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Universal Arguments and Particular Arguments on Abortion Rights

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UNIVERSAL ARGUMENTS AND PARTICULAR ARGUMENTS ON ABORTION RIGHTS

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I. INTRODUCTION

Since *Roe v. Wade*,[1] much academic commentary has investigated the merits of Due Process Clause-based defenses of abortion rights relative to Equal Protection Clause-based defenses.[2] That this topic of discussion persists is indicative of both the complexity of the legal, political, and social issues involved, and the continuing legal uncertainties surrounding abortion rights. While the prospect of a definitive overruling of *Roe* has perhaps lessened over time, the contours of the right to an abortion clearly remain contested.[3] As a result, both proponents and opponents of abortion rights continue to contemplate how best to conceptualize the rights at stake and the various issues involved—both as a matter of legal or doctrinal argument, and as a matter of sociopolitical argument.

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1. 410 U.S. 113 (1973).

2. Since the Supreme Court's focus has been on Due Process Clause-based defenses of abortion rights, much academic commentary has emphasized the virtues of grounding abortion rights in equality and the Equal Protection Clause either along with, or in place of, Due Process Clause-based arguments. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1337–62 (2d ed. 1988); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 311–52 (2007); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PENN. L. REV. 955 (1984); Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057 (1999); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308–22 (1991); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) [hereinafter Siegel, *Sex Equality Arguments*]; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 351–80 (1992) [hereinafter Siegel, *Reasoning from the Body*]; Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31–43 (1992).

3. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the federal Partial-Birth Abortion Ban Act of 2003); *see also*, Kelefa Sanneh, *The Intensity Gap: Can a Pro-Life Platform Win Elections?*, NEW YORKER, (Oct. 27, 2014), http://www.newyorker.com/magazine/2014/10/27/intensity-gap.

My goal in this Paper is to explore the nature of the arguments in defense of abortion rights since *Roe*. However, in categorizing and differentiating between these various arguments, I depart from the commonly emphasized distinction between due process and equal protection arguments. Rather, the distinction that I focus on is between what I will call "universal" and "particular" arguments—two categories of argument that cross-cut the familiar due process-equal protection divide.[4]

What is to be gained by conceptualizing and categorizing abortion rights arguments as universal, particular, or some hybrid of the two—as opposed to categorizing them according to some other set of descriptive labels? This analytical framework offers three primary contributions. First, in line with others who are concerned with the broader social and political acceptability or unacceptability of abortion rights, I believe that we might illuminate such issues in different ways by thinking in terms of the universal and particular. That is, by categorizing these abortion rights arguments in ways outside the familiar constitutional doctrinal labels, we may be able to illuminate the political implications and consequences of certain rhetorical choices in new ways. Thus, the initial task of defining and categorizing various arguments on abortion rights is the subject of Part II of this Paper. In Part III, I begin the task of clarifying the rhetorical trade-offs between deploying more universal and more particular forms of argument.

A second contribution of the analytical framework builds upon the preceding point: much of my focus is on illuminating some of the distinctive rhetorical appeal of particular-arguments on abortion rights that, I believe, have been relatively underemphasized in the literature.[5] I begin to press this concern in Part III of the Paper, but I set forth a more expansive set of arguments in Part IV. In Part IV, I situate particular-arguments on abortion rights alongside more general and broader claims of "societal segmentation" that have appeared episodically in American political and legal thought. Situating particular-arguments on abortion rights alongside legal and political appeals to societal segmentation will help demonstrate the rhetorical force of rights claims and political appeals that directly reference the conditions, hardships, and circumstances distinct to a subset of the polity. I argue that so long as such appeals to entrenched differences or unique cir-

4. I should note that since my focus is on arguments in defense of abortion, I pay relatively little attention in this Paper to the array of arguments that are deployed surrounding the rights of the fetus or the state's interest in potential life.

5. By referencing the rhetorical appeal of different legal and political arguments in this Paper, I should emphasize that I am referring to the rhetorical appeal of these arguments among those Americans who engage with political issues or read Supreme Court opinions. Thus, while I believe I am focusing on a not-insubstantial subset of American citizens—both in terms of numbers and especially in terms of political and social influence—I am admittedly focusing on a select portion of the American polity.

cumstances are made in the context of a sufficiently robust political community, these targeted appeals can still have substantial political and normative appeal.

Finally, a third contribution of employing this conceptual framework is that it allows for conceptualizing the abortion rights debate in ways that link it to broader themes in the examination of American political identity and community. I will focus on this last point in the concluding portion of Part IV.

II. DEFINING AND CATEGORIZING ARGUMENTS ON ABORTION RIGHTS

In discussing gender inequality and competing approaches to securing legal remedies for this inequality, Catharine MacKinnon states that "[e]quality approaches are often faulted as less powerful because [they are] inherently relative, while other approaches like liberty or security or privacy are thought more powerful because [they are] absolute."[6] A few sentences later, she describes equality claims as having a "contextual nature."[7] MacKinnon speaks to commonly held views about the nature of these respective types of claims when she identifies equality claims as relative/contextual and liberty claims as absolute. Yet this distinction draws too sharp a line between liberty-based and equality-based rights claims, at least as they have appeared in judicial opinions. By way of illustrating this, let me introduce my own set of competing terms in the abortion rights context. They do not correspond perfectly with MacKinnon's dichotomy of "absolute" vs. "relative/contextual," nor do the modes of argument I reference necessarily divide well into liberty/due process-based and equal protection-based arguments. Still, I believe they speak well to some of the intuitions underlying the contrast she articulates in the preceding statement.[8] Consider then a dichotomy between "universal" rights claims and "particular" rights claims.[9]

6. MacKinnon, *supra* note 2, at 1326.

7. *Id.*

8. The terms that I use are "universal" and "particular" modes of argument, and while not perfect analogues, they align fairly well with the distinction MacKinnon has in mind with "absolute" and "relative/contextual." By "absolute," MacKinnon likely has in mind a rights claim that is unqualified and that is not subject to variation or a different formulation depending upon different circumstances or a given situation. That is, an "absolute" right retains its form and substance across all situations, circumstances, and applicability to all subjects; this aligns well with the nature of what I call a universalistic rights claim. In contrast, MacKinnon's use of the terms "relative" and "contextual" suggests a rights claim that is qualified by the context in which it is made; it thus implies a rights claim that may be limited to a particular set of circumstances and not applicable to other situations, circumstances, or certain subjects. This also aligns, to a degree, with my use of the term "particular" in the discussion below.

