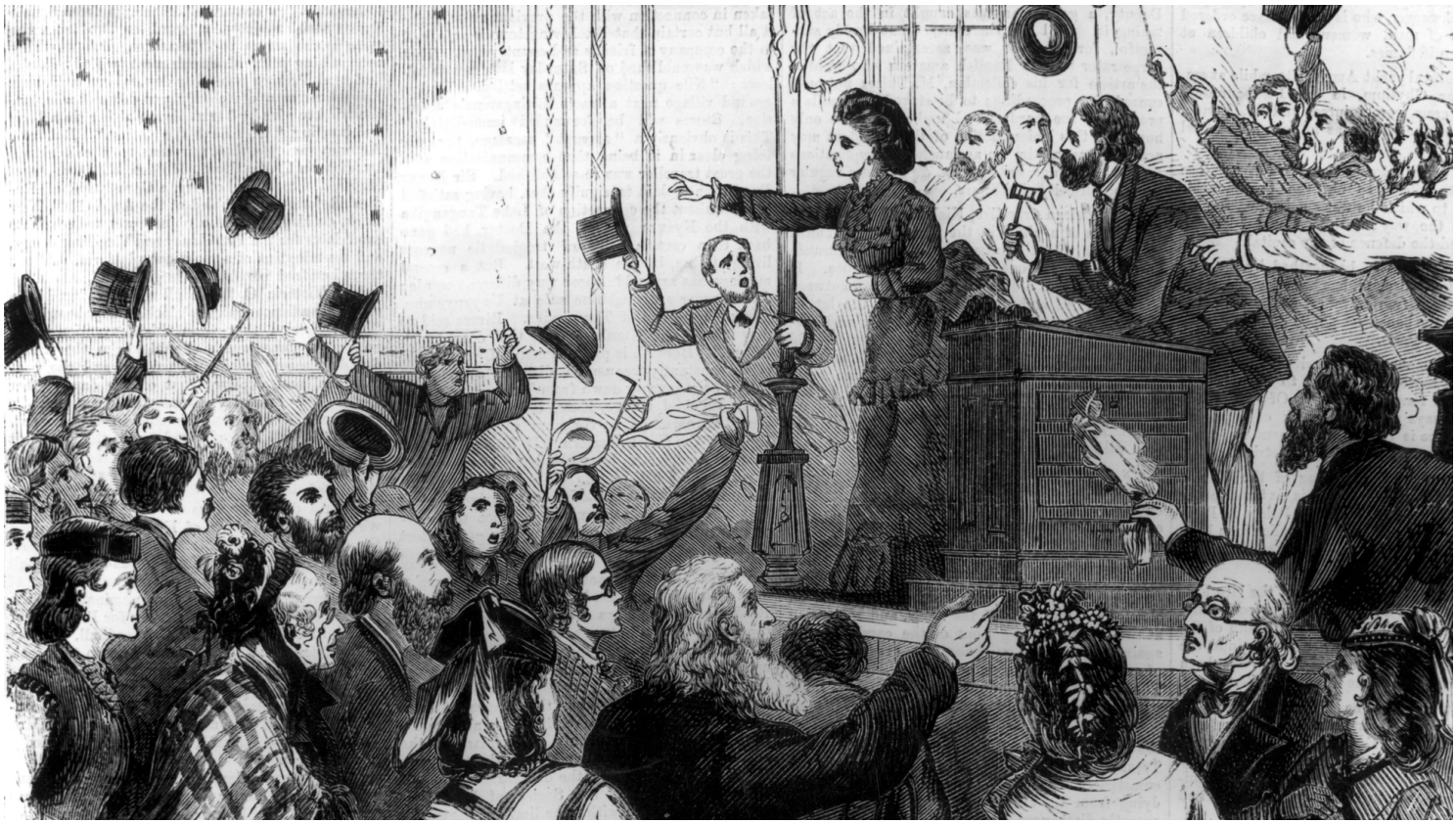
The Troubling Ideals at the Heart of Abortion Rights

Equality premised on the power to end life is not true equality at all.

By Erika Bachiochi



Victoria Woodhull, center, was an early anti-abortion activist who advocated for women's rights. (Hulton Archive / Stringer / Getty)

JANUARY 24, 2020

Many Americans think of *Roe v. Wade* as the defining Supreme Court decision on the issue of abortion. But a 1992 high-court decision actually governs abortion law. That ruling rested on fateful assumptions about the relationship between abortion and women's equality. But in so doing, it has served to enshrine social and professional inequalities, which mothers must fight against every day.

In that case, *Planned Parenthood v. Casey,* a mere plurality of justices on the Court affirmed *Roe*, not because they thought it was good law but because of its "precedential force." Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter wrote that the "certain cost" of overruling *Roe* was just too extensive 19 years later—"even on the assumption that the central holding of *Roe* was in error."

What were the costs that persuaded these justices to affirm a prior—potentially erroneous—constitutional decision? Judicial conservatives point to the joint opinion's concern with the threat to the high court's integrity and legitimacy in overturning long-established precedent. But another concern was just as operative: The plurality writes that the country so "relied" upon the right bestowed in *Roe* for women's economic and social progress that the Court could not now stand in the way.

