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Liberalism, Republicanism and the Abortion Controversy

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I. INTRODUCTION

This article considers the abortion controversy in the context of intellectual history and political theory. It does not analyze the Supreme Court’s recent abortion cases, rely upon formal legal reasoning, or predict how the Court will decide any cases currently pending on its docket. Instead, it examines the Court’s current options in light of the intersecting and pliable traditions of liberalism and republicanism.

Liberalism consists of a bevy of imprecise doctrines which justify an occasionally shifting group of individual rights, a broad range of political liberties and a narrow charter for government. The American version of liberalism guarantees inter alia freedom of thought, religion and expression and protects individuals from various forms of invidious discrimination. A liberal society is, in Karl Popper’s phrase, an open society. American proponents of liberalism regard most laws based upon conventional morality as oppressive. Liberals claim that “it is prima facie a good thing for human beings to have, to act on, and to satisfy desires and inter-

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1. The 1988 term will always be remembered for the Court’s decision in Webster v. Reproductive Health Services, Inc. 109 S. Ct. 3040 (1989) (plurality opinion). In Webster, Justice Blackmun described the Court’s plurality opinion as a “proposed revolutionary revision in the law of abortion.” Id. at 3079 (Blackmun, J., concurring and dissenting in part). The Court continued to revise abortion law in its 1990 term. See Hodgson v. Minnesota, 58 U.S.L.W. 495 (U.S. June 25, 1990) (upholding Minnesota parental consent statute); Ohio v. Akron Center for Reproductive Health, 58 U.S.L.W. 4979 (U.S. June 25, 1990) (upholding Ohio statute requiring physician to notify parent prior to performing abortion on minor child).

2. Sir Karl Popper wrote that “an open society . . . rejects the absolute authority of the merely established and merely traditional . . . .” K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES viii (1963)
Contemporary liberals rally behind *Roe v. Wade* and argue that the public interest in potential life is not more important than a woman's reproductive freedom.

A deferential republican counter-argument is more supportive of a community’s assessment of the moral and legal status of the fetus than a woman’s freedom. The republican vision of democracy is less individualistic than the liberal vision. Although republicanism is consistent with an activist judiciary that guards against democratic excesses contrary to public virtue, prior to the twentieth century it was unthinkable for a federal court to strike down laws which embodied the local community’s moral standards. Contemporary liberals, however, reject any accommodating judicial philosophy that ranks the moral judgments of the community above “privacy” rights recently discovered in the Constitution. Liberals deny that “the common good” is a useful conception to courts. They reject the republican assumption that a legislative majority is capable of identifying the hypothesized common good. Liberals also worry that a consensus of ideas about public virtue leads to intolerance, orthodoxy, and repression. When liberals reject the community consensus, however, how is the judicial activist supposed to rank competing liberal value judgments?

The questions presented by the abortion controversy include the following: Under what conditions are non-therapeutic abortions tolerable? What is the role of the Supreme Court when a state’s abortion control law mirrors the moral standards of its citizens? Should conventional ethics and communal morality be expressed in criminal laws imposing penalties for abortion? Does


5. Deferential republican communitarians must be sharply contrasted with the communitarians who are liberal, egalitarian judicial activists. See, e.g., R. Dworkin, Law's Empire 167-68, 195, 211-13 (1986). The theories of these judicial activists, not discussed in this article, have been criticized cogently. See Kahn, Community in Contemporary Constitutional Theory, 99 Yale L.J. 1 (1989) (questioning usefulness of communitarian model due to contradictions in model’s assumptions).

6. The representatives elected to the legislature are servants of the people with authority, within limits, to act on behalf of the people. See The Federalist No. 78, at 506 (A. Hamilton) (E. Earle ed. 1937). Legislators, more so than judges, are likely to be attuned to the community’s will. It is awkward for judges to assert that the legislature’s assessment of enduring community values is mistaken. Moreover, although a social consensus may depart from ideals of republican civic virtue, jurists have not developed an adequate philosophy of judicial activism based on civic virtue. Judges are intermediaries between the people and their representatives. Judges are not cultural czars.
the right to abortion ever depend on the motives of a woman and the specific circumstances of her pregnancy? What is the moral status and significance of the fetus during various stages of fetal development? These questions present perplexing metaphysical, political and legal issues. The answers to these questions divide people with strong moral claims into pro-choice and pro-life factions.

The Supreme Court's task during the 1990s will be to strike a delicate balance between the woman's interest in reproductive freedom and each state's interest in enacting laws that embody competing social norms. It is impossible to balance these incommensurable interests according to value-neutral conceptions of justice. The Court, in its attempt to weigh competing interests, is affected in subtle, but profound ways by individualistic and communalist conceptions of political morality.

When the Court decided *Roe v. Wade*, the individualistic liberal conception was selected as normatively preferable. The Court's opinion identified an enclave of privacy that was broad enough to protect women desiring abortions from virtually all existing legislation. Even a cursory reading of *Roe* indicates that republican conceptions of civic virtue were rejected as irrelevant or comparatively unimportant. As the boundaries of the right to reproductive freedom are reconsidered in the 1990s, many liberals will continue to maintain that a pregnant woman is not in the same moral category as a fetus because a woman is "a thinking, judging, feeling, hoping, believing human person who suffers in a here and now that may last much of her life." A human fetus lacks several traits which many liberals consider central to personhood. It "does not have hopes that can be dashed, expectations that can be disappointed, desires that can be frustrated, objectives that it can fail to attain." In effect, a fetus is banished from the moral community of liberals—most of whom are motivated by a benign desire to reduce suffering. Liberals argue that to deny women a legal right to abortion is "to condemn very large numbers of actual human persons to pain and anguish . . . ."

Liberals contend that abortion control laws perpetuate sys-

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7. In *Roe*, the Court held that the fourteenth amendment concept of personal liberty affords constitutional protection against state interference with an individual's personal privacy, including a woman's decision to terminate her pregnancy. *Roe*, 410 U.S. at 154.
9. *Id.* at 191.
10. *Id.* at 196.
tems of oppression that treat women as second-class citizens. Liberals are most persuasive when they take an anti-totalitarian stance and explain how mandatory childbearing, as a result of legislation prohibiting abortions, unjustly transforms a woman's body into an instrument of state policy. This anti-totalitarian argument is not based simply on the claim that a pregnant woman's body belongs solely to her, but also upon the extent to which her reasonable expectations of personal autonomy can be crushed by mandatory childbearing requirements. In some situations, a woman's identity as an individual is so traumatically affected by pregnancy that the scope of her constitutionally protected reproductive freedom determines her survival.

When a state forces a woman to bear and raise an unwanted child, especially when she cannot financially afford to fulfill parental responsibilities, her future is dictated by many severe circumstances beyond her control, at least until the child reaches the age of emancipation. What is often at stake is a woman's power to plan her life. In such cases, equal protection principles protect women who demonstrate that they are not similarly situated to others, yet subjected to the same statutory prohibition and criminal penalty. Women want to escape the forces that interfere with their rational plans for self-development as independent persons with opportunities equal to men. Escape is cut off when laws require women to abandon the abortion option.

In controversies over abortion, pro-choice liberals deny they are for abortion. They explain that they are against the subjugation and victimization of women whose basic needs should be satisfied regardless of a community's outmoded habits of thought. The fear of mandatory childbearing interferes with many important relationships, including sexual relationships. Justice Bren-

11. See Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 739-40, 788-91 (1989) (difficult to imagine a "single proscription with a greater capacity to shape lives into singular, normalized, functional molds than the prohibition of abortions"); see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515 (1988) ("A more promising theme in equal protection doctrine may well be an antisubjugation principle, which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens.").

12. See C. GILLIGAN, IN A DIFFERENT VOICE 71-75 (1982); see also L. TRIBE, supra note 11, at 1340 ("[I]t is difficult to imagine a clearer case of bodily intrusion [than prohibiting abortion] . . . .").

13. B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 7 (1984). "It is not surprising that liberals, who regard political community as instrumental rather than as an intrinsic good . . . [aim] to contain power and community and to judge [laws] by how they affect freedom and private interest." Id.
nan, who claims we often cannot agree on the definition of the "good life," explains that "liberty" in a pluralistic "community such as ours . . . must include the freedom not to conform" to customs and usages embodied in state law.14

Critics who read anomic implications in Justice Brennan's remarkable dictum argue that human freedom cannot be achieved unless there are enforceable laws that abridge some desired liberties. Socially integrated human beings renounce many desires, including the desire to disobey law. In any society, the repression of desires is an essential consequence as well as precondition of civilization. Critics of Justice Brennan's liberalism see the dissolution of morality as a sword of Damocles hanging over us—a sword which could fall if the political state does not enforce laws embodying social norms which restrict morally repugnant behavior. The dissolution of the state itself usually accompanies the breakdown of its moral structure. Now that Justice Brennan is no longer on the Court, his replacement will consider whether a state may perpetuate a moral structure that is too rigid for non-conforming individuals desiring an abortion.

Admittedly, in a pluralistic nation, we have many different conceptions of morality. Although each state law and each woman's situation is different, Roe v. Wade does not permit legislatures to enact laws which mirror the conventions, customs, venerated traditions and deeply rooted moral sentiments of political majorities trying to reduce the number of abortions. The Court, after peering into the Constitution, found viability as the appropriate line where compelling state interests begin.15 What is now needed, however, is not a new arbitrary line, but an equitable compromise in each state where abortion battle lines are drawn. An equitable compromise is one that respects the needs of women but does not denigrate the value of developing human life.

Since the morality of abortion depends on a compromise which may vary from state to state,16 it is arguable that some de-

14. Michael H. v. Gerald D., 109 S. Ct. 2333, 2351 (1989) (plurality opinion) (Brennan, J., dissenting). Michael H. claimed that he was the father of a child born to a married woman who was not his wife. Under California law, because the child's mother was living with her husband, and the husband was neither sterile or impotent, the offspring was presumed to be the child of the marriage. The Court upheld the statute over Justice Brennan's objection that it "squashes" liberties protected by the Constitution including the freedom not to conform. Id. at 2351.
15. Roe, 410 U.S. at 163 ("compelling point" at end of first trimester).
16. See Waldron, Particular Values and Critical Morality, 77 CALIF. L. REV. 561,
centralization of decision-making authority is appropriate. Even the states are not suitable political subdivisions. They are too large and contain a variety of moral communities. Decentralization would allow local communities to limit abortion on demand in states where there are not any abortion control laws. Therefore, local communities need more "home rule" so that they can create zones of reproductive freedom if state legislation prohibits abortions. Decentralization also entails a more limited role for the federal courts. Indeed, if \textit{Webster v. Reproductive Health Services, Inc.} foreshadows a return to federalism and judicial restraint, the role of federal judges will be comparatively modest. They will simply determine whether a reasonable legislative compromise violates equal protection standards or falls below the traditional minimum essentials of ordered liberty.