9. These terms are commonly used in the literature on political identity and political community, though, of course, my use of them in the context of abortion rights has some distinct ele-

With respect to the former, "universal" arguments in defense of individual rights emphasize a more universal applicability—in terms of potential harms, the interests at stake, and the subjects who are affected. Hence, universal arguments are not limited to special or specific circumstances. Furthermore, universal arguments are not limited in a self-conscious manner to specific constituencies or clearly defined groups. A purely universal rights claim would, at least in theory, encompass any person within the relevant political community.

To be sure, in the arguments below I will sometimes use the term "universal" in a somewhat looser manner that encompasses situations that more accurately might be labeled "comparative" or "relational" rather than "universal." The latter types of arguments emphasize a more limited application of certain rights claims; that is, comparative or relational rights claims speak to a set of circumstances and subjects greater than a single case or instance, but that fall short of a universal claim encompassing all circumstances and/or subjects. Thus, similar to more purely universal arguments, the emphasis with comparative or relational claims is also on more than just a single context or single set of subjects. At the same time, such arguments fall short of being universal, in the strictest sense.

Situated at the other end of the spectrum from universal or comparative arguments are "particular" arguments. With particular-arguments, the focus lies instead with the single case. Hence when conceptualized within particular-arguments, the potential harms and interests at stake in a given dispute over individual rights are framed in a distinctive manner that may not be easily comparable to the interests and legal harms that arise in other contexts or situations. Similarly, a particular-argument in defense of certain rights is quite self-consciously limited to a single, clearly defined set of subjects. By their very terms, particular-arguments will have little to no direct relevance or immediate consequences for some portions of the political community.

Stating this dichotomy between universal and particular-arguments in such stark form may imply a corollary belief on my part that individual rights claims can easily and wholly be classified as one or the other. To the contrary, and as suggested by my discussion of comparative arguments above, it may be more useful to think of the universal vs. particular dichotomy as opposing ends on a spectrum with much room for hybrid modalities of argument lying in between them. Further, as I will discuss below, the many, extended defenses of abortion rights that we have seen in the Supreme Court's opinions and in the academic literature show that elements of

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ments to it. *See, e.g.*, DAVID HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 54–56, 146–47 (2000); ROGERS M. SMITH, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP 87 (2003).

both the universal and the particular constitute almost every one of these arguments—regardless of whether the argument is grounded in liberty and the Due Process Clause, or equality and the Equal Protection Clause.

A. Due Process Clause Arguments in Defense of Abortion

With respect to arguments grounded in the Due Process Clause, the deployment of both universal and particular-arguments is fairly apparent in Justice Blackmun's majority opinion in *Roe*. With regard to the former, Justice Blackmun's crucial move lay in reaffirming a right to privacy, and in linking it to the right to have an abortion. That is, he conceptualized abortion rights at a higher level of generality to encompass "privacy," and, as such, Justice Blackmun made the abortion right analogous to a host of other rights—also falling within the general category of privacy—that were applicable in a broad range of social contexts, and that were relevant for a broad range of subjects.[10] The interests at stake with abortion rights were thus not unique to that context, nor unique to pregnant woman, nor unique to pregnant women with unplanned pregnancies, but were instead relevant—and indeed had been affirmed by the Court—in other contexts for many other subjects. This is what Justice Blackmun states:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.
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> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is

10. On the topic of defining rights at different levels of generality, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

> broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[11]

We see similar arguments in the Court's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[12] where abortion rights were connected to more abstract and more universally applicable notions of liberty.[13]

Nevertheless, in emphasizing the universal nature of privacy interests—and by implication the universal nature of the interests that were threatened with abortion restrictions—Justice Blackmun's opinion in *Roe* did not neglect to emphasize the more particular or even unique nature of the interests and rights at stake. Immediately following the above extended quotation, Justice Blackmun went on to state the following:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise,

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11. Roe v. Wade, 410 U.S. 113, 152–53 (1973) (citations omitted) (first citing Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891); then citing Stanley v. Georgia, 394 U.S. 557, 564 (1969); then citing Terry v. Ohio, 392 U.S. 1, 8–9 (1968); then citing Katz v. United States, 389 U.S. 347, 350 (1967); then citing Boyd v. United States, 116 U.S. 616 (1886); then citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); then citing Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965); then citing *id.* at 486 (Goldberg, J., concurring); then citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937); then citing Loving v. Virginia, 388 U.S. 1, 12 (1967); then citing Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); then citing Eisenstadtv. Baird, 405 U.S. 438, 453–54; then citing *id.* at 460, 463–65 (White, J., concurring); then citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and then citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)). Stewart makes a similar argument in his concurrence in connecting abortion rights to more abstract constitutional commitments such as "liberty" and liberty as applied to matters of marriage and family. *Id.* at 168–70 (Stewart, J., concurring).

12. 505 U.S. 833 (1992).

13. *Id.* at 846–53, 858–59. See also Justice Stevens's separate opinion emphasizing the same theme at *id.* at 915–916 (Stevens, J., concurring in part and dissenting in part) and Justice Blackmun's separate opinion emphasizing the same theme at *id.* at 926–28 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). On the question as to how abstract the Court should be in its interpretations of the Due Process Clause, Justice Kennedy states:

> It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law.

Id. at 847 (plurality opinion) (citation omitted) (citing Michael H. v. Gerald D., 491 U.S. 110, 127–28, n.6 (1989) (opinion of Scalia, J.)).

> to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[14]

In a similar vein, the plurality opinion in *Casey* noted:

> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[15]

These are particular-arguments. They are defenses of abortion rights that are rooted in the specific context of unplanned pregnancy, and rooted in the unique hardships faced by some subset of women who are forced to navigate the obstacles of an unplanned pregnancy. It is clear that within the immediately preceding quotation, the interests at stake are not stated in such a way as to be potentially applicable to all members of the political community. Rather, these arguments are clearly referring to a specific set of subjects. As such, these arguments supplement the more universal, abstract rights arguments made by Justice Blackmun in *Roe*, and by the plurality in *Casey*, by providing some valuable context.

This joining of universal and particular-arguments can also be seen in academic defenses of abortion rights that largely proceed from claims of liberty or autonomy. Consider Judith Jarvis Thompson's notable thought experiment analogizing an unwanted pregnancy to a person serving as an unwilling means of life support for a famous, unconscious violinist.[16] In a similar vein, consider Eileen McDonagh's conceptualization of unwanted pregnancy as an incursion on one's bodily integrity serious enough that it

14. *Roe*, 410 U.S. at 153.