Behind this logic is a kind of nontraditional, sociological rationale undergirding stare decisis—the legal principle of deferring to precedent. But the *Casey* plurality is also paying tribute to a long-popular argument among pro-abortion-rights legal thinkers: Abortion rights are necessary for women's equality. Indeed, for Justice Ruth Bader Ginsburg and the cadre of other like-minded legal thinkers, the right to abortion, currently based in substantive due process, would be better secured by the Equal Protection Clause of the Fourteenth Amendment—or, better still, the long-proposed Equal Rights Amendment to the U.S. Constitution. Justice Ginsburg, who defended abortion rights as equality rights in scholarship in the 1980s, more recently argued in

her dissent in *Gonzales v. Carhart* that a constitutionally protected right to abortion is even necessary for women's "equal citizenship stature."

Equality arguments for abortion rights have become so pervasive in law and politics that it's easy to overlook just what is being claimed, and how very different this idea of equality is from that of those who first advocated for women's full legal, political, and social equality in this country.

Caitlin Flanagan: The dishonesty of the abortion debate

Consider, as one striking example, Victoria Woodhull, a leading suffragist and radical, and the first woman to run for president of the United States, nominated by the Equal Rights Party in 1872. With her peers in the 19th-century women's movement, she asserted, among a host of other rights, the right to be free of the common-law sexual prerogative that husbands then enjoyed over their wives. Understanding the asymmetrical consequences of sexual intercourse for women, Woodhull anticipated a time "when woman rises from sexual slavery to sexual freedom into the ownership and control of her sexual organs, and man is obliged to respect this freedom."

But owning and controlling one's body did not extend, for Woodhull and other advocates of "voluntary motherhood," to doing what one willed with the body of another. Rather, these women sought sovereignty over their own bodies in part because they could claim no legitimate authority to engage, in Woodhull's words, in "antenatal murder of undesired children." An outspoken advocate of constitutional equality for women, Woodhull also championed the rights of children—rights that "begin while yet they remain the fetus." In 1870, she wrote:

> Many women who would be shocked at the very thought of killing their children after birth, deliberately destroy them previously. If there is any difference in the actual crime we should be glad to have those who practice the latter, point it out. The truth of the matter is that it is just as much a murder to destroy life in its embryonic condition, as it is to destroy it after the fully developed form is attained, for it is the self-same life that is taken.

Nearly 100 years later the arguments shifted, and women's-equality advocates began making arguments *in favor of* abortion rights. In 1969, in a first-of-its-kind legal brief,

attorneys for 300 women challenged New York State's then–relatively restrictive abortion law. The attorneys in *Abramowicz v. Lefkowitz* rightly brought attention to the same stubborn reproductive asymmetries to which advocates of voluntary motherhood had sought to respond. But rather than call men to join women at a high standard of mutual responsibility and care, as prior generations of women's-rights advocates had done, the attorneys argued for a different kind of sexual equality. Because "the man who shares responsibility for her pregnancy can and often does just walk away," the plaintiff's brief maintained that the woman ought to enjoy that same freedom—through abortion. As the Harvard law professor Laurence Tribe would articulate the concept two decades later, "While men retain the right to sexual and reproductive autonomy, restrictions on abortion deny that autonomy to women."

But abortion restrictions do not deny sexual and reproductive autonomy to women; reality does. While pregnant, a woman is carrying a new and vulnerable human being within her. Unlike a biological father, a pregnant woman cannot just walk away; to approach the desired autonomy of the child-abandoning man, a pregnant woman must engage in a life-destroying act.

Chavi Eve Karkowsky: I found the outer limits of my pro-choice beliefs

So in a twisted imitation of the common-law dominion husbands once wielded over their wives, women would now seek sexual equality through the ultimate dominion over their unborn children. To make matters worse, this dominion is now thought necessary for women to achieve, in Justice Ginsburg's view, "equal citizenship stature."

Yet this view of "equal citizenship" seems to be in some tension with Ginsburg's definition of "full citizenship" in the opinion for the Court in *United States v. Virginia*, the much-heralded 1996 sex-discrimination case. Ginsburg defined a person's full citizenship as the "equal opportunity to aspire, achieve, participate in and contribute to society *based on their individual talents and capacities*."

But those capacities are not the same for men and women, at least when it comes to sex and reproduction. If citizenship is understood along the traditional, male model—the capacity to remain physically autonomous from the reproductive consequences of sexual intercourse and unencumbered by the demands of caregiving—the affirmative attachment and nurturing required of young children and those who care for them

become symbols of dependence, and anathema. To celebrate autonomy as the defining feature of citizenship undervalues both men and women who have caregiving responsibilities, especially when those responsibilities impede one's capacity to live and work unencumbered.

The market economy, ever seeking efficiency and profits, already carries a bias against time-consuming and often-unpredictable parental duties. Given feminism's tendency today to associate equality with autonomy, it is no wonder that work-family balance remains a foremost issue, and that women's status as mothers still results in the most acute social and professional inequalities, even as women have made tremendous gains overall.

Perhaps the strongest illustration of the brokenness of these ideas comes in the form of a counterfactual: Imagine a world without *Roe* and *Casey,* but with Ginsburg's rightfully celebrated anti-discrimination successes in the 1970s. In this world, workplaces and other institutions better acknowledge encumbered women, duly encumbered men, and the child-rearing family's demands generally. Rather than being "free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society," as the *Casey* plurality contemplated, employers are burdened instead by the reality—now too easily cast aside—that most working persons are, and wish to be, deeply encumbered by their obligations to their families and the important work they do in their homes. In such a world, authentically transformed by women's legal, political, and social equality, today's overburdened mothers and fathers just might receive the respect they deserve.