On Women's Autonomy: From Muller to Dobbs

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"*My message to women: Do what makes you feel good because there'll always be someone who thinks you should do it differently. Whether your choices are hits or misses, at least they're your own.*"

Michelle Obama

Abstract: This Article studies the way women's autonomy is limited in two contexts: contract and abortion. In cases of both freedom of contract and reproductive freedom, the courts employ a narrow, individualistic notion of autonomy, balanced against other policy considerations. Since both the notion of autonomy and the way it is balanced against competing interests are gendered, women's autonomy is restricted. To better protect women's autonomy, this Article suggests applying a relational and more complex notion of autonomy. Relational autonomy would consider the social relations that constitute women's autonomy—including oppression—and propose ways to restructure these relations to enhance autonomy. Contrary to a freedom-public policy binary, relational autonomy provides a more comprehensive notion of autonomy, enabling consideration of the many conflicting values while not pitting one against the other.

I. INTRODUCTION

Women's autonomy is central to their equality.[1] However, notwithstanding women's achievements, in American law, they do not enjoy full autonomy in parity with men. This Article studies the way women's autonomy is limited in two contexts: contract and abortion. It reviews canonical cases involving women's freedom of contract and reproductive freedom, showing that the same rationales appear in older as well as more recent decisions. It also demonstrates preservation through transformation[2] in the context of women's curtailed autonomy. As this Article illustrates, in both freedom of contract and reproductive freedom cases, the courts employ a narrow, individualistic notion of autonomy, which they balance against other policy considerations. Since both the notion of autonomy and the way it is balanced against competing interests are gendered, women's autonomy is restricted. To better protect women's autonomy, this Article suggests applying a relational, more complex notion of autonomy. Relational autonomy views parties as embedded in relationships rather than as isolated individuals, and as connected rather than separate.[3] Moreover, relational autonomy would consider social context and social relations—including oppression—and propose ways to reconstruct these relations in order to enhance autonomy.[4] Contrary to a freedom-public policy binary that draws a gendered line between competing interests, relational autonomy provides a more comprehensive notion of autonomy, enabling consideration of many conflicting values without pitting one against the other.[5]

Even though abortion and contract may seem to be two unrelated subjects, by examining them together, this Article demonstrates that both are

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[1] Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting) (citations omitted) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022)):

> Women . . . have the talent, capacity, and right 'to participate equally in the economic and social life of the Nation.' Their ability to realize their full potential . . . is intimately connected to 'their ability to control their reproductive lives.' Thus, 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.

"[A] woman's freedom and equality are likewise involved." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 370 (2022) (Breyer, J., dissenting); *see also* Olivia Roat, *Drawing Connections Between "Separate Cubbyholes": Ruth Bader Ginsburg's Multifaceted Approach to Reproductive Rights*, 32 CORNELL J. L. & PUB. POL'Y 63 (2022) (exploring Ruth Bader Ginsburg work linking sex equality and reproductive autonomy as a precondition for women's equal citizenship).

[2] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

[3] *See* discussion *infra* Section IV.A

[4] *See* discussion *infra* Section IV.A

[5] *See* discussion *infra* Section IV.A

underpinned by similar rationales regarding autonomy. Although different legal contexts, both reveal the same problematic notion of autonomy and demonstrate the need for a different analysis of this concept. The issue is not the limited and problematic application of legal doctrines, but, more broadly, a limited and individualistic notion of autonomy.[6] In other words, incorporating reproductive freedom into the discourse on freedom of contract enriches the discussion on women's autonomy in general. Notably, in both *Casey* and *Dobbs*, two cases discussing women's rights to abortion, the Supreme Court referred to *Lochner*, a leading contract law case, when discussing stare decisis.[7] Hence, the intertwining of these two issues was already alluded to by the Supreme Court, albeit in the context of precedent rather than autonomy.

In addition, though the subject of this Article is women's autonomy, it should be noted that men's autonomy is also constrained. Although both the notion of autonomy and the line drawn between autonomy and other interests is gendered in a manner that mainly restricts women's autonomy, the current notion also works to the detriment of men, since they, like women, are relational and their social relations affect their—not only women's—autonomy. Therefore, men also stand to gain from a more complex relational notion of autonomy.[8] In the same manner, while this Article focuses on the gendered notion of autonomy, relational autonomy is also concerned with other social relations and inequalities beyond gender, based, for example, on race, class, and their intersection. As such, relational autonomy would also benefit other minorities, as well as otherwise disadvantaged, disempowered, or marginalized social groups. This Article highlights the gendered components of contracts and abortion; however, both have other social considerations embedded as well.