15. *Casey*, 505 U.S. at 852; *see also id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." (citing R. PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133, n.7 (rev. ed. 1990))).

16. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971).

warrants a claim of self-defense, even with deadly force.[17] The power of such analogies lies precisely in their power to universalize the distinctive or particular adverse consequences of an unwanted pregnancy—whether in terms of autonomy, health, or incursions upon the pregnant woman's bodily integrity—in order to evoke a sense of empathy from those individuals who are not, have not, or who may never experience an unwanted pregnancy.

B. Equal Protection Clause Arguments in Defense of Abortion

Not surprisingly, equal protection arguments in defense of abortion rights employ particular-arguments to great effect. This speaks to MacKinnon's ready identification of equality with "contextual" rights claims. Hence, consider several examples of this mode of argument from the Court's opinions and from the academic literature.

In his separate opinion in *Casey*, Justice Blackmun stated that:

> A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.[18]

In her dissent in *Gonzales v. Carhart*,[19] Justice Ginsburg states that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[20] Finally, in the academic literature, Reva Siegel has stated that:

> Since its decision in *Brown v. Board of Education*, the Court has employed the Equal Protection Clause to analyze class- or

17. McDonagh, *supra* note 2, at 1060. To be sure, McDonagh's argument relies, in part, on the Equal Protection Clause as well.

18. *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (first citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–26 (1982); and then citing Craig v. Boren, 429 U.S. 190, 198–99 (1976)); *see also* related comments in the plurality opinion. *Id.* at 896–97 (plurality opinion).

19. 550 U.S. 124 (2007) (Ginsburg, J., dissenting).

20. *Id.* at 172; *see also id.* at 183–86.

> caste-based legislation, including caste-based regulation of women's conduct. From a historical perspective it is clear that abortion-restrictive regulation is caste legislation, a traditional mode of regulating women's conduct, concerned with compelling them to perform the work that has traditionally defined their subordinate social role and status. From a historical perspective, it is also clear that this society's reasons for enacting restrictions on abortion have been deeply entangled in its conceptions of women as mothers. . . . Given the centrality of sex in defining the objects, impositions, and justifications for abortion-restrictive regulation, it is crucial to analyze restrictions on abortion from the standpoint of equal protection commitments, whether as a primary or complementary focus of constitutional review. Equal protection doctrine is the only body of constitutional jurisprudence explicitly skeptical about the rationality of gender-based judgments and specifically concerned with the justice of gender-based impositions.[21]

Common to all of these arguments is an emphasis on the relative uniqueness or the particularity of the interests at stake with abortion restrictions. In place of the more abstract modes of argument seen with universal rights claims that analogize abortion restrictions to other kinds of governmental intrusion, we hear greater specificity and detail on how individual rights should be conceptualized and how they may be infringed upon in the preceding quotations. Further, and related to the preceding point, there is also no mistaking exactly who is affected by abortion restrictions. Each argument quite clearly places women at the forefront of concern. The normative force of these arguments stems not so much from the possibility of every person imagining themselves in the place of a woman dealing with an unwanted pregnancy. Rather, their normative appeal stems from a sense of fairness informed by a specific context; the quotations indicate that the burden of these abortion restrictions are, for the most part, targeted at this one particular social group with minimal overlap to other persons in the political community who may be in little to no danger of facing unwanted pregnancy.

Yet, a legal argument merely cataloging a set of unique hardships—given the avowedly nongeneralizable orientation of particular-arguments—

21. Siegel, *Reasoning from the Body*, *supra* note 2, at 351–52 (1992) (footnotes omitted) (first citing Brown v. Board of Ed. Of Topeka, Kan., 347 U.S. 484 (1954); then citing Craig v. Boren, 429 U.S. 190 (1976); and then citing Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982)). For similar particular-arguments critiquing abortion restrictions as a form of gender subordination in their promotion of traditional or stereotypical roles for women specifically (offered as either a complement to Due Process-based arguments or as an improvement on those arguments), see TRIBE, *supra* note 2, at 1353–54; Balkin, *supra* note 2, at 322–25; Ginsburg, *supra* note 2, at 382–83; Law, *supra* note 2, at 1017–20; MacKinnon, *supra* note 2, at 1308–22; Siegel, *Sex Equality Arguments*, *supra* note 2, at 815–22; Sunstein, *supra* note 2, at 32, 36–37.

might risk losing some rhetorical appeal for appearing to be detached from more general or "neutral" principles.[22] Hence, at least implicit, if not explicit, in nearly every equal protection defense of abortion rights deploying particular-arguments is an added feature: the joining of particular appeals with corollary arguments drawing comparisons between the circumstances of women potentially facing unplanned pregnancies and other social groups. I consider these latter types of arguments to be quasi-universal in nature, but to be more precise, we should label them "comparative" arguments. These comparative arguments highlight the potential hardships faced by women in comparison to the circumstances faced by other social groups, and thus provide added illumination to the nature of the harms imposed by abortion restrictions. Or, to state the point differently, there is a sense in which the hardships of unwanted pregnancy can only truly be grasped when they are juxtaposed to the hardships or non-hardships of different, yet somewhat analogous social groups.

Unlike universal arguments that proceed by linking abortion rights claims to abstract principles that are potentially applicable in all contexts and to all subjects, comparative arguments on abortion rights are firmly rooted in clearly defined subjects and circumstances that fall short of universal. Yet, somewhat similar to universal arguments, comparative arguments are also *outward looking* in orientation; they seek to ground abortion rights claims with appeals or references to subjects and circumstances that fall outside the unique context of women dealing with unwanted pregnancy.