The concept of traditional ordered liberty depends on the Court's understanding of people's enduring basic rights and responsibilities. The post-\textit{Webster} debates indicate that Americans in different localities think and act differently on issues of crucial importance to women. Public opinion polls show that the vast majority of Americans want women to have adequate reproductive freedom, but many people (male and female) are opposed to abortion on demand, absent exigent circumstances.\textsuperscript{18}

The constitutionalized right of abortion is still too new to be described as an enduring basic right which outweighs all state interests in morality. The American tradition of legal moralism has a stronger historical basis than recently recognized rights of privacy.\textsuperscript{19} \textit{Webster} invites the public to reconsider whether abortion rights should be trimmed down to accommodate a reflective consensus about the zone of a woman's protected privacy. Many strong-willed Americans might accept an equitable compromise after they understand that their opposite numbers are willing to make some concessions. The ongoing political debate can either further divide us or deepen us as a thoughtful people. As the people and the judiciary decide whether a woman may choose to

\textsuperscript{17} 109 S. Ct. 3040 (1989) (plurality opinion).

\textsuperscript{18} In the CBS News \textit{New York Times} Poll of September 20, 1989, 43% of those polled said that abortion should be "legal as it is now," 40% wanted it legal "only in cases such as rape, incest or to save the life of the mother," and 13% said they would never permit abortion. See \textit{Ladd, Abortion Issue Remains an Even Split}, Richmond News Leader, Nov. 30, 1989, at 18, col. 1.

\textsuperscript{19} For a discussion of legal moralism, see infra notes 21-46 and accompanying text.
exclude a fetus from the community, we are passing judgment on ourselves and history will pass judgment upon us.

A political compromise, by definition, cannot fully satisfy only one set of rigid principles. Whenever a legislative compromise is proposed, it inevitably encounters the liberals' resistance to the idea that restrictive laws help society maintain a decent moral environment. But should courts give more weight to the principles of liberalism over competing republican communitarian principles? The question cannot be answered fully without a consideration of the political position of legal moralism.

II. The American Tradition of Legal Moralism

Legal moralism is a manifestation of republicanism in communities in which majorities vote for criminal laws punishing behavior deemed immoral and intolerable. It is a political position abhorred by many liberals because it signifies that individuals in society do not have adequate freedom to behave as they please. Legal moralists remind us that freedom depends on laws limiting some liberties: labor laws, anti-discrimination laws, minimum wage laws and laws protecting the environment. Liberals and republicans, if they are realistic, understand that law constrains the freedom of some so that others may have a degree of freedom they would not otherwise have. The legal moralist views the community as an organism in which every malfunctioning part is a threat to its capacity to function at an acceptable qualitative

20. See K. Karst, Belonging to America: Equal Citizenship and the Constitution 190 (1989). Kenneth Karst wrote, "What makes a community is not merely birth or place or values or interests but a state of mind and feeling, the common perceptions of a number of individuals that they are linked in ways that give emotional content to the word we." Id.

Ronald Dworkin argues that judicial review is necessary to check political majorities that do not consider the interests of all the groups in the community. Dworkin, at best, is a half-hearted communitarian; he wants to exclude decisions about the good life from politics in order to be true to the liberal principle of treating, as equals, those whom he recognizes as human beings. Dworkin, What Liberalism Isn't, N.Y. Rev. Books Jan. 20, 1983, at 47, 50; see also R. Dworkin, Taking Rights Seriously 125-30 (1977) (supporting Roe v. Wade). Dworkin is concerned with women as members of the community. He does not include the fetus as a right-holding member of the community. Dworkin, The Future of Abortion, N.Y. Rev. Books, Sept. 8, 1989, at 51.

21. A society ideally refers to a group of interdependent human beings working together for the satisfaction of their wants and collective needs. Legal moralists often treat society as if it were as real as individuals, whereas liberals frequently treat individuals as if they are abstractions not dependent on others in society. R. Bellah, R. Madsen, W. Sullivan & S. Tipton, Habits of the Heart: Individualism and Commitment in American Life 334 (1985) [hereinafter R. Bellah].
Arguably, individuals who need each other for their mutual benefit should not be permitted to act as entirely self-governing entities. Even in morally pluralistic communities, the individual is not completely separated from other members of the political community who insist upon a substantial degree of conforming behavior. Legal moralists do not accept the idea of a radical separation between individuals and their community. The never-ending debates about legal moralism and the morality of abortion now challenge many state legislatures to wrestle with the tension between permissive liberal individualism and a communalist conception of morality. Some of the following questions, not mentioned earlier, are extremely pertinent for state legislatures and courts: Does liberalism unrealistically demote the intellect by making it the instrument of desire? How is liberalism's emphasis on individualism, rights, tolerance, and permissiveness related to the success of demagogues who exploit social anomie? How coercion is necessary because “the freedom of some must at times be curtailed to secure the freedom of others.” I. Berlin, Four Essays on Liberty 126 (1970); see also J. Bentham, Theory of Legislation 94 (1931); M. Cohen, Reason and Law 7 (1950) (“No integrated social action is possible without some adjustment among the different elements that co-operate.”); S. Hook, Philosophy and Public Policy 20 (1980) (“[W]e cannot be free unless others are unfree to interfere with our freedom.”).

24. One commentator sees the debate as one involving the individual’s relationship with the community. He explains that the relationship is dialectical. Neither term (community nor individual) is comprehensible without the other: “the community is a community of individuals, whose own identities are inseparable from their social involvements.” Michelman, The Supreme Court, 1985 Term—Forward: Traces of Self-Government, 100 Harv. L. Rev. 4, 32 (1986).

25. Another question is suggested by John R. Silber’s argument that the abortion issue is one “that cries out for toleration because there is so much bitter debate and confusion between legal issues and moral ones, between religious issues and political ones.” Silber, Don’t Roll Back ‘Roe’ N.Y. Times, Jan. 3, 1990 at A19, col. 1.

But is the issue of abortion one that cries out for toleration or one that requires a continuing dialogue that generates different legislative compromises in different states?

26. See H. Arendt, The Origins of Totalitarianism 478 (1973). Arendt writes that men are prepared for totalitarian exploitation when they become so lonely that they are ready for any “escape from this reality.” They are captured by the “mighty tentacle” of totalitarian rhetoric that “appears like a last support in a world where nobody is reliable and nothing can be relied upon.” Id.
much moral relativism can our society tolerate?\textsuperscript{27} What kinds of private behavior undermine a community's commitment to raising children? Are criminal sanctions ever appropriate to punish behavior considered ethically repugnant if, as in the abortion controversy, there is an absence of an independent ground for moral judgment? To what extent are abortion-control laws motivated by religious considerations that detract from the rationality of legislative judgments?

These questions pose many difficulties. For example, if a legislature demands penal sanctions\textsuperscript{28} in order to influence the behavior of women considering abortion, \textit{Roe v. Wade} still remains an obstacle.\textsuperscript{29} \textit{Roe} embraced many tenets of liberalism that are critical of legal moralism. Justice Blackmun regarded the questionable moral status of the fetus as a factor tending to complicate the abortion question.\textsuperscript{30} His \textit{Roe} opinion was criticized, however, because it was not based upon principles either deeply rooted in the community\textsuperscript{31} or evidently designated by the text of the Constitution.\textsuperscript{32} The \textit{Webster} decision reopened the door through which legal moralism may enter since states "now appear to have some unknown degree of additional power to control the incidents of abortion."\textsuperscript{33}

\textsuperscript{27} Although toleration in itself is not necessarily action producing harm, it often permits harm to be done. For example, the toleration of offensive speech permits the infliction of psychological trauma. \textit{See} Rosenfeld v. New Jersey, 408 U.S. 901, 903 (1972) (Powell, J., dissenting).

\textsuperscript{28} \textit{See} Dworkin, \textit{Liberal Community}, 77 CALIF. L. REV. 479 (1989). Dworkin argues that the changes in a person's behavior, if induced by criminal sanctions, "corrupt[s] rather than enhance[s] critical judgment," because conformity with the community's moral standards solely because of threats of punishment can hardly be counted as genuine. \textit{Id.} at 486.

\textsuperscript{29} \textit{See} R. Bork, \textit{The Tempting of America: The Political Seduction of the Law} 116 (1990) (calling \textit{Roe} "the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century").

\textsuperscript{30} \textit{Roe}, 410 U.S. at 161 ("There has always been strong support for the view that life does not begin until live birth . . . . [T]he law has been reluctant to endorse any theory that life as we recognize it, begins before live birth or to accord legal rights to the unborn . . . ?").

\textsuperscript{31} \textit{See}, e.g., A. Cox, \textit{The Role of the Supreme Court in American Government} 114 (1976).

\textsuperscript{32} \textit{See} R. Bork, \textit{supra} note 29, at 114-15.

\textsuperscript{33} \textit{Id.} at 116. In \textit{Webster}, Justices Rehnquist, White, and Kennedy employed a "standard of review which necessarily, though not explicitly, completely overrules \textit{Roe.}" \textit{Id.} Justice Scalia is prepared to overrule \textit{Roe}. Justice O'Connor favors an approach that might invalidate state legislation that is "unduly burdensome" on the right to seek an abortion. \textit{See}, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 749 (1986) (O'Connor, J., dissenting) (Pennsylvania Abortion Control Act of 1982 should not be subject to heightened judicial review since provisions of Act do not impose "undue burden" on abortion decision); Akron v. Akron Center for Repro-
Communitarians in favor of legal moralism claim that liberals draw too "sharp [a] distinction between [their] own . . . well-being and the well-being of the political community to which they belong." Belonging to the community entails responsibilities and obligations. Communitarians call attention to the numerous social benefits provided by communities. Among the benefits are priceless interpersonal relationships. Indeed, a sense of belonging provides individuals with an identity, loyalties and attachments without which they feel empty, alone and adrift. One argument for legal moralism is that too much tolerance of non-conforming behavior makes the community ineffective in its role of serving the material, kinship and intellectual needs of individuals. Another argument insists that individuals who derive benefits from the community have a responsibility to conform to reasonable legislative judgments, so long as laws do not unduly interfere with their liberty.