This Article does not aim to discuss all the ways or reasons women's autonomy is limited. It does present one crucial explanation for women's curtailed autonomy that needs to be addressed in order to empower women and enhance their autonomy—namely, the individualistic and gendered notion of autonomy. There are other explanations for why women have not attained full autonomy. For example, *Dobbs*' holding that there is no constitutional right to have an abortion is based not only on the restriction of women's autonomy, but also on an originalist interpretation of the

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[6] *See, e.g.*, Rachel L. Wagner, *Women's Autonomy in Nondisclosure Agreements for Sexual Misconduct Cases*, 82 MONT. L. REV. 409, 415–16 (2021); Lucy-Ann Buckley, *Ante-nuptial Agreements and "Proper Provision": An Irish Response to* Radmacher v Granatino, 14 IRISH J. FAM. L. 3, 5–6 (2011); Robert Leckey, *Contracting Claims and Family Law Feuds*, 57 UNIV. TORONTO L.J. 1, 10–12 (2007); Meghan Boone, *The Autonomy Hierarchy*, 22 TEX. J. ON C.L. & C.R. 1, 43–44 (2016).

[7] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 861 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022).

[8] Karla Elliott et al., *Understanding Autonomy and Relationality in Men's Lives*, 73 BRIT. J. SOCIO. 571, 573 (2022).

constitution,[9] on the historical account of abortion,[10] democratic principles,[11] and stare decisis.[12] In fact, the dissenting opinion in *Casey*, which affirmed *Roe,* advanced the narrow, individualistic notion of autonomy criticized in this Article. Furthermore, the right to abortion is not only a matter of making one's own autonomous decision but also a matter of control over one's body, privacy, and dignity. In addition to being a legal issue, it is also a political, constitutional, moral, religious, and medical issue, thus further complicating the debate over women's reproductive freedom.[13] Likewise, contract law is applied alongside other areas of law, such as consumer law, employment law, and family law. Therefore, women's autonomy should be addressed not only by contract law but also by other intersecting areas of law. As in the abortion context, women's freedom of contract is a complicated issue that is beyond the scope of this Article. However, highlighting women's autonomy in both contract and abortion cases shows that even cases supporting women's freedom, such as *Roe*, hold a narrow, problematic notion of autonomy. Therefore, women's reproductive and economic autonomy, while an important factor, is but only one component of women's equality. In a similar manner, though also related to autonomy, this Article does not discuss gender equality and gender stereotypes in contract law and abortion law, except as part of the analysis of women's autonomy. They deserve a separate special discussion in both contract law and abortion law.[14] Furthermore, this

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[9] Miranda McGowan, *The Democratic Deficit of* Dobbs, 55 LOY. U. CHI. L.J. 91, 93 (2023); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1129 (2023).

[10] *See generally* Collection, *Doing History After* Dobbs*: Applications, Implications, and Critiques of* Dobbs*'s Historical Methodology*, 133 YALE L.J. F. (2023–24) (criticizing the historical account in *Dobbs*); Reva B. Siegel, Commentary, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901 (2023) (criticizing the historical account in *Dobbs*); Mary Ziegler, *Intended Consequences: The Fall of* Roe v. Wade, *in* RESEARCH. HANDBOOK ON FEMINIST POLITICAL THOUGHT 141 (Mary Caputi & Patricia Moynagh eds., 2024) (criticizing the historical account in *Dobbs*); Mary Ziegler, Essay, *Bad Effects: The Misuses of History in* Box v. Planned Parenthood, 105 CORNELL L. REV. ONLINE 165 (2020) (criticizing the historical account of Justice Thomas in another abortion case).

[11] *See generally* Katherine Shaw & Melissa Murray, Dobbs *and Democracy*, 137 HARV. L. REV. 728 (2024) (arguing that while the *Dobbs* majority emphasized democratic rhetoric, its conception is inconsistent and unlimited).

[12] *See generally* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023) (discussing the reliance interests and the precedent about precedent in *Dobbs*); Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99 (2023) (challenging the claim in *Dobbs* that overturning *Roe v. Wade* is like overturning *Plessy* in *Brown v. Board of Education*); Mary Ziegler, *Unsettled Law: Social-Movement Conflict, Stare Decisis, and* Roe v. Wade, 54 CONN. L. REV. 457 (2022) (discussing stare decisis in abortion jurisprudence).

[13] *See generally* Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics after* Dobbs, 76 SMU L. REV. 27 (2023) (exploring abortions politics after *Dobbs*).