The primary comparative arguments that appear in this context are comparisons of the status and legal treatment afforded women relative to men. That is, the differential impact of abortion restrictions upon women relative to men—in dealing with the consequences of an unwanted pregnancy—is often deployed as a corollary to the above noted particular-arguments either implicitly or explicitly. Thus, to be more precise, equal protection claims in defense of abortion rights are not simply based upon a recognition of the hardship faced by some women with unwanted pregnancy. Rather, the equal protection claim is that such hardships are *legal* hardships because women are subject to them, and men are not. Tribe articulates this point as follows:

> Even if we view pre-viable fetuses as full human beings, the intimate and personal sacrifice that a ban on abortion would impose by requiring pregnant women to nurture unborn life is one that our legal system almost never demands. The common law contains a deeply rooted principle that people are not required to aid others in distress, particularly when aid can be provided only at

22. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

> significant cost or risk to the rescuer. And the law nowhere forces *men* to devote their bodies and restructure their lives even in those tragic situations (such as organ transplants) where nothing less will permit their children to survive. Yet those who would outlaw abortion (or who would refuse to fund it) would rely upon economic and physiological circumstances—the supposed dictates of nature—to conscript women as involuntary incubators and thereby to usurp a control over sex and its consequences that men take for granted. A right to terminate one's pregnancy might therefore be seen more plausibly as a matter of resisting sexual and economic domination than as a matter of shielding "private" transactions between patients and physicians from public control.[23]

III. THE POLITICAL AND RHETORICAL APPEAL OF UNIVERSAL ARGUMENTS AND PARTICULAR-ARGUMENTS

In a basic sense, it should hardly be surprising that both due process and equal protection defenses of abortion rights appeal to both the particular and the more universal. After all, any argument employing analogical reasoning will rely upon both the particularities of the case at hand, and the relevance of other cases that may serve as ready analogues for comparison. Yet, even if both universal and particular-arguments may each partially constitute a wide array of the abortion rights arguments referenced here, it is also the case that—at least in some cases—we can glean a greater reliance upon the universal or the particular. For example, one might reasonably conclude that universal arguments seem to be the primary point of emphasis in *Roe*, and they also appear to be of primary importance in related cases outside the abortion context such as *Griswold v. Connecticut*[24] and *Lawrence v. Texas*.[25] In a similar vein, MacKinnon's discussion of abortion and gender equality appears to emphasize the particular over more general or comparative themes.[26]

The varying emphasis on universal and particular themes in these arguments suggests that each argumentative strategy may have distinctive rhetorical benefits and drawbacks. Some of those benefits and drawbacks may be tied to the usefulness of these arguments for rationalizing and revis-

23. TRIBE, *supra* note 2, at 1354 (footnotes omitted) (citing Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); then citing Thompson, *supra* note 16, at 47). Others making this point include Balkin, *supra* note 2, at 324; MacKinnon, *supra* note 2, at 1320; McDonagh, *supra* note 2, at 1060; Siegel, *Sex Equality Arguments*, *supra* note 2, at 822; and Sunstein, *supra* note 2, at 31–40.

24. 381 U.S. 479, 482–86 (1965).

25. 539 U.S. 558, 562, 566–67, 572, 574, 578 (2003).

26. *See* MacKinnon, *supra* note 2, at 1308–22.

ing constitutional doctrine.[27] But of greater interest to me—and only partially related to the question of doctrinal consistency—are the relative strengths of universal and particular-arguments as a matter of political and normative rhetoric. On these dimensions, the appeal and strength of universal arguments can be stated simply. By conceptualizing abortion rights in a more abstract manner such that they are made personally relevant to potentially all members of the political community in a broad array of contexts, universal arguments are able to evoke a basic kind of empathy from those who find these arguments—and the analogies they rely upon—to be plausible. Within universal arguments, the harms imposed by abortion restrictions are not a matter that affects only a clearly defined segment of the polity with no consequences for all others. To the contrary, universal arguments suggest that abortion rights are the concern of all because their absence may, in some sense, affect nearly everyone.[28] Furthermore, given their wide scope, universal arguments are fundamentally rooted in general principle and—perhaps unlike particular-arguments—they have a ready and obvious defense against any critique of being merely self-referential.

In contrast, the political and normative rhetorical power of particular-arguments speaks, at least in part, to the very weakness of universal arguments: the universalizing tendency to abstract a rights claim to a broad array of contexts, and to potentially all individuals, may risk detracting from or minimizing the peculiarities of specific harms, in specific contexts, imposed upon specific individuals.[29] Hence one rhetorical strength of particular-arguments stems from their accuracy and their ability to convey more complicated and truthful depictions of social conditions. It is this "truth-advantage" possessed by particular-arguments that MacKinnon likely has in mind when she states: "The contextual nature of the equality right seems to

27. The relative value of certain arguments for rationalizing and encouraging the judicial revision of abortion rights doctrine often comes up in the familiar debate on evaluating the relative merits of due process and equal protection arguments (which is, again, somewhat distinct from the present focus on universal versus particular-arguments). For a relatively common view in the literature in this regard, see Sunstein, *supra* note 2. As Sunstein states, "There are serious difficulties, however, in treating the abortion right as one of privacy, not least because the Constitution does not refer to privacy and because the abortion decision does not involve conventional privacy at all." *Id.* at 31 (citing John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 932 (1973)). This topic, in turn, often overlaps with the related debate on whether some of the political divisiveness on the abortion issue could have been reduced (or might be reduced in the future) if the Court relied on equal protection-based arguments in addition to the due process-based arguments that it has employed. For a view sympathetic to this position, see Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160, 170 (2013). For a view skeptical of this position, see Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 59, 62–63 (1998).

28. Professor Yoshino has also stressed this point. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 792–95 (2011).

29. *Id.* at 798–99.

me a strength: what it seeks is always real, because it is real for someone."[30] And beyond MacKinnon, this truth-advantage of particular-arguments is usually at least implicitly acknowledged in the claims of those who deploy such arguments.

Beyond the descriptive accuracy of particular-arguments, I believe they possess at least one other rhetorical strength: if universal arguments are capable of evoking empathy in certain listeners because listeners are able to personally identify with the harm or interest at stake, particular-arguments are capable of evoking a sympathy in listeners that stems precisely from the fact that those listeners may have never experienced or had firsthand knowledge of the interest or harms at stake. That is, particular-arguments are capable of generating a kind of sympathy rooted in the unknown, and rooted in the listener's capacity for humility in acknowledging the limits of their own experience and knowledge.

To be sure, the speaker who deploys particular-arguments may, in certain cases, face a more difficult chore than a speaker deploying convincing universal arguments because of the former's need to sometimes navigate the absence of firsthand experience among their listeners. But trade-offs exist going in the other direction as well. Consider, for example, the situation where a speaker deploys universal appeals to individual rights, and listeners in that situation simply find the speaker's analogies unconvincing. What if, for example, a speaker deploys the arguments set forth by Thomson or McDonagh, and certain listeners conclude that the analogies fail, and abortion is nothing at all like being unwilling life support for an unconscious violinist, or similar in any way to incursions upon bodily integrity justifying deadly forms of self-defense. The speaker deploying universal arguments may then find themselves without a next step in their argument. In contrast, for the speaker deploying particular-arguments, their argument need not end if they fail to connect to the personal experiences of their listeners.

