *Harris v. McRae*, 448 U.S. 297 (1980) and *Maher v. Roe*, 432 U.S. 464 (1977)).

¹³⁰ O'Sullivan, *supra* note 6, at 37.4, 37-13.