When political issues are debated in a legislature, vigorous verbal conflict is used as a means to achieve compromise. The non-violent conflicts are sometimes carried to the courts. The Supreme Court can assert its authority to end the political struggle when fundamental rights are abridged. The abortion debate, however, was not ended by Roe because so many people were shocked to learn that abortion is a fundamental constitutional right.

Viewing abortion as a fundamental constitutional right sends a message that an elective abortion is acceptable behavior anytime an unwanted offspring threatens a woman's plans; in fact, many people believe that some of the Court's post-Roe decisions endorse abortion as a means of birth control. If a legislative conducive Health, 462 U.S. 416, 463 (1983) (O'Connor, J., dissenting) ("The 'unduly burdensome' standard is particularly appropriate in the abortion context because of the nature and scope of the right that is involved."). Justice O'Connor believes that "the State possesses compelling interests in the protection of potential human life and in maternal health throughout pregnancy, [and] not every regulation that the State imposes must be . . . examined with strict scrutiny." Akron, 462 U.S. at 461. Nevertheless, she is opposed to any "imposition of an 'absolute obstacle' on the [woman's] abortion decision." Id.

34. Dworkin, supra note 28, at 491.
35. Id. at 487.
36. B. Barber, supra note 13, at 162.
37. See M. Glendon, Abortion and Divorce in Western Law 24 (1987) ("The U.S. Supreme Court . . . after some initial equivocation in Roe v. Wade now speaks routinely of a constitutional right to abortion."). But see Maher v. Roe, 432 U.S. 464, 473 (1977) ("Roe did not declare an unqualified 'constitutional right to abortion.' ")
promise is negotiated after a heated exchange of opposing opinions, the legislature's justification is rarely free of problematic presuppositions. If the justification involves a fundamental right, it rarely survives strict scrutiny. Unintended messages are often sent by judges when they invalidate legislation that does not survive strict scrutiny. Indeed, according to deferential republicans, the Court's strictest level of intensified scrutiny is too demanding.

A legislative compromise on abortion control is usually not the product of impeccable logic. Therefore, a legal brief defending such a compromise will always have some weak links. Courts should not ordinarily place excessive emphasis upon the weakest link in an advocate's chain of reasoning. Instead, in the spirit of legal moralism, courts should ascertain whether the legislature has woven together many strands of public opinion to represent a coming together of reasonable people who have reflectively considered each other's counter-arguments.

Professor Mary Ann Glendon condones legal moralism in the area of abortion rights. She believes that courts should avoid undermining local communities where values are "established, maintained and transformed." She has compared Roe and its progeny with the approaches of lawmakers and courts in nineteen other countries. She points out that the United States Supreme Court's position curtails legislatures more severely than any other Western nation. Glendon suggests that greater judicial deference to state legislatures is "desirable, because the legislative process, however imperfect, is a major way in which we as a society try to imagine the right way to live." Legislative compromises, which bring political enemies together, keep the peace and are indispensable in any civilized human society.

Glendon observes that reasonable legislative compromises have been upheld by courts in many nations that "have been just

38. See B. Barber, supra note 13, at 163. Benjamin Barber quotes Charles Sanders Peirce who wrote, "'Reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided that they are sufficiently numerous and intimately connected.'" Id.


40. Id. at 2 ("[W]e have less regulation of abortion in the interest of the fetus than any other Western nation . . . ."). Glendon's argument has been challenged as factually inadequate by an international women's health organization. See Brief of Amici Curiae International Women's Health Organization in Support of Appellees at 2-20, Webster v. Reproductive Health Services, Inc., 109 S. Ct. 3040 (1989) (No. 88-605).

41. M. Glendon, supra note 37, at 62.
as deeply divided as ours, if not more so, on the abortion question . . . ."42 Glendon’s comparative analysis demonstrates that compromises can be carefully worked out to decide matters of common concern, notwithstanding profound differences of opinion.43 Glendon concludes that the United States Supreme Court fails to understand that many thoughtful Americans do not want non-elected judges “to confer upon others, a fundamental right to dispose of developing life.”44 She favors judicial opinions that leave abortion regulation primarily up to the state legislatures.45 She also observes that the intellectual framework of Roe “appears rather rigid and impoverished when viewed from a comparative perspective.”46 While Glendon’s analysis rests on comparative

42. Id. at 40. Unreasonable compromises, however, have been struck down. Perhaps the best known opinion is that of the constitutional court of the Federal Democratic Republic of West Germany. The West German Court invalidated a permissive abortion control law finding that a pregnant woman’s freedom of choice was inappropriately broad. Id. at 26 (citing language of the Constitutional Court of the Federal Republic of Germany). The decision was followed by a retaliatory bombing of the court’s building. See Olsen, Comment: Unravelling Compromise, 103 HARV. L. REV. 105, 105 n.3 (1989); West German Abortion Decision: A Contrast to Roe v. Wade, 9 J. MARSHALL J. OF PRAC. & PROC. 605 (R. Jonas & J. Gorby trans. 1976) (reprint of complete opinion).

The contrasting approaches of the American and West German courts are noteworthy. The American High Court privileges individualistic values (privacy, autonomy, and preferred life styles). The West German Court considered several communitarian values that influence the formation of beliefs. See Kommer, Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective, B.Y.U. L. REV. 371 (1985). The West German court recognized that developing human life in the womb was a societal interest deserving protection not only for the sake of the fetus, but for the sake of the common weal. M. Glendon, supra note 37, at 38.

Similarly, the highest constitutional court in Spain concluded that “unborn life is a public good protected by [Spain’s] Constitution.” Id. In France, abortion laws are drafted in a way to “make sure everyone knows that abortion is considered to be a serious matter.” Id. at 17. In contrast, Canada’s Supreme Court invoked Roe to strike down a 1969 abortion statute which required approval of abortions by a hospital committee. See Morgentaler v. Regina, 1 S.C.R. 30 (Can. 1988). The court was deferential to the Canadian Parliament, however, and recent legislative proposals for restricting abortion have received approval. See L. Tribe, Abortion: The Clash of Absolutes 70 (1990).

43. M. Glendon, supra note 37, at 40.

44. Id. at 62. After studying relevant data including public opinion polls taken over a lengthy period of time, Glendon wrote:

There is no evidence at all that ‘conventional moral culture’ validates the fundamental and radical message . . . . that no state regulation of abortion in the interest of preserving unborn life is permissible in approximately the first six months of pregnancy, and that such regulation in the last trimester is permissible only if it does not interfere with the woman’s physical and mental well-being.

Id. at 45.

45. Id. at 62.

46. Id. at 39. Article Four of the American Convention of Human Rights
law, I provide another comparative perspective: an historical narrative tracing and defining the evolution of republicanism and liberalism.

III. FROM THE ENLIGHTENMENT TO POST-MODERN HEDONISM

America's founders possessed a spirit of Lockean liberalism that was tempered by their reading of medieval and ancient texts describing republican federations and confederacies. Early American political discourse was a mixture of republican civic virtue, Protestant ethics, Deism, English empiricism, and Enlightenment rationalism. The founders were liberal in some respects and republican in others. It was difficult to distinguish the average liberal from the middle-of-the-road republican. There are still many liberals whose views are compatible with many contemporary communitarian and republican precepts. Therefore, I use the overlapping concepts of liberalism and republicanism very loosely as ideal types.

protects every person's life from the "moment of conception" and prohibits most abortions since "[n]o one shall be arbitrarily deprived of his life." Under the United States Constitution, however, as currently interpreted, this provision is not legally applicable.

47. See, e.g., L. STRAUSS, LIBERALISM ANCIENT AND MODERN 10, 28 (1968); THE FEDERALIST No. 18 (A. Hamilton & J. Madison); THE FEDERALIST No. 19 (A. Hamilton & J. Madison); THE FEDERALIST No. 20 (A. Hamilton & J. Madison).

A primitive antecedent of liberalism was originally elaborated by Socrates and Aristotle. In Socrates' time, "a liberal was a man who behaved in a manner becoming a free man as distinguished from a slave." L. STRAUSS, supra at 28. Originally, being a liberal meant not being subject to a tyrant. When the ancient Greeks talked about liberty, however, they had in mind the liberty of the whole people, the community-state (polis). Liberty to them was provided by a commonwealth of people sharing the same values. D. SPITZ, THE REAL WORLD OF LIBERALISM 71-72 (1982).

48. See L. MACFARLANE, POLITICAL THEORY 235 n.1 (1973). A republic, as I use the term, is an elected, non-monarchial form of government. This conforms to conventional usage. The republican tradition has roots in the cities of classical Greece and Rome. It was later expressed as civic humanism in late medieval and modern Europe and in seventeenth century England before it was incorporated into the American republic tradition.

49. See L. STRAUSS, supra note 47, at 26-64. The notions of republicanism and liberalism in classical antiquity were not easily separable.

50. Ideal types, which focus on a cluster of salient characteristics, are heuristic devices that ignore nuances. In real life, American liberalism and republicanism are not radically different patterns of thought. Indeed, American political thought is an amalgam of liberal and republican principles that, over time, have been modified in content and emphasis. There are, however, some obviously noteworthy differences although these differences cannot be incorporated into an analytically neat ordering. Ideal types serve as shorthand references in lieu of a more discriminating approach sensitive to nuance. See Horwitz, Republicanism and Liberalism in American Constitutional Thought, 29 WM. & MARY L. REV. 57, 64 (1987).
Liberals traditionally focus upon what is permissible for persons rather than upon what is good for the people. Many contemporary liberals still prefer a morally neutral, minimalist state—a stripped down government with few powers. Others welcome more extensive economic regulation and central planning. Even when liberals support governmental efforts to redress economic inequality, their conception of the government's instrumental role is grounded in the human capacity for self-determined autonomy.

Contemporary liberals emphasize the desirability of a value-free pluralism and generally hold the view that what is morally right should not usually be dictated by the criminal law. Republicanism, in contrast, envisions a unified community that is more socially cohesive than a collection of asocial individuals who coincidentally live in the same locality. The republican commonwealth is held together by its members' shared creed and world view.\(^5\) Their framework of beliefs and values enables them to evaluate their lives, and they are willing to impose their judgments on others.