I will return to this point about the sympathy evoked by particular-arguments in the next Part of this Paper, but let me conclude for now with one final point: we may also presume that the sympathy-generating appeal of particular-arguments is significant given the very existence and prominent presence of such arguments in the abortion rights debate. The fact that such arguments are powerful to at least some men and some women who have never experienced or will never experience unwanted pregnancies underscores the appeal of such arguments across a broader audience.

30. MacKinnon, *supra* note 2, at 1326.

IV. UNIFORM AND SEGMENTED CONCEPTIONS OF SOCIETY

While the dichotomy of universal and particular-arguments in the context of abortion rights speaks to a distinction in how constitutional rights claims are articulated and defended, these competing sensibilities obviously have relevance beyond this domain. By way of illustrating the broader relevance of this universal-particular conceptual dichotomy, consider how similar concepts may function in the context of claims about American society.

In response to the question of how best to describe and/or shape the constituent parts of American society, one may similarly respond with answers emphasizing greater uniformity or greater societal segmentation. Indeed, within at least some universal rights claims, we might glean an emphasis on relatively greater societal uniformity and inherent similarities across individuals. Correspondingly, the same might be said about at least some particular-rights claims and their emphasis on relatively greater societal differentiation and differences across individuals. Thus, for the moment, consider a second conceptual dichotomy—this one regarding the nature of American society—that might, in turn, anchor two ends of a different spectrum of political and legal arguments. The conceptual dichotomy I will focus on at present is between competing notions of "societal uniformity" and "societal segmentation."[31] After elaborating on these concepts, I will conclude this Part by discussing their relevance for abortion rights.

A. Uniformity

With respect to "uniformity," this speaks to an aspect of American political and legal thought that references and emphasizes the commonalities present within certain elements of American society (if not within American society as a whole). These may be commonalities of interest across different constituencies, common ideology, or commonalities in social and political status. Uniformity arguments may be oriented as descriptions of American society, or they may be articulated as plausible aspirations for American society.

Elements of these ideas of uniformity are present and quite prominent within the major "political traditions"[32] in American politics. Consider, for

31. My discussion over the next several pages on uniformity, societal segmentation, and a review of the relevant literature are reproduced from portions of Stuart Chinn, *Situating "Groups" in Constitutional Argument: Interrogating Judicial Arguments on Economic Rights, Gender Equality, and Gay Equality*, 18 U. PA. J. CONST. L. (2015) (forthcoming) (manuscript at 10–16, 52–53).

32. I use the term "political tradition" in the manner defined by Rogers Smith: "(1) a world view or ideology that defines basic political and economic institutions, the persons eligible to participate in them, and the roles or rights to which they are entitled, and (2) institutions and practices

example, the presence of uniformity themes within liberalism. Liberal political philosophy is generally understood to be at the center of American political thought; hence most scholarly discussions of American political ideologies or traditions begin with an examination of it. By "liberalism" most commentators within this literature have in mind a John Locke-inspired version of liberalism[33] emphasizing some mix of these key commitments and ideals: individualism, individual rights, a limited state, "atomistic" social freedom (i.e., negative liberty), and commitments to property rights and market capitalism.[34] Furthermore, most also emphasize the notion of equality or universalism at the core of liberalism with respect to individual rights and entitlements.[35] This also leads to an accompanying emphasis on government by consent and representative government; so long as individual rights are respected, the basic equality among members of a liberal political community leads to some form of majority rule.[36] At the same time, of course, conceptions of liberalism also emphasize a sense of cautiousness and wariness about majority rule—hence the aforementioned focus on individual rights (especially property rights), and commitments to constitutionalism and the rule of law.[37]

Undoubtedly different scholars would emphasize some concepts and deemphasize others among those I mention. Still, there are clear convergences, and much of that convergence reflects a point of intellectual history: the preceding paragraph and the authors cited within it rely upon, critique, or are otherwise in conversation with the work of Louis Hartz. Hartz's key claim was that a pervasive liberal political tradition exists in America due to

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embodying and reproducing such precepts." ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 507 n.5 (1997).

33. For a brief summary discussion of John Locke's *The Second Treatise of Government* within the context of a broader discussion of Hartz and American liberalism, see JAMES P. YOUNG, RECONSIDERING AMERICAN LIBERALISM: THE TROUBLED ODYSSEY OF THE LIBERAL IDEA 23–39 (1996).

34. The key text in this literature is LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 12, 14–18, 55–57, 59–60, 62–64, 128–34 (1955). Other key works include J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM 48 (1993); CAROL A. HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM 5 (2005); SMITH, *supra* note 32, at 8, 18, 35–39, 507 n.5; ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 14 (2d ed.1990); and YOUNG, *supra* note 33, at 6–7, 328–29. The Lockean liberalism discussed here should be distinguished from "legal liberalism," the latter of which Laura Kalman describes as a faith in the potential of the judiciary—the Supreme Court in particular—to bring about progressive change on behalf of more disempowered social groups. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2, 247 n.1 (1996).

35. HARTZ, *supra* note 34, at 56, 205–06; DESMOND KING, IN THE NAME OF LIBERALISM: ILLIBERAL SOCIAL POLICY IN THE USA AND BRITAIN 7–8 (1999); SMITH, *supra* note 32, at 18, 35–37; YOUNG, *supra* note 33, at 6, 328.

36. GREENSTONE, *supra* note 34, at 48; HARTZ, *supra* note 34, at 56–62; HORTON, *supra* note 34, at 5; SMITH, *supra* note 32, at 507 n.5.

37. *See infra* note 34 and accompanying text.

the absence of feudalism in our history and historical consciousness.[38] The Hartzian thesis has been subject to sustained scholarly critique over the past several decades. Still, despite its potential shortcomings, the Hartzian thesis retains enough significance to be a starting point for most discussions of American political thought.

For our purposes, what is most relevant about the Hartzian thesis are its implications for uniformity. This idea directly stems from Hartz's aforementioned emphasis on the absence of feudalism in American history: precisely what makes American society liberal, according to Hartz, is the absence of permanent feudal classes. Thus, while individuals in a liberal society would want and expect differences to emerge among themselves with respect to wealth and property, there would also be an expectation of equal rights and equal legal entitlements for all "full" members of the political community. There may also be an emphasis on the relative equality of social status for all members of the political community as well; notwithstanding substantial economic differences that may exist among citizens existing in society, citizens in a liberal polity would not view those differences as fundamental or permanently entrenched.[39] This pervasive equality across individuals marked a point of concern for Hartz, and at an earlier time, de Tocqueville as well. Both warned of the specter of a tyranny of the majority, where such equality might lead to a problem of conformity and the stifling of dissent.[40] One might say that both theorists noted liberalism's ambivalence, or even hostility—at least at a conceptual level—toward entrenched, permanent differentiation in society.