[14] For gender equality and gender stereotypes in contract law, *see generally* Orit Gan, *Anti-Stereotyping Theory and Contract Law*, 42 HARV. J.L. & GENDER 84 (2019) (applying anti-stereotyping theory to contract law). For gender equality and gender stereotypes in abortion

Article is limited to the context of contract and abortion, while acknowledging that women's autonomy in other settings, such as criminal law, constitutional law, and health law, is also limited.

There is rich scholarship on relational autonomy;[15] however, it has only been sporadically applied to contracts.[16] There is rich scholarship on contractual relations,[17] but it has only recently addressed their gendered aspects.[18] There is rich literature on autonomy as a basic value in contract law,[19] but it does not specifically address women's autonomy.[20] There is rich

law, *see generally* Paula Abrams, *Abortion Stigma: The Legacy of* Casey, 35 WOMEN'S RTS. L. REP. 299 (2014) (exploring abortion stigma).

[15] *See generally* Genevieve Mann, *A Good Death: End-of-Life Lawyering Through a Relational Autonomy Lens*, 98 WASH. L. REV. 1259 (2023) (discussing relational autonomy in end-of-life planning); Eniola Salami & Bonnie Lashewicz, *More Than Meets the Eye: Relational Autonomy and Decision-Making by Adults with Developmental Disabilities*, 32 WINDSOR Y.B. ACCESS JUST. 91 (2015) (discussing relational autonomy and decision making of women with developmental disabilities); Tally Kritzman-Amir, *Asylum-Seekers are not Bananas Either: Limitations on Transferring Asylum-Seekers to Third Countries*, 43 MICH. J. INT'L L. 699 (2022) (applying relational autonomy to international migration law); Stephen M. Feldman, *Postmodern Free Expression: A Philosophical Rationale for the Digital Age*, 100 MARQ. L. REV. 1123 (2017) (discussing relational autonomy, self-emergent and free expression); Roxana Banu, *A Relational Feminist Approach to Conflict of Laws*, 24 MICH. J. GENDER & L. 1 (2017) (applying relational autonomy to conflict of laws theory); Margaret Isabel Hall, *Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability*, 58 MCGILL L.J. 61 (2012) (advocating replacing mental capacity construct based on liberal autonomy with a vulnerability construct based on relational autonomy); JONATHAN HERRING, RELATIONAL AUTONOMY AND FAMILY LAW (2014) (recommending using relational autonomy in family law rather than traditional autonomy).

[16] *See generally* Lucy-Ann Buckley, *Relational Theory and Choice Rhetoric in the Supreme Court of Canada*, 29 CAN. J. FAM. L. 251 (2015) (discussing relational autonomy approach in Supreme Court of Canada decisions on martial property and spousal support agreements).

[17] *See generally* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980) (developing a relational theory of contract); *see also* IAN R. MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001) (collecting essays on relational theory of contract).

[18] For a feminist relational theory of contract, *see generally* Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45 J. L. & SOC'Y 617 (2018) (applying feminist relational contract theory to family property agreements) and Sharon Thompson, *Using Feminist Relational Contract Theory to Build upon Consentability: A Case Study of Prenups*, 66 LOY. L. REV. 55 (2020) (applying feminist relational contract theory to prenups).

[19] *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017) (developing a choice theory or contract which is a liberal theory with autonomy at its core); *see also* Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 LAW & PHIL. 213 (2021) (developing choice theory of contract emphasizing that autonomy is the telos of contract and its grounding principle); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 112 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) (developing choice theory of contract emphasizing that autonomy is the telos of contract and its grounding principle); Hanoch Dagan & Michael Heller, *Freedom, Choice, and Contracts*, 20 THEORETICAL INQ. L. 595 (2019) (discussing freedom of contracts: a liberal theory of contracts grounded in contractual autonomy).

[20] Though Dagan is committed to relations, relational justice, and substantive equality, he does not address women's autonomy.

scholarship on feminist analysis of contract law,[21] but it does not directly discuss autonomy. There is also rich scholarship on relational feminism,[22] but it addresses contract law only sporadically.[23] This Article is inspired by and builds on this scholarship and makes the connection between contract and abortion, as well as between autonomy, relations, social inequality, and gender. It places the spotlight on women's autonomy in contract law and abortion law from a feminist relational perspective.

Part II explores women's contractual autonomy, discussing how women de jure enjoy freedom of contract, but then explores how this freedom is limited de facto. Part III explores women's reproductive autonomy, analyzing how women's reproductive freedom is limited in a manner similar to their contractual freedom. Following the parallel stories of women's curtailed economic and reproductive autonomy, Part IV suggests an alternative notion of autonomy designed to enhance women's autonomy in both these contexts.