Unlike individualistic liberalism, which tolerates "law as a necessary evil,"\(^5\) republicanism values law as a constitutive and edifying element of civilization.\(^5\) The republican criterion for a just community is, in part, one which derives rights and duties from the roots of a particular community's traditions. Republican communalists believe that society shapes us more than we shape society. Cultural conservatives who support republicanism's emphasis on civic virtue blame permissive liberalism for the spread of decadence and the breakdown of law and order in our nation.

In the United States, republicanism and communitarianism have become interwoven doctrines. Republicans emphasize civic virtue as a norm that protects us against the excesses of democracy. Communitarians believe that civic virtue gathers its sub-

\(^5\) See E. Foner, Tom Paine and Revolutionary America 87 (1976). In some communitarian versions of republicanism, there is a heavy emphasis on solidarity; therefore, communal morality is an important republican value. In some versions of republicanism, the community is more important than the individual's pursuit of property. For example, agrarian republicanism in late 18th century America stressed equal property rights whereas urban republicanism stressed economic growth. Id. at 100-05.

\(^5\) Horwitz, supra note 50, at 73. Horwitz traces the neutral-state ideal from "early American political and constitutional thought to its application in the current debate over characterizing American constitutional thought as republican or liberal." Id.

\(^5\) Id. ("Under the republican view, law could create structures that enabled individuals and communities to fulfill their deepest aspirations.").
stantive meaning from enduring social norms. Needless to say, many communitarians prefer the widest reasonable scope for an individual's freedom of choice. Before elaborating further upon the intertwined doctrines of republicanism and communitarianism, I shall examine liberalism's underlying assumptions.

A. Liberalism's Original Assumptions

Many liberal assumptions became widely accepted as "self-evident truths" during the Enlightenment, a time of upheaval when reason was praised in contrast with superstition, fanaticism, traditional authority, and religious faith. With the Enlightenment, a "new kind of moral, political, and epistemological justification [for humanism] came into being, one that derived from the natural, free, rational and morally autonomous individual." 55

A new model for scientific inquiry replaced the pre-Enlightenment outlook on the nature of the world. According to Newtonian physics, the basic goal and presupposition of research is universal order and law in the material world. The laws of the physical universe constituted the preconceptual framework for knowledge about reality. 56 Accordingly, many eighteenth century political theories describing a well-ordered legal system postulated a permanent framework of reference that was "prior [or preconceptual] to the very theories they frame." 57 Nature's laws preceded the formation of the political state.

All parts of the political system were supposed to be governed by the same natural laws governing the cosmos. It follows that human beings could be viewed as separate particles often colliding with each other. 58 As a consequence, a system of govern-

54. See generally, S. Stromholm, A Short History of Legal Thinking in the West 180-211 (1985). I will not deal with the contrast between Enlightenment writers described as rationalistic and those writers who were empiricists relying on experience rather than innate principles, except to notice their common quest for premises (foundations supportive of systems of thought) that were either self-evident to the human mind or verifiable scientifically.


56. B. Barber, supra note 13, at 27.

57. Id. Descartes wrote, "What little knowledge of physics I have tried to acquire . . . has been a great help to me in establishing sure foundations in moral philosophy." C. Taylor, Sources of the Self 148 (1989) (citing Descartes: Philosophical Letters 196 (A. Kenny trans. 1970)). The source of morality, according to liberal corollaries following from Cartesian axioms, is situated within individuals who view themselves as if they were detached observers of their minds, disengaged from others, and not obligated by their traditions.

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ance that maintained a stable equilibrium was desirable. Eventually, this world view was a foundation for natural law theories identifying natural rights.

Liberal philosophers during the Enlightenment "understood freedom and power as antonyms, each defined (analytically) by the absence of the other." 59 Any state which claimed to have an exclusive monopoly on legitimate coercive power was viewed as a threat to the individual seeking more freedom for rational action. Enlightenment liberals wanted a system of separated powers which would enable human beings to maximize their freedom to satisfy their desires and needs. 60

Liberalism has been modified to accommodate nineteenth century Romanticism, twentieth century Freudian insights, and post-modernism. 61 Theories of natural rights have fallen into disfavor. For example, liberalism has been adjusted to reflect economic realities. Some liberals now admit the need for a certain degree of government control over the economy in order to mitigate the inhumanity of unbridled private enterprise. 62 Liberalism, however, is still an anti-totalitarian ethos.

Except for economic justice issues, liberals continue to emphasize the importance of individual rights, 63 the pursuit of private goals, 64 instrumental rationalism, 65 tolerance, and a

might collide with one another, but... could not alter the field of play." Id. at 4. Newton was unaware of a modern philosophy of science holding that a scientist's theory influences his observations, and that "the support provided a theory by observation is specious." M. Martin, CONCEPTS OF SCIENCE EDUCATION 116 (1985).

59. B. Barber, supra note 13, at 35.

60. Id. at 72-73 ("Power is no more than the 'present means to some future good' (Hobbes), the 'primary social goods' by which the human animal secures the interests arising out of his defining neediness (Rawls). ").


63. Several intertwined strands of liberal thought are relevant when politics is discussed, such as libertarian, anarchist, egalitarian, contractarian, or utilitarian. Similarly, republican discourse can be conservative (classical republican or contemporary communitarian), moderate, or pragmatic. See Michelman, Law's Republic, 97 YALE L. J. 1493 (1988). See generally Symposium: The Republican Civil Tradition, 97 YALE L. J. 1493, 1493-1723 (1988).

64. Kantian liberals might take exception to this statement because "Kant's conception of will (Wille) is that of a desire that has submitted completely to the formal prescriptions of universal reason." R. Unger, KNOWLEDGE AND POLITICS 51 (1975).


"[T]he moral and political outlook of liberalism is instrumental in its view of
Because of differences of opinion about the ethics of abortion, they contend that the abortion issue cries out for tolerance. Liberals respect the capacity of persons to act as independent agents free to "choose their conceptions [of the good life] for themselves." They insist that the burden of proof is always on those who propose governmental interference with liberty.

Many ideologues confuse liberal tolerance with nihilism, but liberals are not nihilists. Indeed, liberals often fight unflinchingly for their beliefs and for the rights of others to follow the dictates of conscience. Generally, most liberals share the understanding that an individual has a strong stake in securing justice not only for himself but for everyone else as well. Moderate liberals, therefore, will accept compromises that are preferable to violent resolutions of conflict. Compromises are, needless to say, usually imperfect from a partisan point of view. They require the parties negotiating an agreement to make concessions. Hedonists do not easily make these concessions.

A liberal need not be purely hedonistic, as the example of Immanuel Kant (1724-1804) makes clear. Kant insisted upon "notions of duty, morality, or moral obligation [which] must be understood as rigorously distinct from notions of utility, pleasure, and happiness." According to Kant, the individual's uncritical surrender to his random inclinations is akin to bondage, not freedom. Moreover, individuals lack moral autonomy, according to Kant, if they are either enslaved by compulsive desires or if they surrender to unworthy addictive appetites. Kant searched for rules that the individual could set up for himself, and Kantian political and social life. It identifies value with what is useful to the individual."

66. J. Pennock, Democratic Political Theory 241-43 (1979). Liberalism in its classic political sense refers to a regime in which the government does not impose a particular substantive conception of morality upon the governed. Some so-called welfare liberals, however, support governmental intervention in the economy. Welfare liberals stress conceptions of equality more so than economic liberties and property rights.


68. A. Levine, Liberal Democracy: A Critique of Its Theory 22-23 (1981). Levine believes that the individual should be left free from coercive control. He calls this idea "formal liberalism"—"marking off an area of non-interference." Id.

69. R. Dworkin, supra note 20 at 492-94.


principles of morality are designed to lead enlightened individuals to freedom\textsuperscript{72} and emancipate them from oppressive traditions. In short, Kantian theory imposes obligations that can be equated with commands.

Kant’s rules of moral autonomy are subsumed by the objective principle known as the categorical imperative: "Act in such a way that the maxims of your actions can serve at the same time as universal laws, that is, as maxims on which all other autonomous agents may also act."\textsuperscript{73} In popular discourse, this universal command has been compared to the golden rule of treating others as you would have them treat you.\textsuperscript{74} Individuals who accept the categorical imperative as a norm restricting desires disagree about what it requires in specific cases. Therefore, concrete rules of law become necessary. These rules, however, cannot objectively end disagreements. For example, Kant is silent on whether a fetus is a person who is owed duties by individuals and by the moral community.

According to Kant, the existence of a just political state is crucial because duly enacted laws are necessary to protect morally autonomous persons. In the \textit{Metaphysics of Morals}, Kant works out the duties of justice and duties of virtue.\textsuperscript{75} Kant presents law as a self-contained, formal system\textsuperscript{76} that specifies the juridical relationships governing persons subject to a legal system’s commands.\textsuperscript{77} The laws of the political state do not require the actual


\textsuperscript{74.} "Kant himself explicitly argues against interpreting the Categorical Imperative in this way." \textit{Id.} at 204. Kant stresses "the goal-setting nature of reasoning," a virtue not implicit in the golden rule. \textit{Id.} A "key precondition for an individual to perform [in accordance with Kant’s three formulations of the categorical imperative] was the condition of autonomy, the full assumption of responsibility for one’s own moral life." J. Dunn, \textit{Western Political Theory in the Face of the Future} 45 (1979). What enables the individual to be autonomous "is his capacity to reason, an ability to grasp formal relations." \textit{Id.} at 44.

\textsuperscript{75.} See I. Kant, \textit{The Metaphysical Elements of Justice: Part I of the "Metaphysics of Morals"} (J. Ladd trans. 1955). Kant’s discussion of judicial duties occurs in part one of the \textit{Metaphysics of Morals} published in 1797. See B. Aune, \textit{Kant’s Theory of Morals} 131 (1979) (discussing Kant’s basic principles of justice).

\textsuperscript{76.} Kant’s theory of law is an ideal that does not refer to the laws in force in any particular jurisdiction and, therefore, he leaves unspecified the content of the law’s rules. Fletcher, \textit{Law and Morality: A Kantian Perspective}, 87 \textit{Colum. L. Rev.} 533, 533-34 (1987).