B. Segmentation

On the other side of the spectrum, themes of segmentation have also colored aspects of American political and legal thought through time.[41] Segmentation arguments, as I define them, invoke a description of society that might be gleaned in legal and political arguments. We might say that a legal or political actor makes an argument referencing segmentation when: First, the person proceeds from the assumption, or seeks to assert, that certain cleavages exist in American society that are persistent and significant within the polity. We might expect the referenced cleavages to be tied to distinct and separate social identities. Further, these arguments may assert

38. HARTZ, *supra* note 34, at 3–14, 20. On this point, Hartz drew on a Tocquevillian insight: "The Americans have this great advantage, that they attained democracy without the sufferings of a democratic revolution and that they were born equal instead of becoming so." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 509 (J.P. Mayer ed., George Lawrence trans., 1988). *See* YOUNG, *supra* note 33, at 100.

39. *See infra* note 35 and accompanying text.

40. HARTZ, *supra* note 34, at 11, 57; DE TOCQUEVILLE, *supra* note 38, at 254–56.

41. *See* Chinn, *supra* note 31.

the permanence of these cleavages. Or, they may assert a belief in the possibility of key cleavages eventually being erased—though the latter argument would likely be joined with an accompanying demand for a change of posture by the state and/or a hope that the passage of time would have significant effect in erasing differences.[42]

Second, implied within the preceding point, but worth spelling out explicitly, segmentation arguments invoke or perceive situations where the benefits or burdens tied to a particular issue or policy are relatively more targeted and specific to groups of individuals. That is, these arguments emphasize at least a minimal overlapping of benefits or burdens across groups, and may contemplate direct conflicts of group interests. To be sure, arguments reflecting segmentation may also accompany appeals to the public interest, though the more that broader, public interest themes recede, the more we may consider the argument an appeal to segmentation.

Third, and building upon the preceding point, segmentation arguments need not be uniformly so. The appeal to segmentation may, in a given instance, be relatively more or less pronounced; it can travel alone or it can be mixed with other kinds of arguments. Fourth, and finally, themes of segmentation may be specific to certain issues or policy contexts, such that at a given moment in time, other policy contexts may be constituted more by arguments and appeals to consensual pluralism or quasi-consensus. That said, stronger forms of segmentation arguments would emphasize how certain societal cleavages encompass or implicate or simply overshadow multiple policy areas, with perhaps some pre-Civil War sectional arguments serving as prominent, more dramatic examples of segmentation arguments.[43]

Segmentation themes are also clearly present within traditions of American political thought. Consider, for example, the presence of segmentation themes within civic republicanism. While liberalism remains central to discussions of American political traditions, civic republicanism has often been invoked as a competitor of sorts to liberalism. In contrast to liberalism's focus on the individual and individual social freedom, many have emphasized the civic republican focus on the normative ideal of an active citizenry, oriented toward serving a larger common good or the general welfare of the polity. Thus the civic republican vision places relatively

42. *See, e.g.*, Justice O'Connor's measured endorsement of race-based affirmative action in *Grutter v. Bollinger*, where she concluded her opinion for the Court by stating, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. 306, 343 (2003).

43. *See, e.g.*, John C. Calhoun, *A Disquisition on Government* in AMERICAN POLITICAL THOUGHT: A NORTON ANTHOLOGY 607, 610–23 (Isaac Kramnick & Theodore J. Lowi eds., 2009) (advocating for the "concurrent majority," in order to protect Southern sectional interests in the pre-Civil War era).

greater emphasis on the duties of citizenship and on the polity as an entity worthy of consideration in its own right. This is a theme that Pocock traces from Renaissance political thought to the American context;[44] that Wood emphasizes as an enduring theme in the American Revolutionary era;[45] and that contemporary political theorists like Sandel have invoked as a normative prescription for the ills of current politics.[46]

In contrast to liberalism's commitment to equality and social undifferentiation, some scholars have emphasized a different civic republican view that diverges in key respects. A sense of equality among citizens also underlies many discussions of civic republicanism,[47] but equality in the latter is sometimes accompanied by the theme of a persistent divide and the potential for conflict between "the people" and "elites."[48] Hence there is a basic and fundamental societal division that accompanies some strains of civic republican thought that is in tension with some core components of liberal ideology.

Consider also the presence of segmentation themes within the more exclusionary aspects of American political thought. Focusing on doctrinal developments in citizenship law, Rogers Smith asserts that such group-based exclusion and inequalities are so pervasive that they encompass nothing less than a tradition in American political thought separate from liberal-

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44. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); *see* especially *id.* at 506–07, 550–52.

45. Gordon Wood describes the common good in the American colonial context as follows:

> This common interest was not, as we might today think of it, simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of groups and individuals. . . . [P]olitics was conceived to be not the reconciling but the transcending of the different interests of the society in the search for the single common good . . . .

GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 58 (1969); *see also id*. at 53–65.

46. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 3–7 (1996). On republicanism in general, see also Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 18–20 (1992); SMITH, *supra* note 32, at 15, 507 n.5.

47. SMITH, *supra* note 32, at 37; WOOD, *supra* note 45, at 70–75.

48. Wood discusses this theme among key Anti-Federalist figures during the Founding Era, who he views as legitimate spokesmen for the republican tradition. WOOD, *supra* note 45, at 513–24, 562–64. *See also id.* at 57–58; John P. McCormick, *Machiavellian Democracy: Controlling Elites with Ferocious Populism*, 95 AM. POL. SCI. REV. 297 (2001); POCOCK, *supra* note 44, at 507. This basic idea was a notable component of Jacksonian political thought. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 380–81, 501, 582 (2007); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 513–14 (2005); JULES WITCOVER, PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS, 138–39 (2003). And it also appeared within Populism as well. As Kazin states: "That is the most basic and telling definition of populism: a language whose speakers conceive of ordinary people as a noble assemblage not bounded narrowly by class, view their elite opponents as self-serving and undemocratic, and seek to mobilize the former against the latter." MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 1 (1995).

ism and civic republicanism. He labels it a tradition of "ascriptive hierarchies."[49]

Thus, a crucial fault line might be drawn between a liberal perspective and the ascriptive-hierarchical perspective, with civic republicanism perhaps residing in between. While the liberal perspective emphasizes individuals and the ideals of relative equality and sameness, the ascriptive-hierarchical perspective emphasizes clearly defined groups or classes of persons, and allows for differential (and subordinating) treatment of those groups or classes.