II. CONTRACT LAW

This Part examines how women's autonomy is limited under contract law. It begins by describing how, compared to the past when women could not contract with others, contract law provides women with some economic autonomy. Yet, at the same time, women's autonomy remains limited. Next, it describes the individualistic notion of autonomy and how public policy is at odds with freedom of contract. Both the gendered balancing of interests

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[21] For literature discussing feminist analysis of contract law, *see generally* LINDA MULCAHY & SALLY WHEELER, FEMINIST PERSPECTIVES ON CONTRACT LAW (2005) (compiling works addressing how contract law has contributed to the exclusion of women from law and legal discourse), Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247 (1999) (arguing that "contract law is as susceptible to 'male bias' or sexism as any other area of the law"), Hila Keren, *Feminism and Contract Law*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 406 (Robin West & Cynthia Grant Bowman eds., 2019) (discussing the slow proliferation of feminist intervention in contract law), Martha M. Ertman, *Contract's Influence on Feminism and Vice Versa*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 532 (Deborah L. Brake et al. eds., 2023) (discussing influential work relating to contract law and feminism), and Mairead Enright, *Contract Law*, *in* GREAT DEBATES IN GENDER AND LAW 1 (Rosemary Auchmuty ed., 2018) (providing considerations intended to disrupt the messages typically associated with artificial contract law doctrines).

[22] For literature discussing feminist relational theory, *see generally* Jennifer Nedelsky, *A Relational Approach to Law and Its Core Concepts*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 57 (Deborah L. Brake et al. eds., 2023), Christine M. Koggel et al., *Feminist Relational Theory*, 18 J. GLOB. ETHICS 1, 1–3 (2022), and Robin West, *Relational Feminism and Law*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 65 (Robin West & Cynthia G. Bowman eds., 2019).

[23] For literature discussing the intersection of feminist relational theory and contract law, *see generally* Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid - Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791 (1991) (applying relational theory to contract law), Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (discussing marriage as relational contract), and John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93 (2000) (applying relational contract theory to contracts between intimates).

and the notion of individualistic autonomy impede women's freedom of contract.

A. Women's Autonomy

Autonomy is a fundamental principle of contract law.[24] Scholars have suggested that a contractual regime would advance women's equality, especially in the family sphere, where moving from coverture and status to contract opens the door for new economic opportunities for women.[25] Under coverture, married women could not contract with their husbands or anyone else since they were denied legal identity.[26] Therefore, contract law offered great economic improvement for women by permitting them to sell, buy, and work, for example. The ability to negotiate the terms of a marital contract that deviated from marital gender roles also promoted women's equality.[27] Women's economic independence gives them greater bargaining power negotiating with their intimate partners. Some feminists have alluded to contract law's gendered biases, which make its application to women problematic.[28] Notwithstanding this feminist criticism, scholars have argued that the ability to contract is an important tool for women's equality,[29] and that women should be able to exercise their right to contract to advance their autonomy and to achieve economic independence. In fact, their participation in the job market and in the market economy at large is based on their ability to contract.[30] Thus, rather than being economically dependent on men or the state, women have access to capitalist society. Also, rather than the law perceiving the family as a unit, it is viewed as a collective of individuals with

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[24] Hanoch Dagan, *Autonomy and Contracts*, *in* RESEARCH HANDBOOK ON THE PHILOSOPHY OF CONTRACT LAW 43 (Mindy Chen-Wishart & Prince Saprai eds., 2025).

[25] *See* Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982) (discussing the benefits of marriage contract); *see also* Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J. L. & PUB. POL'Y 121 (1985) (supporting marital contracts); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 133–34 (2004).

[26] 1 WILLIAM BLACKSTONE, COMMENTARIES *121, *442–45.

[27] Freedom of contract advances equality not only for women but also for nontraditional families such as same-sex families. *See* Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027 (2015); Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But not Hell Either*, 73 DENV. U. L. REV. 1107 (1996); MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES (2015).

[28] *See generally* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988) (criticizing social contract theory for neglecting the sexual contract).

[29] *See generally* Susan Moller Okin, *Feminism, the Individual, and Contract Theory*, 100 ETHICS 658 (1990) (criticizing Carole Pateman's book, "The Sexual Contract"); Ertman, *supra* note 21 (discussing pro-contract and the anti-contract feminist views).

[30] Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV. 1079, 1079 (2002).

different interests and preferences, which may utilize a contract to compromise on their differences.[31] Women's right to contract seems obvious today, though feminists fought long and hard to gain this right. The following presents examples (rather than an exhaustive survey) of court decisions that support the importance of contract law for women's economic autonomy.

In the early twentieth century, in *Muller v. Oregon*, the Supreme Court declared that

> women, whether married or single, have equal contractual and personal rights with men . . . [I]n the matter of personal and contractual rights[,] they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers.[32]

Thus, more than a decade before women received the right to vote, the court made a progressive statement for its time, though stating the now-obvious.