\textsuperscript{77.} According to Kant, judges may not use the opportunity presented by a lawsuit to promote their preferred conception of the common good. The judge must not confuse the welfare of the state with the welfare or happiness of the
consent of every person. For Kant, a public law is illegitimate only when "all the people could not possibly give it their consent." In the absence of this unanimity, practical individuals using their common sense are expected to obey duly enacted laws, however distasteful. Therefore, Kant does not limit the power of the political state and, despite his hope for law-abiding moral progress, his references to governmental power suggest that the autonomous moral actor is not entitled to all of the rights needed for acting in accord with the moral law.

Law and morality, in effect, become two distinct and nonintersecting normative realms in Kant’s politically conservative thought. Kant did not banish ethics from his jurisprudence, but his concept of public law obligated morally autonomous individuals to obey the enlightened state. Civil laws lay down what is allowed and what is forbidden to the community. There is simply no other alternative to combat egoism and the injustices it can cause. The justification for the state rests on the liberal ground that each person is obligated to recognize the freedom of everyone else. Once again, however, Kant does not tell us how the legislature is to decide the dubious case of whether a fetus should be regarded as a human being entitled to the law’s protection.

Kant’s liberal theory, despite its contradictions, is preferable to Thomas Hobbes’s (1588-1669) discredited political science. Hobbes believed that the state should be headed by a monarch who dictated legal limits curtailing the individual’s pursuit of happiness. Hobbes did not believe that a person had the capacity to control his aggressiveness toward others by an exercise of rational “will.” Hobbes, who loathed the concept of democracy,
sisted that rational individuals should invest a sovereign with authority in order to maintain peace and security. The sovereign must arbitrarily function as an "artificial substitute" for the people's agreement about their legal obligations. In short, Hobbes believed it was instrumentally rational for all individuals to subject themselves to an authoritarian ruler.

In some respects, John Locke (1632-1704) accepted Hobbesian psychology. Unlike Hobbes, who supported a command theory of law, Locke envisioned a more voluntarist legal system. In The Essay Concerning Human Understanding, Locke wrote that reason helps persons reach goals, but it cannot set the goals. In Locke's view, individuals use reason instrumentally as they satisfy their basic needs. A theory of personal freedom that is the foundation of the good community inevitably gives lexical normative priority to rights whether or not they advance transient conceptions of the common good. Locke believed that an individual could disengage himself from irrational community customs and remake himself according to what will bring him the most happiness. Relying in part upon empirical data, Christian ethics, and natural law, Locke was convinced that mutual trust provides the basis for a social contract. From this social contract, which has the tacit consent of everyone in civil society, civic obligations are created and guaranteed.

Another basis for mutual trust during the Enlightenment was proposed by Francis Hutcheson (1694-1746) who believed that most people are endowed with a moral sense which motivates individuals to act virtuously. The moral sense is not just another

85. L. Strauss, supra note 47, at 220. The Hobbesian social contract is an undertaking in which people totally alienate their power to a sovereign. This is an instrumental trade off to reduce violence. See J. Hampton, Hobbes and the Social Contract Tradition 3-4, 256-79 (1986).
86. See T. Pangle, supra note 70, at 179-80 (citing J. Locke, The Essay Concerning Human Understanding, book II, ch. xxxiii, sec. 4 (P.H. Nidditch ed. 1979)). Locke maintained that morality is capable of demonstration, but his demonstration was based on so-called self-evident propositions such as the individual's need for self-preservation. Id. at 182.
87. See id. at 187-89.
88. Id. at 145-66, 189-211; see also A. Rapaczynski, Nature and Politics: Liberalism in the Philosophies of Hobbes, Locke, and Rousseau 120 (1987). "The social contract establishes the state including its legislative authority, for the purpose of executing the laws of nature." T. Pangle, supra note 70, at 202 n.68.
89. L. Weinreb, Natural Law and Justice 81 (1987).
90. G. LeeDes, The Meaning of the Constitution 39-41 (1986); C. Taylor, supra note 57, at 259-65; see also M. White, The Philosophy of the Ameri-
primitive desire, but a much higher inclination. The moral sense
is not an "innate idea" in Descartes's sense nor a concept derived
from experience in a purely empirical sense.\textsuperscript{91} The world is
designed, in Hutcheson's view, so that each individual seeking his
or her notion of the good life will also be good. Hutcheson's
providential conception of the benevolent moral sense obviously
presents interpretive difficulties.\textsuperscript{92}

The moral sense might produce socially beneficial agree-
ments.\textsuperscript{93} David Hume (1711-1776) insisted, however, that the
moral sense is shaped in part by "a consensus of sentiment and
passion . . . established historically over time."\textsuperscript{94} Hume rejected
the providential view of morality that was described by Locke and
Hutcheson and substituted a conventional view. For Hume, jus-
tice consisted of the rules that most people find useful.\textsuperscript{95}
Although Hume's conventional view of justice is consistent with
communitarian theory, his historicism sowed the seeds of con-
temporary liberalism. After Hume's skepticism was appropriated
by liberal thought, the notion of the public good and justice were
rendered infinitely malleable, if not normatively impoverished.\textsuperscript{96}

Jeremy Bentham (1748-1832), unlike Hume, looked for a
formula for recognizing substantive rules that maximize the
greatest happiness for the greatest number of people.\textsuperscript{97} Using
Bentham's methodology, legislators add up each person's self-as-
essment of utility and enact laws that reflect the sum of satisfi-
able desires which exceed avoidable pain and suffering.

\textsuperscript{91} For a discussion of Descartes' views on the origin of ideas, see B. WIL-
\textsuperscript{92} For example, Hutcheson rejects the idea that there are objective moral
norms that are discoverable by reason. See G. Leedes, supra note 90, at 41; A.
MCINTYRE, supra note 90, at 272-73.
\textsuperscript{93} Adam Smith wrote that "[b]y pursuing his own interests [the individual]
frequently promotes that of society more effectually than when he really intends
to promote it." A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE
WEALTH OF NATIONS 456 (1976).
\textsuperscript{94} See A. MCINTYRE, supra note 90, at 319.
\textsuperscript{95} See id. at 320. "What makes the utterance of judgments about virtue
and vice effective is that they express not merely one's own individual responses
but the responses shared and reciprocated by the same vast majority. Id.
\textsuperscript{96} See id. at 337-38. For a less critical view, see HISTORY OF POLITICAL
PHILOSOPHY 556 (L. Strauss & J. Cropsey eds. 1987).
\textsuperscript{97} The utilitarianism of Bentham "recognized only one good: pleasure." C. TAYLOR, supra note 57, at 332. Bentham's calculus has been called a paradigm
for "reductive mechanical liberalism." J. DUNN, supra note 74, at 41. On the
plus side, Bentham bequeathed to liberalism and the Enlightenment the "moral
imperative to reduce suffering." C. TAYLOR, supra, at 394.
Everyone's desires are taken into account, even those of undisciplined sensualists who do not care about the community. According to Bentham, the community is "a fictitious body" composed of its members. Other writers disagree with Bentham and believe that a community has value apart from its members' interests. A moral theory like Bentham's utilitarianism, so focused upon legislative actions that increase happiness for the greatest number of people, "may well, given different social circumstances, lead to anti-liberal conclusions." A few in power might decide that they know best what makes the masses happy. Recently, liberals have disowned Bentham because of features of his utilitarianism that curtail freedom.

In contrast, John Stuart Mill (1806-1873) is famous for his spirited defense of liberties that "contribute to self-realization." Mill proposed a principle which, simply put, prevents society from invading a protected zone of privacy if an individual's behavior is not likely to harm others. Mill believed that governments should devote themselves to "optimizing the balance between leaving peoples' private lives alone and preventing suffering." Although it is a never-ending creative task to strike the balance at the optimum point, Mill's mature writings on representative government recognize the value of decentralization of authority. He did not consistently deny society's right to interfere with an individual's conduct for the sake of its own preservation. Mill, the quintessential liberal, wrote, "[M]isplaced notions of liberty prevent moral obligations . . . from being recognized, and legal obligations from being imposed, where there are the strongest grounds [for laws] . . . ." Mill's concept of repres-
tative government, in practice, requires compromises among people with differences of opinion. Indeed, the United States Constitution, admired by many Millians, is the product of a compromise that resolved a political crisis.

B. Contemporary Liberalism and the Abortion Controversy

John Stuart Mill, a feminist, is often regarded as a patron saint of liberalism. His opposition to paternalism and legal moralism is consistent with the Supreme Court's protection of rights of "privacy." Pro-choice abortion groups cite Mill's work, *On Liberty*, claiming that "the [g]overnment should not interfere in so personal a decision [as abortion]." Pro-life groups rely on an arguably more inclusive conception of social justice which counts the fetus as a member of the community who is subject to harm. They fear what Mill feared: that a purely instrumental view of rationality empties life of meaning and thereby ultimately threatens the institutions of self-government. The chasm between pro-life and pro-choice groups was bridgeable before *Roe* when both sides were free to negotiate and compromise. But even after *Webster*, when seemingly irreconcilable differences are debated in vehement political discourse, practical compromises can and must be found on "the rough contours of a way of life."  

Liberals, who refuse to compromise the principles of *Roe*, frequently claim that cultural conservatives attach too much weight to society's common good. Liberalism as a political doctrine, however, fails to provide cogent answers to several difficult questions about society's common good. For example, should the self-governing people in a liberal state be satisfied with having provided the conditions for the pursuit of happiness, or should they be more specific about what constitutes happiness, the good

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107. See C. Taylor, supra note 57, at 500.

108. Walzer, *A Critique of Philosophical Conversation*, 21 Phil. F. 191 (1989-90); see also I. Berlin, supra note 23, at 166 (necessary to strike a compromise between irreconcilable attitudes).
Critics of contemporary liberalism argue that liberalism is an incomplete theory of politics because it tells government what it ought not do, and yet fails to guide us normatively because its vision of the good is in the eye of each beholder.

Critics of liberalism recite a list of its antinomies and contradictions. For example, liberals praise educational pursuits, and yet liberalism is often anti-intellectual. Liberals respect the dignity of each individual even as they show their distrust of individuals in positions of power. In liberal thought, there is an admiration for both materialism and idealism, as well as a “fluctuation between higher law constitutional theories and more positivistic, utilitarian views.”