C. Segmentation Themes, Particular Rights Claims, and Political Community

It is clear that particular-arguments in the context of individual rights claims share strong conceptual affinities with segmentation arguments regarding American society. Common to both are notions of inherent and intractable differences across certain portions of the American polity. Yet what is noteworthy about both particular-arguments and segmentation appeals is that such claims have historically been used to great effect by *both* conservatives and liberals. First, as underscored by Smith's focus on ascriptive hierarchies, segmentation and particular-arguments have, not surprisingly, been used to oppress and subordinate certain minority groups in the past. To take just one example of a particular-argument being used to subordinate a social group, consider this well-known quotation from Justice Bradley's concurring opinion in *Bradwell v. Illinois*.[50] Here, the Court concluded that there was no constitutional obstacle—particularly with respect to the Fourteenth Amendment—to the state of Illinois in refusing to allow women to practice law:

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

49. SMITH, *supra* note 32.

50. 83 U.S. 130 (1873).

> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[51]

At the same time, particular-arguments and appeals to societal segmentation can and have been used by minority groups to question the legitimacy and normative attractiveness of legal arrangements and social conditions that purport to be "consensual" or "fair" for all. Such arguments have been used to powerful effect in challenging entrenched social hierarchies. The example of abortion rights in the preceding Parts speaks to this point, but I have also made the case elsewhere that much of the judicial rhetoric underlying the movement toward greater equality in the context of gender and gay rights in recent decades proceeds from assumptions that seem rather oriented toward segmented views of American society. Within these cases on gender and gay equality, the judicial solicitude for these groups appears to extend only to the protected groups, with no larger society-wide goals seemingly driving the Court's actions toward reform. Indeed, in the Court's discussion of group rights and interests in these cases, its focus has been on the very specific and targeted legal disabilities these groups have suffered. Documenting these disabilities was often a crucial early step in the Court's analysis, and it generally provided the basis for very specific and targeted judicial remedies. Hence group-specific past harms and group-specific legal remedies—themes that resonate with an assumption of a segmented polity—were crucial elements of the arguments in pro-reform judicial opinions on gender and gay equality.[52]

If claims of particularity and segmentation are capable of influencing important legal and political debates over abortion rights, gender equality, and gay equality—and if, in some fashion, they are actually able to help shape legal and political developments toward egalitarian reform—what then is the root of their normative or rhetorical appeal? I hinted at an answer in the preceding Part, but having now introduced the concept of segmentation, let me elaborate upon my answer in greater detail here. The rhetorical appeal of claims of difference among portions of the American polity depends, in a very basic sense, upon the willingness of listeners to acknowledge, consider, and feel sympathy for a range of hardships, obstacles, and social conditions that they may not have personally experienced.

51. *Id.* at 141–42 (Bradley, J., concurring in the judgment).

52. *See* Chinn, *supra* note 31.

This speaks to the presence of a kind of imaginative humility and sympathy among listeners: despite whatever differences may exist in the first-hand experiences and circumstances of individuals across different portions of the polity, these points of difference or segmentation are contained within a common political community that binds all of us together, and that demands a shared sympathy and consideration that can cross those lines of societal segmentation. In short, successful appeals to egalitarian reform based on particular rights arguments are dependent upon the existence of a robust political community: a context where individuals feel bonded to one another in the absence of personal familiarity, common experience, or possibly even a shared set of discrete and specific values.[53]

Still, if particular-arguments and appeals to societal segmentation are dependent upon political community for some significant portion of their political and rhetorical appeal, this begs an obvious follow-up question: What then are the conditions that allow for and facilitate the creation and maintenance of a political community—a political community that is robust enough to not only accommodate difference, but to allow arguments based on difference to generate sympathy toward reform? By way of tentatively working toward an answer, we may start with John Higham's delineation of three forms of unity, or three types of "cohesive structures" that, he argues, have historically helped constitute American society to different degrees. These cohesive structures are types of social glue that have bound groups of individuals together, and they include "primordial unity," defined as "a corporate feeling of oneness that infuses a particular, concrete, unquestioned set of inherited relationships."[54] Within this category, Higham has in mind very localized, specific interpersonal connections firmly rooted within a community defined by location and/or a complex web of family, extended family, neighbor, and friendship relations.[55] Next, he mentions "ideological unity," which Higham defines as "explicit systems of general beliefs that give large bodies of people a common identity and purpose, a common program of action, and a standard for self-criticism."[56] Of particular interest for

53. Benedict Anderson's famous description of national political communities as, in part, "imagined communities" binding individuals together who would never know or meet each other somewhat speaks to this point. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6–7 (1991). Relatedly, Noah Pickus nods to a similar, and more expansive point in stating, "The capacity to enforce rights depends on a sense of community that creates a recognition of such rights and a willingness to sacrifice for their achievement." NOAH PICKUS, TRUE FAITH AND ALLEGIANCE: IMMIGRATION AND AMERICAN CIVIC NATIONALISM 153 (2005).

54. JOHN HIGHAM, HANGING TOGETHER: UNITY AND DIVERSITY IN AMERICAN CULTURE 5 (Carl J. Guarneri ed., 2001).

55. *Id.* at 5–7.

56. *Id.* at 7. The emphasis on ideology as a cornerstone of American political identity is a common theme in the literature. For a prominent statement on this view, see Philip Gleason,

Higham in this regard are two ideologies in particular: American Protestantism and American nationalism (the latter of which, for Higham, constituted the building blocks or the foundational ideas for the political traditions noted above including liberalism and civic republicanism).[57] Finally, perhaps of least relevance for our purposes, Higham also discusses "technical unity" which he defines as "a reordering of human relations by rational procedures designed to maximize efficiency. Technical unity connects people by occupational function rather than ideological faith."[58]

Higham acknowledges that these three forms of unity are hardly exhaustive of all cohesive structures in American history.[59] Indeed, while they are quite useful across a range of contexts and historical eras, none seems to fully capture the kind of unity needed to create or maintain a political community within which the rhetorical appeal of particular-arguments on rights, or appeals to societal segmentation, may be plausible tools for egalitarian reform. To return to the example of abortion rights, I would tentatively propose that the type of underlying social glue needed to facilitate political community in this context—and the ingredient needed for particular-arguments to be rhetorically attractive to defend abortion rights—would be some combination of two key elements: ideology and culture.