In *Marvin v. Marvin*, the Supreme Court of California declared that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[33] *Marvin* dealt with agreements between unmarried partners, and in the 1970s, the court took for granted that women could enter into enforceable contracts with their partners. Recent decisions treat agreements between intimate partners as a given and even encourage them, without acknowledging that this was not the case in the past.[34]

More than a decade after *Marvin*, in another case dealing with an agreement between unmarried partners, this time a premarital relationship, the Supreme Court of Pennsylvania stated,

> [w]e are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what *they* regard as an acceptable distribution scheme for their property. A court should not ignore the parties' expressed intent by proceeding to determine whether a prenuptial agreement was, in the court's view, reasonable at the time of its inception or the time of divorce. These are exactly the sorts of judicial determinations that such

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[31] *See* Pamela Laufer-Ukeles & Shelly Kreiczer-Levy, *Family Formation and the Home*, 104 KY. L. J. 449, 450 (2016) (criticizing traditional conceptions of the family and discussing a pluralistic conception based on home-sharing).

[32] Muller v. Oregon, 208 U.S. 412, 418 (1908).

[33] Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976).

[34] *See, e.g.*, Thorne v. Kennedy, [2017] HCA 49, [17] (Austl.).

agreements are designed to avoid.[35]

Gone are the days when courts found the idea of spouses contracting with one another repugnant and appalling.[36] Furthermore, with regard to women's freedom to contract, the court held that "the law has advanced to recognize the equal status of men and women in our society. Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded."[37] At the end of the twentieth century, the court's argument was not that enabling women to contract would advance their equality, but the other way around—that because women enjoy autonomy and equality, they contract with their husbands on equal terms.[38] The court not only ruled that agreements between intimate partners are acceptable; it also assumed the social background of equality and, therefore, concluded that these contracts are unproblematic and enforceable.[39]

However, as discrimination persists, enforcing contracts can be problematic for women. As Justice Papadakos commented in his concurring opinion of the same Pennsylvania Supreme Court case,

> [i]f you want to know about equality of women, just ask them about comparable wages for comparable work. Just ask them about sexual harassment in the workplace. Just ask them about the sexual discrimination in the Executive Suites of big business. And the list of discrimination based on sex goes on and on.[40]

This comment suggested that women have not yet achieved full equality, which is sadly true even today, over thirty years later. That is, applying contract law with no regard for social inequalities perpetuates them and leaves women behind. What's more, while supporting women's freedom of contract, these cases also planted the seeds for limiting this freedom, as will be discussed in the following Sections.

B. Individual and Gendered Autonomy

The previous Section discussed the courts' support of women's freedom of contract. However, the notion of freedom of contract in these cases is

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[35] Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990).

[36] Balfour v. Balfour, [1919] 2 KB 571 at 578–80 (Eng.); *see also* Miller v. Miller, 35 N.W. 464, 464 (Iowa 1887), *aff'd*, 42 N.W. 641 (Iowa 1889) (holding that an agreement between husband and wife was unenforceable).

[37] *Simeone*, 581 A.2d at 165 (citation omitted).

[38] *Id.*

[39] *Id.* at 165–67.

[40] *Id.* at 168 (Papadakos, J., concurring).

narrow[41]—only consensual agreements would be enforced,[42] parties are viewed as self-sufficient and self-determined, and courts will not intervene in the choices and preferences as written in the agreement, even if its enforcement would lead to an inequity.[43] It assumes that the parties are rational agents who entered into the contract of their own free will to advance their interests.[44] That is, they chose to contract, and the contract reflects their preferences and interests. Therefore, the court should accept the contract as is, defer to the parties' wishes, and not police its fairness or intervene based on its own values. The terms of the contract are set by the parties, with the courts' intervention only in extreme cases.[45] As long as there are no vitiating factors and no defenses such as duress, undue influence, misrepresentation, or mistake, the court will enforce the contract.[46] Policing the contract, whether procedurally or substantively, is reserved for marginal cases, as the above defenses are narrow and limited. Furthermore, mandatory rules are reserved for special contracts, such as consumer law, and are therefore the exception to the rule.[47] Mandatory rules are also reserved for specific contexts, thus leaving general contract law with the freedom-of-contract rule and default rules. Contract law takes social background as a given, and only in extreme cases (such as defenses and mandatory rules) will these be considered. Though we have progressed from classic contract law, neo-liberal law today still holds an individualistic, limited view of contractual liberty.[48] Thus, even though *Lochner*,[49] which focused on protecting the freedom of contract against the state's intervention, was overruled, courts still maintain