Some conventional legal scholars recite the adage that “liberalism displays an unresolved tension between its conceptions of liberty and equality” when dealing with “connections between constitutional issues of political equality and liberal theory.” Liberals manifest simultaneous respect for and suspicion of all religions. Liberals endorse tolerance, but are increasingly intolerant when insensitive persons use racial and ethnic slurs and sexist stereotypes that stigmatize members of traditionally victimized groups. Liberals insist upon popular sovereignty, usually in the form of a representative democracy, but they fear the power of political majorities even as they support and participate in their favorite political action groups.

It is further alleged that liberalism fails to aid the development of cohesive communities. Its heavy emphasis on each individual’s desires disables people from evaluating which desires are politically worth satisfying and which desires are pernicious. In its libertarian version, liberalism fails to adequately protect the environment, future generations, and the impoverished underclass.

Feminists criticize “the abstract equality of liberalism [which] permits women little more than . . . substantive inequal-

109. Liberalism cannot provide us with an intellectually satisfying conception of the common good. See W. Sullivan, supra note 65, at 13, 15.

110. R. Smith, Liberalism and American Constitutional Law 4 (1985). Moreover, there is a divergence between the “strand of liberal thinking that emphasizes individual moral autonomy and . . . utilitarian strand.” W. Sullivan, supra note 65, at 18.

111. R. Smith, supra note 110, at 8.

Even critics who regard liberalism as superior to other political theories point out its theoretical vulnerability. In short, a liberal theory of justice lacks guiding principles because it does not indicate what is substantively valuable nor which community conceptions of the good life should be affirmatively privileged.

On the other hand, liberalism is responsible for many advances in the nations that accept it as a dominant ideology: its victories include the emancipation of some traditionally oppressed minorities and a greater degree of tolerance for nonconformists. Liberalism has been responsible for a widespread appreciation of the dignity of the individual. Each person is considered, regardless of his or her non-conforming behavior, worthy of equal respect. On a more materialistic level, liberalism facilitates scientific breakthroughs and solutions to technical problems. It also has produced a perennally increasing gross national product, investment opportunities, economic incentives, and the satisfaction of consumer demands. Since the New Deal, liberals have become the primary advocates of the economic needs of the impoverished. Liberalism's cultural permissiveness, however, has caused a conservative backlash that gained strength during the Reagan era and resulted in the appointment of several justices who are cultural conservatives.

Daniel Bell, a cultural conservative, describes what he considers to be the perversion of political liberalism. He condemns the 1960s counter-culture, which made an imaginative admixture of art and life a model for the good life. Bell contends that what made liberalism possible during its finest moments were certain norms of self-control. But the recently expanded ultra-liberal conception of freedom does not refer to sacred enclaves of liberty so much as it proclaims that there is "nothing sacred." "One

113. C. MacKinnon, Feminism Unmodified 16 (1987); see also Feminism/Postmodernism (L. Nicholson ed. 1990).
114. Among the important issues in the abortion debate, not pursued in this article, is the question of economic justice. Arguably, laws restricting abortion discriminate against women who want economic opportunities routinely open to men. A state's prohibition of abortion might not eliminate abortion as an option for those who can afford to travel and pay for the surgical procedure in jurisdictions where abortions are legal. A poor woman, however, does not have that option. She may be forced to choose between a dangerous illegal abortion and the economic hardships caused by the costs of supporting a child. See C. MacKinnon, Toward a Feminist Theory of the State 184-94 (1989).
115. D. Bell, The Cultural Contradictions of Capitalism xi (2d ed. 1978) ("I am a socialist in economics, a liberal in politics, and a conservative in culture.").
116. Id. at xxi.
cost," Bell writes, "has been the . . . spread of an antinomian attitude to moral norms and even to the idea of cultural judgment itself."

Bell claims that the new emphasis on mere subjectivism, trendy life styles, and radical non-conformity, rather than upon character and self discipline, "has trivialized the culture."

He describes a culture that, during the 1970s, was in the process of disintegration, but which is now groping for a sense of limits.

The emerging socially conservative majority on the Supreme Court shares Bell's concerns. Webster, for example, was a response to the concern that some of Roe's principles, as applied, have shredded America's moral fiber and that this deterioration has trivialized the value of genetically human life. The Court is now more inclined to view an abortion-control statute as a reflection of a genuine community understanding of how a particular issue should be resolved. Now that Webster has given states more leeway to regulate abortion, many energized pro-choice activists are finding grass roots support for a reaffirmation of Roe's principles. I shall return to the abortion controversy after I discuss communitarian conceptions of the common good which evolved into American republicanism.

IV. COMMUNITARIAN CONCEPTIONS OF THE COMMON GOOD

A. From Ancient Greece: A Narrative

In contrast to individualistic liberalism, American Republicanism evolved from communitarian conceptions of the common good. The dominant vision of reality in a liberal society is the isolated individual who has the cognitive capacity to enter into

117. Id. at xxii.
118. Id. at xxvii.
119. Id. at xxix. Bell argues that it is surprising that the nation is not only tolerating the counter-culture but celebrating its mindlessness. Id.

120. "Visions," as Thomas Sowell uses the word, are pretheoretical, "what we sense or feel before we have constructed any systematic reasoning that could be called a theory . . . . A vision is our sense of how the world works." T. SOWELL, A CONFLICT OF VISIONS 14 (1987).

121. Liberals deny "the centrality of relationships in constituting the self." Nedelsky, Reconceiving Autonomy, 1 YALE J. L. & FEMINISM 7, 9 (1989). According to many communitarians, however, there is no "pre-existing, unitary self in isolation from relationships." Id. at 9 n.4. This was the only vision in Homer's depiction of ancient Greece. "The self becomes what it is in heroic societies only through its role; it is a social creation, not an individual one." A. MACINTYRE, AFTER VIRTUE 129 (1984).
an instrumentally rational social contract. Critics of this vision assert that individuals should not be reduced by liberal writers to dehumanized abstractions separated from society and concrete social norms. These critics believe that interpersonal relationships help individuals become better citizens as they abide by and internalize a given code of ethics closely bound up with their society. Communitarian thought holds that a person cannot become a complete human being if he or she focuses all attention on his or her wants and desires. Some communitarian scholars suggest that liberalism has roots in the ancient idea of "the human good" and that liberals should not ignore ways to connect conceptions of their self-interest with the common good.

The communitarian ethos presupposes cooperative individuals who become integrated into a community and who achieve freedom by acting altruistically in concert with other socialized persons. This political activity is called collective self-determination. Such individuals look to families, friendships, peer groups and voluntary associations (communities within communities) for confirmation of their identity and self respect. Within these communities, participating individuals not only have a place, an anchor, allegiances, and moral bearings, but they become more caring human beings. When an individual engenders respect from others by recognizing his or her obligations to them, life gains its greatest meaning.

Contemporary communitarian discourse "has obvious connections to the Aristotelian position that human nature is realized

122. Habermas, Justice and Solidarity: On the Discussion Concerning "Stage 6", 21 PHIL. F. 32, 37-38 (1989-90). Arguably, a person's capacity to enter into a social contract is comprehensible only with reference to shared social norms, values, and concepts—standards that supply a context in which individuals interact and relate to each other.

123. See, e.g., A. MACINTYRE, supra note 121; M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (focusing on the liberal theory of justice); C. TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 3 (1985) ("[T]o be a full human agent is to exist in a space defined by distinctions of worth . . . incorporated into [one's] self-understanding.").

124. Communitarians assert that individuals who have accepted the idea of civic virtue as a limit on self interest do not claim a right to prevent the government from achieving public happiness. The term public happiness "includes everything from adequate public facilities to the trust and civic friendship that makes public life something to be enjoyed rather than feared." R. BELLAH, supra note 21, at 335.


126. See generally M. SANDEL, supra note 123.
most fully within a community, by a citizen of the *polis.*”127 The communitarian defines a community by its constituent members' vision of the good life, and each individual's vision is limited by the community's menu of ideas.128 In this sense, communities are ontological entities that shape the individual's definition of himself. Communitarians invariably contend that what is good for the community is also good for the individual.129 Liberals have difficulty with this premise. Each liberal has a different conception of the conditions necessary for human flourishing, and they believe that the morality of a *polis* is often superficial and oppressive.130

If we refer to ancient history, we can reconstruct the origin131 of a communitarian ethos that preceded liberalism. In the society chronicled by Homer, who lived before 700 B.C., morality and social structure were one and the same.132 For the Homeric man,


129. In some communitarian societies, individuals who do not conform to the rules are punished or banished. “In [some] 'mass' societies, the healthy communitarian need for common foundations and a certain minimal homogeneity quickly becomes an unhealthy quest for uniformity.” B. Barber, *supra* note 13, at 243. Unfortunately, there are “bogus” communitarians who appeal to community as a means to “enslave humankind.” Id. at 120. The human yearning for a sense of belonging cannot be ignored, however, by citing the worst abuses of totalitarian societies.

A less frightening conception of communitarianism is the view that a community is simply a group of socially interdependent people who participate together in discussions and decision making, and who engage in certain shared activities or practices that are not undertaken as a means to an end but are perceived as ethically good in themselves. These shared activities are nurtured by the community which itself is then, in turn, defined by its members' common values. See R. Bellah, *supra* note 21, at 335.


132. Morality as something distinct from self-validating customs did not yet exist. See A. MacIntyre, *supra* note 121, at 123. In Homeric society, a person did not step back and evaluate the social norms as an outside evaluator might. Homer's *Iliad*
there could be no evaluative moral standards external to those embodied in the structure of his own community. The very idea of a normative order was immanent in the "laws that were as much moral as physical." This was a world of clearly defined roles in which citizens had no need to debate with each other over which principles to follow. The cosmic order never changed.

Two hundred years after Homer, Heraclitus explained that the cosmos was not static, but constantly changing. If one perceives the world as constantly changing, it is possible for moral standards to change along with other parts of the cosmos. Moral disagreement arises not only when one set of virtues is "countered opposed to another [but] also because rival conceptions of one and the same virtue coexist." What can be done? In circa 500 B.C., Heraclitus wrote in support of the aristocrats against the new revolutionary forces that "[a] people ought to fight for the laws of the city as if they were its walls." Plato (c. 429-347 B.C.), an elitist, argued that authorities responsible for enforcing the law need not defer to any community's consensus of opinion.