The ideology point is easy enough to understand: for a particular-argument on abortion rights to be compelling to a listener, we might generally expect the listener to link such an argument to more abstract notions of fairness or unfairness in relation to other groups, such as men. Indeed, this perhaps helps to explain the common linkage of particular-arguments with comparative arguments within equality-based defenses of abortion rights. An emphasis on the particular is, in some sense, dependent upon comparisons that go beyond the situation at hand.

But I suspect ideology is not enough, because without sufficient concreteness or rootedness in easily recognizable contexts for a listener, abstract appeals to fairness (or liberty, or equality) can only go so far. The second ingredient, culture,[60] may be partly encompassed within Higham's

American Identity and Americanization, *in* HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 32, 56 (Stephan Thernstrom ed., 1980).

57. HIGHAM, *supra* note 54, at 8–14.

58. *Id.* at 14.

59. *Id.* at 5.

60. In the literature on political identity and political community, several notable works have focused on culture as a cohesive or adhesive structure. One of the more prominent arguments in defense of the notion that culture constitutes the core of American political identity is MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION 5–15 (1995), though I suspect Lind's conception of culture may be narrower than what I am suggesting here. In discussing his normative vision of a "postethnic America," David Hollinger emphasizes the importance of civic nationalism as a cohesive force for Americans, hinting at a nationalism based in ideology and in culture (though the emphasis seems to be more on

notion of primordial unity, but it speaks to something broader than personal, concrete relationships tied to a particular place and community. Rather, the power of particular-arguments for some American listeners may be linked to the ability of listeners to imagine a woman facing an unplanned pregnancy, who is an American woman, living in an American community, possessing a background recognizably American, facing the hardships common to many Americans, and possessing the kinds of aspirations that a listener can easily grasp as familiar and American.[61] Hence, in sum, the rhetorical appeal of particular-arguments stems from their ability to convey—to some listeners—specific or unique hardships that plausibly violate accepted legal or political norms for individuals that seem "recognizable" or familiar to the listener. Those women facing unwanted pregnancy are perceived by sympathetic listeners as being part of the same cohesive structure as the listener.

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the former). Hollinger, however, does not elaborate in much detail on the content of this civic nationalism, since his focus is more on developing the postethnic ideal in the context of individual identity. HOLLINGER, *supra* note 9, at 134, 140, 215–16 (2000). Similar to Hollinger, Kenneth Karst also emphasizes "civic culture" as the primary adhesive force in American society, though his emphasis is on ideology. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 361–77 (1986). Finally, Rogers Smith has emphasized "stories of peoplehood" as a crucial adhesive structure in creating and maintaining political community. In this regard, Smith emphasizes the importance of three kinds or types of stories of peoplehood: economic stories, political power stories, and ethically constitutive stories. SMITH, *supra* note 9, at 60. Smith defines ethically constitutive stories as follows: "Such stories proclaim that members' culture, religion, language, race, ethnicity, ancestry, history, or other such factors are constitutive of their very identities as persons, in ways that both affirm their worth and delineate their obligations." *Id.* at 64–65. I suspect that within Smith's delineated categories, the cultural element that I discuss probably falls mostly within this category of an ethically constitutive story—as either a more culturally oriented or a more historically oriented ethically constitutive story. *Id.* at 188–91. Still, there is a difference in focus to Smith's inquiry, relative to my inquiry, that suggests the need for defining adhesive structures beyond his framework for a context such as abortion rights. Consider that for Smith's argument, his emphasis lies in examining the adhesive influence of narratives when the question of political community creation and maintenance is directly under examination by significant portions, or significant members, of the polity. It seems likely that the types of adhesive structures relevant in those contexts may have some differences—perhaps significant, or perhaps only marginal—from the types of adhesive structures that are relevant when, within a given policy or legal context, deep questions of political community definition are more subdued, absent, or distant enough from consideration that they do not prompt sustained attention (as with arguments on abortion rights). Thus, if Smith's focus lies on adhesive structures in contexts of critical junctures or near critical junctures on political membership questions, I suspect my focus lies more in examining adhesive structures in legal and policy contexts where there may be relatively greater equilibrium or stability or inattention on the political membership question among significant portions of the polity.

61. In my example, since I use the adjective "American," I am referencing a listener who views the nation-state as their primary political community. However, the same basic idea outlined above would also seemingly apply for listeners who subscribed to a form of political peoplehood greater than or less than the nation-state. Regardless of whether one felt their primary political community was the global community, or say, their own municipality, the appeal of a particular-argument for listeners has to stem in part from the ability of listeners to find the victim of a given hardship "familiar" enough to seem part of the same (more global or more local) cohesive structure.

While the focus in the preceding paragraphs has been on the ability of particular-arguments to inspire feelings of commonality—or even a form of kinship—between listener and the victim of a hardship, one obviously should not expect particular-arguments to have this result for all audiences, in all contexts. Indeed, one can easily imagine situations where appeals to particularity or segmented interests will inspire indifference or perhaps even aggressive antipathy to the victims of hardship. Again, recall Justice Bradley's comment in *Bradwell* as an illustration of the latter.[62] The receptivity of certain listeners to either applying certain ideological norms to a given situation, or to viewing the victims of a hardship as part of that listener's political community, are variables undoubtedly influenced by a number of contextual factors that one would not expect to be uniform across different rights claims or different appeals to segmentation.

I do suspect that a focus on ideological and cultural unity may help illuminate how the bonds of political community can vary enormously depending upon the context and the groups of individuals involved. A focus on that variability, or a focus on the *relative* cohesiveness between different members of the American polity in different contexts, may be a useful starting point in thinking about the nature of the American political community.

V. CONCLUSION

Universal and particular-arguments in defense of abortion rights each carry distinctive rhetorical and normative appeal. The best evidence of this can be seen in the continued use of both modes of argument within liberty and equality-based legal arguments on abortion. Grasping the rhetorical appeal of particular-arguments seems the more complicated task relative to understanding the attractiveness of universal arguments. Still, a closer look at how particular-arguments function offers a valuable window into further exploration of the nature of American political community.

62. *See* text accompanying *supra* note 51.