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[41] For further discussion of the limited nature of the freedom of contract, see generally Ellen Gordon-Bouvier, *The Open Future: Analysing the Temporality of Autonomy in Family Law*, 32 CHILD & FAM. L. Q. 75 (2020) (pointing to the individualistic and gendered notion of autonomy in family law); ANNA HEENAN, AUTONOMY, CARE AND FAMILY LAW (2024) (criticizing the individualistic and gendered notion of autonomy in family law); Sharon Thompson, *Pre-nuptial Agreements – A Good Route to Autonomy?*, 2024 FIN. REMEDIES J. 163 (2024) (criticizing the individualistic and gendered notion of autonomy in prenuptial agreements); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983 (2018) (criticizing the tension between autonomy and dependency in family law).

[42] For further discussion of consent and autonomy, see NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 74–81 (2019).

[43] *See* sources cited *supra* note 41.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Gerhard Wagner, *Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights*, 3 ERASMUS L. REV. 47, 47 (2010).

[48] David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 13–14 (2014) (explaining neoliberalism).

[49] Lochner v. New York, 198 U.S. 45, 53 (1905), *overruled by* Day-Brite Lighting, Inc. v. Missouri 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

a Lochnerian view of freedom of contract.[50]

In addition to the individualistic notion of autonomy, contract enforceability is laden with gender stereotypes. The following demonstrates how courts' decisions on whether to enforce a contract are gendered. Unmarried couples can enter into contracts; however, they are selectively enforced. As Albertina Antognini showed, the right to contract in these cases is limited by coverture thinking:

> [P]rinciples underlying coverture are alive and well in courts' current treatment of nonmarital couples. Coverture's influence in the case law is twofold: courts addressing property distribution outside of marriage rely on doctrines that have their roots in coverture and, in the process, actively preserve and perpetuate the principles undergirding coverture in the nonmarital realm.[51]

Some nonmarital agreements are not enforced for lack of consideration, since domestic work, care work, and love and affection do not qualify as consideration.[52] Furthermore, the court sees these benefits as gratuitous, performed altruistically out of love and devotion, with no intention of receiving anything in return.[53] Thus, coverture, though officially dead, still limits women's freedom of contract. Moreover, though seemingly gender neutral, these contracts mainly disadvantage women. Women have a hard time enforcing promises made to them since courts indirectly apply these principles of coverture, and these contracts thus fall outside the world of enforceable contracts. When women sue for breach of contract based on the understanding that their partner made an enforceable promise to them, the courts deny their claim based on stereotypical gender roles. Therefore, while women have the right to contract with their partners, in practice, these promises are unenforceable under contract law.[54] This also holds true for married women. They are also denied enforcement of the promises made to them by their husbands based on the same limited and gendered notion of consideration, which does not include care work and housework.[55] Old-day stereotypes and gender roles still prevail, limiting women's ability to contract

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[50] Cantor Fitzgerald, L.P. v. Ainslie, 312 A.3d 674, 676 (Del. 2024).

[51] Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2144–45 (2019)*; see also*, Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 78–80 (2021) [hereinafter Antognini, *Nonmarital Contracts*]; Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 9 (2017).

[52] Antognini, *Nonmarital Contracts*, *supra* note 51, at 102.

[53] *Id.*

[54] *See, e.g.*, Williams v. Ormsby, 966 N.E.2d 255 (Ohio 2012) (holding a cohabitation agreement unenforceable for lack of consideration).

[55] *See, e.g.*, Borrelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993) (holding a marital agreement unenforceable for lack of consideration).

with their spouses.

Stereotypical thinking is present not only when women wish to enforce the promises made to them, but also when they wish to avoid such enforcement. Take, for example, the *Arthur Murray* cases where customers, most of them women, wished to rescind the contracts they entered into with a dance studio to provide dancing lessons.[56] Debora Threedy showed that courts employ gender stereotypes when rescinding these contracts.[57] The women in these cases got out of their contracts with the dancing studio and received their money back as they wished.[58] However, this came at the price of perpetuating gender stereotypes. They were portrayed as old, feeble-minded women whom the studio swept off their feet, and as women who did not really know what they were signing, because they were under the influence of the studio.[59] Therefore, they needed to be saved from their hasty deeds. They were not really autonomous contract parties, and their signatures came with limitations. For the plaintiffs, this was a victory. However, for women more generally, the decisions meant limiting their right to contract based on gendered thinking. Threedy also highlighted the differences between men and women plaintiffs.[60] Even when the contract with a male dancer was rescinded, the court still granted him some degree of agency, more than it did in comparable cases of women dancers.[61] That is, agency, autonomy, and freedom were gendered. Furthermore, the cases seemed to portray women as emotional rather than rational, which the court determined impeded their ability to evaluate their options and act wisely, thereby denying their autonomy.