Aristotle (c. 384-322 B.C.) tried to solve the problems of the changing world described by Heraclitus and others without resorting to Plato's immutable and authoritative "Ideas" (eidos). In contrast to Plato, who believed that nature is governed by general laws imperfectly understood, Aristotle was convinced that nature and our place within it can be reasoned out, discussed, comprehended, and put to practical use. Aristotle wanted to learn the ultimate purposes of human beings and to identify their functions. Aristotle believed that the highest purpose of the most virtuous human beings was cooperative participation in governing and being governed by a city state—a polis.

"Aristotle’s ontology . . . was teleological . . . [but] [t]he purposiveness that he had in mind was not outside our experience." Aristotelian politics envisions individuals in association with others in the city state—a community of values. The good

has no single word equivalent to what we call the mind, the soul, or a conscience. See H. Bloom, Ruin the Sacred Truths 29-31 (1989).

133. A. MacIntyre, supra note 121, at 133.
134. L. Weinreb, supra note 89, at 19.
135. A. MacIntyre, supra note 121, at 133.
137. L. Weinreb, supra note 89, at 32-33.
138. "The polis, properly speaking, is not the city-state in its physical location; it is the organization of the people as it arises out of acting and speaking
political life depends on inculcated virtues that transform a selfish child into an empathetic adult. In a healthy community, the good man is identical to the good citizen.

In the \textit{polis}, any individual who becomes unwisely preoccupied with his or her particular interests or private goods is deemed a source of corruption. An Aristotelian concept of virtues distinguishes between what a particular pleasure-seeking individual "takes to be good for him and what is \textit{really} good for him as a man."\footnote{A. \textsc{MacIntyre}, supra note 121, at 150 (emphasis added).} From this ancient standpoint, "a modern liberal political society can appear only as a collection of citizens from nowhere who have banded together for their common protection."\footnote{Id. at 156.} The modern liberal believes that we can become virtuous,\footnote{See id. at 8.} but not by virtue of our political participation, as Aristotle maintained.\footnote{L. \textsc{Weinreb}, supra note 89, at 253.}

According to communitarians, the modern liberal conception of the self is too thinly constituted to be the most reliable source of moral rules. Only a fully constituted person with character and a history that attaches him to others "can make significant moral decisions."\footnote{In the liberal tradition, even in its more benign forms such as minimalism, "virtues remain largely instrumental; they are valued less in and for themselves than for the sake of the individualist ends they faithfully serve." B. \textsc{Barber}, supra note 13, at 17.} The function of the community is to help individuals to shoulder their civic responsibilities. American liberals are familiar enough with the communitarian ethos to engage in some critical thinking about how modern liberalism might be modified by the venerable notion of the common good. In fact, the founders tried to institutionalize the common good in our republican form of government.\footnote{According to J. \textsc{Pocock}, a republic exists "to realize for its citizens all the values which men [and now women] are capable of realizing in this life." J. \textsc{Pocock}, \textit{The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition} 3 (1975). The republican tradition treats a citizen's active participation in government as an educational enterprise that, when habitually practiced by all citizens with political rights, facilitates the government's efforts for achieving common good. \textit{Id.} at 56-59.} The most influential leaders during America's transition from separate colonies to a unified republic knew that its success depended on the mobilization of the intelligentsia together," in a community of values that enables persons to distinguish themselves by living together and sharing words and deeds. H. \textsc{Arendt}, \textit{The Human Condition} 197 (1958). For a helpful discussion of Aristotelian thought, see M. \textsc{Grant}, \textit{The Classical Greeks} 250-62 (1989).
gence and civic virtue of all citizens and lawmakers. Our nation has the same need today. The following section focuses on the problem of designing a self-governing republic.

B. The Early American Republic

In 1775, “for [most] Americans, the idealistic goal of their Revolution” was the common good. Thomas Paine convinced Americans that republics furthered “the good of the whole, in contradistinction to the despotic form [of government], which makes the good of . . . one man, the only object of the government.” Republican optimism and enthusiasm notwithstanding, there were realists in 1775 who “perceived the inherent conflict between individual liberty and traditional republican theory.”

Post-revolution, the prevalence of “leveling” legislation alarmed the class of persons with vested interests. There was corruption in every state, causing Americans to have doubts about the suitability of their society for republicanism. Even skeptics, however, still hoped that the inspiring republican ideal could be an instrument for reform and moral regeneration.

By 1787, faith in republicanism waned and pessimism replaced the earlier optimism about human nature. Madison wrote that “the latent causes of faction are . . . sown in the nature of man.” He reluctantly concluded that “local prejudices” cannot be prevented by the individual’s moral sense or sense of civic virtue. In an effort to rally support for the new Constitu-

146. Id. at 55-56.
147. Id. at 64.
148. Almost immediately after the Revolutionary War began, the evidence indicating the inability of Americans to govern themselves under republican principles of civic virtue became alarming. By 1780, the American’s inveterate suspicion of the crown and its agents was transferred to the state legislatures, for “people . . . were as capable of despotism as any prince; public liberty was no guarantee after all of private liberty.” Id. at 410.
149. There was evidence of sustained corruption by officials in office who were not acting as trustworthy public servants because, lacking character and civic virtue, they could not resist the temptations of power which facilitated their greedy quest for luxury and wealth. Id. at 410, 416-18.
151. Id. at 113-14.
152. Id. at 424.
154. G. Wood, supra note 145, at 505 (citing The Federalist No. 27 (J. Madison)).
tion, Madison claimed he had found a “republican remedy for the diseases” plaguing the American people. 155 Although fostering the common good was still their stated goal, the founders drafted the new Constitution 156 to protect vested interests 157 because they feared democratic “excesses against personal liberty and private property.” 158 Madison hoped that a mixed republican and liberal form of government with checks and balances would prevent “factional interests from gaining a position of dominance in government and the society.” 159

How can a constitution advance the common good when neither the political majorities nor minorities can be trusted? 160 The Framers’ dilemma had to be resolved through trial and error by a people with enough moral backbone to maintain civic virtue. Unfortunately, civic virtue “seemed to be in danger of completely disappearing as every man and every social group sought private goods at the expense of harmony and other people’s rights.” 161

Gordon Wood captured the essence of the reälpolitik that was triumphing during the ratification debates. He wrote:

No longer was man to be obsessed with the way he ought to live; he was now to base his government on the way he actually lived. In place of the high ideals of the ancients that sought to compel man to transcend his lowly passions and interests, modern governments were now to be founded on these very passions and interests. Modern man became obsessed with his particular private pursuits of happiness and his individual desires, which he calls rights. Reason was dethroned, civic participation was reduced to periodic voting, and the public good was

155. THE FEDERALIST, supra note 153, at 62.
156. G. Wood, supra note 145, at 505; see also R. Bellah, supra note 21, at 253 (citing excerpts from Madison’s writings and The Federalist).
158. Id. at 114 (citing 1 The Records of the Federal Convention of 1787, at 517 (M. Farrand ed. 1937) (statement by Gouverneur Morris)).
160. R. Bork, supra note 29, at 139.
lost in the scramble for private interests.\(^{162}\)

Despite the opposition of many Anti-Federalists,\(^{163}\) the Constitution was ratified.

The founding generation learned to live with the opposition between the concept of economic man and \textit{homo sociologicus}, the politically mature person whose civic virtue and behavior conforms to community norms. Social tensions generated by this ideological dichotomy were reduced and ameliorated by great political compromises. In contrast, it is obvious that contemporary liberals and republicans cannot communicate effectively or negotiate compromise if they mindlessly believe their own political action groups' paid television advertisements. What compromise requires is a thoughtful exchange of ideas.

We need ideas that connect liberalism's intuitive preferences for freedom of choice with equally powerful moral intuitions about what is good for humanity. Compromises are more likely in our profoundly changing global village if liberals face up to the contingency of their own convictions and if republicans realize that their ideas about the common good are largely products of location, tradition, and chance.

V. PROSPECTS OF LEGISLATIVE COMPROMISES AFTER WEBSTER

Encouraged by \textit{Webster}, groups favoring severe restrictions on women seeking abortions and supporters of abortion on demand might negotiate sensible compromises—a common occurrence in Western Europe.\(^{164}\) Although “[t]here are no easy recipes” for agreements in a pluralistic democracy,\(^{165}\) it is possible to find a blend of ingredients that narrow differences among


\(^{163}\) H. Storing, \textit{What the Anti-Federalists Were for} 3 (1981). By and large, “[t]he Anti-Federalists were committed to both union and the states; to both the great American republic and the small, self-governing community; to both commerce and civic virtue; to both private gain and public good.” \textit{Id.} at 6. To reconcile these seemingly incompatible contradictions, they wanted a system that would encourage voluntary obedience to laws, responsible office holders, and a virtuous population. \textit{Id.} at 16.

\(^{164}\) See M. Glendon, supra note 37, app. at 145-50 (Appendix A: Countries Permitting Abortion for Cause).

\(^{165}\) \textit{Id.} at 142. Philip Selznick wrote: “The . . . quest for a communitarian morality must recognize the great contribution liberalism has made to our civilization—in reinforcing values of political and economic liberty, democracy, equality, the rule of law, respect for diversity, academic freedom, and perhaps much else.” Selznick, \textit{supra} note 128, at 463.
the groups participating in the abortion controversy.\textsuperscript{166}

Several regulations aimed at abortion clinics might be acceptable to the moderate elements of both the pro-choice and pro-life communities. For example, regulations that ensure safe abortions, if the restrictions are reasonable from a medical standpoint, should not be objectionable to moderates in either camp. Feminists might be persuaded to support laws regulating profit-seeking abortionists if there is factual support for a legislative judgment that women are being exploited by proprietors of abortion clinics. Moderates oppose abortions in the third trimester and the pro-choice community should concede that these abortions are frequently difficult to justify. As part of a compromise package, legislatures should consider providing more state aid in the form of financial assistance, day care centers and maternity leave from work for mothers unable to support or care for their babies. A state’s interest in encouraging parental involvement may justify notification requirements for minors seeking abortions.\textsuperscript{167} Parental notification should not be required, however, when a physician has reason to believe that the minor’s family is dysfunctional or if the parent to be notified is abusive, guilty of incest, or is not likely to be helpful.\textsuperscript{168}

A parental notification statute, if rational, protects the legitimate interests of an unemancipated minor seeking a non-therapeutic abortion if she has a good reason not to notify her parents. In such cases, the minor’s physician should submit an affidavit to a court; the minor should not have to appear herself unless the government has substantial evidence indicating the affidavit is untrue. Another alternative is an adult involvement law, which allows a pregnant adolescent in her early teens to notify any family

\textsuperscript{166} See generally, M. Glendon, \textit{supra} note 37, at 142.

\textsuperscript{167} For examples of recent Supreme Court decisions addressing the constitutionality of statutes requiring parental notification for minors seeking abortions, see Hodgson v. Minnesota, 58 U.S.L.W. 4957 (U.S. June 25, 1990) (state’s strong interest in welfare of its citizens justifies reasonable legislation requiring minor to obtain parental consent prior to terminating pregnancy); Ohio v. Akron Center for Reproductive Health, 58 U.S.L.W. 4979 (U.S. June 25, 1990) (holding that Ohio statute requiring physician to give notice to parent of minor child prior to performing abortion on minor does not impose unconstitutional burden on minor).

\textsuperscript{168} Both the Minnesota and Ohio parental notification statutes provide a mechanism for by-passing the parental notification requirement if, for example, one of the minor’s parents has engaged in a pattern of physical, sexual or emotional abuse against her. \textit{See} Hodgson, 58 U.S.L.W. at 4959; \textit{Ohio}, 58 U.S.L.W. at 4981.
member of her choice, or other designated adults such as judges, clergy, impartial ethicists or reputable counselors.

The anti-totalitarian principle should be adopted by the Supreme Court when it evaluates the validity of any legislative compromise. The anti-totalitarian principle of liberalism protects women from being reduced to mere instrumentalities of the state regardless of their hopes, careers and plans. Applying this principle, the Court should invalidate legislation which sentences a woman to prison when she seeks escape from a trauma-laden pregnancy. Women must have access to adequate medical treatment when they are suffering from the unbearable consequences of a pregnancy. The Constitution, if interpreted under evolving humane principles of liberalism and republicanism, does not give any rights to a fetus whose birth will ruin a woman's life. The anti-totalitarian principle, however, does not rule out reasonable legislation prohibiting abortions when parents elect abortion because of the gender of a particular fetus. There are still other restrictions that would not unduly burden the exercise of the abortion privilege. For example, reasonable laws obligating physicians to provide a patient with information consistent with the usual requirements for informed consent are rarely unjustifiable.

The anti-totalitarian approach enables courts to consider the extent to which legislation regulating abortions interferes with a woman's future prospects for parity as a citizen in a political community currently dominated by males. This approach permits women to obtain abortions in situations where their future is seriously endangered. No constitutional principle, however, prevents states from prohibiting abortions demanded solely for

169. Professor Tribe has written that mandatory childbearing is similar in some respects to "involuntary servitude prohibited by the thirteenth amendment to the Constitution." L. Tribe, supra note 11, at 1353-54. In some cases, abortion control laws subject women to a lengthy period of involuntary servitude that limits her options in an intolerable manner. The anti-totalitarian principle condemns involuntary servitudes but surely not every law which regulates the conditions of legal abortions is similar to involuntary servitudes condemned by the thirteenth amendment.

170. A recently proposed Canadian statute is consistent with the premises of liberalism, democracy, the founding generation's conception of a social contract, and the anti-totalitarian principle. The bill, if enacted, would prohibit non-therapeutic abortions, but allows abortion if a physician believes that continued pregnancy will have an adverse effect on his or her patient's physical, mental, or psychological health. See L. Tribe, supra note 42, at 70. In such cases, Republicans should realize that the impact of criminal sanctions on the woman's life is a counter-productive and unwise way to integrate authentic persons into a genuine community. See Colker, Feminism, Theology, and Abortion: Toward Love, Compassion and Wisdom, 77 Calif. L. Rev. 1011, 1048 (1989).
reasons of convenience. The constitutional law question, stripped of politicized rhetoric, is whether the reasonable expectations of a woman will be shattered by an unreasonable law. The Court's role is to curtail the excesses of political majorities. The Court exceeds its bounds, however, if it presumes that reasonable compromises are facially unconstitutional.

The judiciary will be effective and helpful so long as it remains trustworthy and politically neutral. Fidelity to process is the hallmark of a trustworthy, non-partisan court. The Supreme Court will lose credibility, however, if it upholds draconian, mandatory and unrealistic childbearing laws. Normally, such laws are the products of a malfunctioning political process that has been manipulated by zealots who do not represent the moderate majority. Such laws do not advance the common good of all members of the political community. On the other hand, if women are not victimized by a return to the dark ages, the social norms of communities should not be cavalierly disregarded.

The anti-totalitarian principle is implicit in Justice O'Connor's approach. Her opinions may help the Court's emerging majority formulate opinions that are consistent with its perceived role as an impartial umpire. As a pivotal influence on the Court, Justice O'Connor has demonstrated in a wide variety of cases\textsuperscript{71} that she is attuned to "the specific needs and interests of the particular persons whose fates she decides."\textsuperscript{72}

In abortion cases, Justice O'Connor inquires whether state regulation unduly burdens a woman seeking an abortion.\textsuperscript{73} Her case by case approach does not predetermine the outcome of an appeal.\textsuperscript{74} She objects to a "\textit{per se} rule under which any regulation..."

\textsuperscript{71} See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986) (O'Connor, J., dissenting). In \textit{Goldman}, an Orthodox Jew serving in the Air Force sought to wear a yarmulke in an indoor military environment despite an Air Force regulation forbidding such conduct. The majority of the Court found that the first amendment did not require the military to accommodate such a practice. \textit{Id.} at 510. In her dissent, Justice O'Connor found that "the Government's policy of uniformity must yield to the individual's assertion of the right of free exercise of religion" under the circumstances. \textit{Id.} at 532 (O'Connor, J., dissenting).

\textsuperscript{72} Michelman, \textit{supra} note 24, at 14.

\textsuperscript{73} See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 749 (1986) (O'Connor, J., dissenting) (Pennsylvania Abortion Control Act of 1982 should not be subject to heightened judicial review since the provisions of the Act do not impose an "undue burden" on the abortion decision); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 463 (1983) (O'Connor, J., dissenting) ("The 'unduly burdensome' standard is particularly appropriate in the abortion context because of the \textit{nature and scope} of the right that is involved.").

\textsuperscript{74} Michelman, \textit{supra} note 24, at 34.
touching an abortion must be invalidated.”175 She “dispute[s] . . .
the legitimacy of the Court’s attempt to discredit . . . state abor-
tion regulation regardless of the interests it serves and the impact
it has.”176 In Webster, Justice O’Connor did not budge from her
previously stated position that, during the previability period of
pregnancy, “a regulation imposed on a lawful abortion is not un-
constitutional unless it unduly burdens the right to seek an
abortion.”177

Justice O’Connor is prepared to narrate a story that is not
limited to the Court’s precedents.178 Her opinions contain co-
gent reasoning. She eschews misleading rhetoric about the right
to be let alone or the freedom not to conform. She is sensitive to
the plight of women who are not adequately respected as citizens
of their communities, and she understands that the pregnant wo-
man is usually in the best position to decide if she can bear the
responsibilities concomitant with bringing a fetus to term. Her
respect for the dignity of each individual can eventually give more
content and shape to the Court’s concept of autonomy.

The open-ended concept of autonomy has to be defined and
clarified by the Court. Once a useful concept of moral and polit-
cal philosophy, courts now refer to autonomy in so many differ-
ent ways that its core meaning is no longer intelligible. Autonomy
is sometimes used to refer to an absolute right (legal and moral)
of persons to make their own decisions about any argu-
ably private matter without any interference by others. Auton-
omy is used somewhat differently in a psychological sense to
designate a fully functioning person. Kant’s idea of autonomy is
much more restricted than the privacy notion embraced by con-
temporary liberals. The future usefulness of autonomy as a legal
concept depends on how it is integrated with responsible public
standards of responsible behavior.

Although the existentialist liberal defines autonomy as each
person’s own creation,179 not every pregnant woman’s psycholog-

175. Thornburgh, 476 U.S. at 829 (O’Connor, J., dissenting).
176. Id.
177. Webster, 109 S. Ct. at 3063 (O’Connor, J., concurring in part and con-
curring in the judgment) (quoting Akron, 462 U.S. at 453).
178. Michelman, supra note 24, at 35.
179. J. Raz, supra note 100, at 408. The notion of autonomy is a central
concept in moral and political philosophy and discussed by countless writers
including John Rawls, Robert P. Wolff, and Bruce Ackerman. See G. Dworkin,
The Theory and Practice of Autonomy (1988); see also B. Ackerman, Social
Justice in the Liberal State (1980); J. Rawls, A Theory of Justice (1971); R.
ical autonomy as a functioning person is seriously jeopardized by abortion control laws. "The significance of [a state's] denial of options [needed for] one's autonomy depends on the circumstances one finds oneself in." If a state denies a woman an option dictated by her profound and clearly evident personal needs, as opposed to whims, or her first choice of many available options, her psychological autonomy is seriously impaired. Reasonable legislative compromises regulating abortion, however, do not foreclose too many options if the legislature finds a middle ground between extremely strict and extremely permissive positions, and is sensitive to the reasonable expectations of women. Only a dogmatic, one-dimensional liberal could insist that all values and rights are subordinated to an unqualified absolute right to reproductive freedom.

VI. Conclusion

This article has described liberalism's concern for the dignity and integrity of free individuals and its revulsion for legal moralism. While liberalism is a vital ingredient in American constitutional law, it is not the whole story. According to venerable notions of republicanism, state legislatures may impose their political will if their concerns are important, comport with their professed adherence to civic virtue, and are subject to ongoing democratic re-evaluation. In such situations, a politically responsible Supreme Court will be sensitive to and informed by the people's dialogues—the building blocks of a legal system's legitimacy.

In sum, absent demonstrable violations of the written Constitution, this narrative generally supports greater judicial deference to the political community's assessment of its members' common good, particularly if its deference is compatible with an enduring common sense understanding of civic virtue. History demonstrates that no decision by a court of law will end the continuing public debate about a political problem that has no ultimate or permanent solution. The Court's role is to help people reach a solution within constitutional boundaries and judges should avoid becoming part of the problem. Concerning abortion, it is submitted that a responsible individual is subject to reasonable laws that deserve general acceptance after a fair and full debate. A prohibition of abortion, however, is inconsistent with both lib-

180. J. Raz, supra note 100, at 410.
eralism and republicanism if it is the product of a systematically distorted political process, subjects women to serious trauma, pain or grief, or "sends a message to [women] that they are outsiders, not fully members of the political community." 181