The doctrine of unconscionability is also riddled with gender (and race) stereotypes. The canonical case of *Walker-Thomas* is an example.[62] There, the court dealt with a one-sided consumer contract between a company and a poor African-American woman.[63] Although the court held that the predatory consumer contract was unconscionable and therefore unenforceable,[64] this portrayed poor African-American single mothers on welfare as not being a

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[56] *See, e.g.*, Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 907–08 (Fla. Dist. Ct. App. 1968).

[57] Debora L. Threedy, *Dancing around Gender: Lessons from* Arthur Murray *on Gender and Contracts*, 45 WAKE FOREST L. REV. 749, 767 (2010).

[58] *See, e.g.*, *Vokes*, 212 So. 2d at 909.

[59] Threedy, *supra* note 57, at 762.

[60] *Id.* at 766.

[61] "[H]e is portrayed as an investor making decisions to further his self-interest, not as the pawn of unscrupulous dance studio owners, as in the case of the female plaintiffs." *Id.*

[62] *See generally* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (stating that a contract to purchase household items from a furniture store is unconscionable and unenforceable).

[63] *See id.* at 447.

[64] *Id.* at 450.

real party to the contract. Women like Ms. Williams have an exception carved out for them, while others are relegated to the enforceable contracts rule. Just as in the *Arthur Murray* cases, though Ms. Williams benefited from this ruling, the case perpetuates gender and race stereotypes.[65] As Amy J. Schmitz argued, consumer contracts are gendered.[66] Since freedom of contract means enforcing contracts, to rescind a contract, women need to show that they are not a competent, autonomous party. Freedom of contract contradicts norms of fairness and other policy considerations; therefore, when the court refuses to enforce a contract for policy considerations, it diminishes the right to contract. As demonstrated in the *Walker-Thomas* case, the unconscionability doctrine is not neutral, but rather applied based on gender and racial stereotypes.[67] In addition to the individualistic notion of autonomy, the next Section also discusses balancing freedom of contract against public policy.

C. Freedom v. Public Policy

Courts view freedom and public policy as competing, even contradictory, values that must be balanced, thereby limiting women's freedom of contract. Balancing freedom and these other "competing interests" inherently curtails autonomy. That is, as freedom of contract means contract enforcement, rescinding a contract on public policy grounds means a lack of autonomy. Thus, a simplistic notion of contractual autonomy limited to contract enforcement, combined with a paternalistic protectionist notion of public policy, results in overriding autonomy in the name of public policy. As a result of this binary approach, the parties lose their autonomy if they want to enjoy public policy protection.

The court's balancing of these competing interests is gendered, as demonstrated by the way it sets the boundaries between the rule of freedom of contract and the public policy exception to it. Freedom is given an individualistic, narrow meaning, and as public policy is paternalistic, it perpetuates gender stereotypes of women as incapable of making autonomous decisions. I do not argue for absolute and unlimited freedom,

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[65] *See* Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Co., 3 TEMP. POL. & CIV. RTS. L. REV. 89, 90 (1993); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 305 (1994); Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 33–35 (2013); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 927–29 (1997).

[66] *See generally* Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J. L. & GENDER 437 (2013) (emphasizing empirical data suggesting gender differences in contract outcomes, interests and behaviors); s*ee also* Jim Hawkins, *Female Perspectives in Commercial and Consumer Law*, 34 COLUM. J. GENDER & L. 1 (2016) (discussing commercial targeting of women for deceptive or misleading contracts); Emma Caterine, *A Fresh Start for a Women's Economy: Beyond Punitive Consumer Bankruptcy*, 33 BERKELEY J. GENDER L. & JUST. 1 (2018) (arguing that certain bankruptcy provisions perpetuate gender stereotypes).

[67] *See* sources discussing the racial and gender aspects of the case *supra* note 65.

nor for a libertarian notion of freedom. Rather, Part IV will show that the relationship between freedom and other values is not of one versus the other but rather more complex and nuanced. The argument is not intended to state the obvious (balancing freedom of contract against public policy limits freedom of contract), but rather to call for more sophisticated interaction, rather than competition, between different values.[68] The following demonstrates how courts' pitting of freedom against other countervailing values works to the detriment of women's autonomy.

In the *Muller* case, which discussed whether a state statute limiting the working hours of employees was constitutional, Justice Brewer stated that women have the right to contract on par with men.[69] Three years earlier the court celebrated the right to contract in the landmark *Lochner* case which focused on the constitutionality of a similar statute limiting employees' working hours, stating that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution . . . ."[70] Distinguishing *Lochner* from *Muller*, Justice Brewer generally stated that

> the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract.[71]

Applying this general dictum, the court held that public policy in this case outweighed the right to contract.

> Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real

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[68] For a discussion of balancing between freedom of contract and substantive justice see generally, Rebecca Stone, *Putting Freedom of Contract in Its Place*, 16 J. LEGAL ANALYSIS 94 (2024) (developing a rights-based conception of contract law).

[69] Muller v. Oregon, 208 U.S. 412, 418 (1908).

[70] Lochner v. New York, 198 U.S. 45, 53 (1905), *overruled by* Day-Brite Lighting, Inc. v. Missouri 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). For a recent Lochner conception see Cantor Fitzgerald, L.P. v. Ainslie, 312 A.3d 674, 676 (Del. 2024) ("The courts of this State hold freedom of contract in high—some might say, reverential—regard. Only 'a strong showing that dishonoring [a] contract is required to vindicate a public policy interest even stronger than freedom of contract' will induce our courts to ignore unambiguous contractual undertakings") (quoting ev3, Inc. v. Lesh, 103 A.3d 179, 181 n.3 (Del. 2014)).

[71] *Muller*, 208 U.S. 412, 421 (1908).

> equality of right. . . . [L]egislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all . . . .The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.[72]

Muller and *Lochner* reflect the different attitudes towards the autonomy of women and men. *Muller* blatantly distinguished *Lochner* based on the assumed differences between the sexes.[73] However, the only relevant difference between the cases was the gender of the employees.[74] I am not addressing the correct balance between liberty of contract and the protection of employee health, or whether *Lochner* was right in preferring the former or *Muller* was right in preferring the latter, but the mere assumption that these values conflict is gendered. The focus is on the pitting of one against the other and the need to balance between them.[75] In the process of balancing

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[72] *Id.* at 422–23.

[73] *Compare* Muller v. Oregon, 208 U.S. 412 (1908), *with* Lochner v. New York 198 U.S. 45 (1905), *overruled by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[74] Gan, *supra* note 14, at 99–100.

[75] This binary still holds true today. *See, e.g.*, Cantor Fitzgerald, L.P. v. Ainslie, 312 A.3d 674 (Del. 2024) (weighing freedom of contract against a variety of state public policy interests).

these values, two similar cases, both issued around the same time, favored men's freedom of contract while paternalistically limiting women's freedom. Thus, a comparison of these two cases shows how the freedom-public policy binary was balanced in a gendered manner.[76] *Muller* is, of course, anachronistic, reflecting attitudes prevalent in the "old days," and should be read in the social context of the early twentieth century when it was decided. However, the setting of a seemingly gender-neutral right to contract rule and a gendered public policy exception is apparent in modern cases as well, as shown in the following analysis of *Marvin v. Marvin* and *In re Baby M*.

In *Marvin v. Marvin* the Supreme Court of California carved out an exception to nonmarital agreements.[77] According to the court, unmarried couples may enter into enforceable contracts. However, "a contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services."[78] The parties "cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason."[79] Even though it uses gender neutral language, the exclusion of illicit sex from the doctrine of consideration has a disparate impact on women.[80] And while it supposedly does not use gendered language, as in *Muller*, prostitution is nonetheless gendered. Excluding the sexual aspect of the nonmarital relationship—or sexual exceptionalism—limits the enforcement of nonmarital agreements mainly for women.[81] Though not as explicit as *Muller*, the *Marvin* court set the freedom-public policy dichotomy in a gendered manner to the detriment of women. *Marvin* is still good law and is cited by courts in California and other states.[82]

In *Baby M*, the famous surrogacy case, the court held that a surrogacy agreement is contrary to public policy.

> The surrogacy contract is based on, principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child;

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[76] Gan, *supra* note 14, at 99–100.

[77] *See generally* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (explaining that nonmarital partners may contract so long as it does not rest upon consideration of sexual services).

[78] *Id.* at 112 (emphasis omitted).

[79] *Id.* at 116.

[80] Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807, 1854 (2022).

[81] *Id.* at 1810.

[82] *See, e.g.*, Frederico v. Sullivan, No. FSTCV166029399S, 2018 WL 1137582, at *3 (Conn. Super Ct. Feb. 2, 2018) (referencing *Marvin* in analyzing the existence of an enforceable contract); Sass v. Cohen, 477 P.3d 557, 561, 573 (Cal. 2020) (recognizing *Marvin* as a ground against enforcing a contract).

> it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money. Beyond that is the potential degradation of some women that may result from this arrangement. . . . [T]he harmful consequences of this surrogacy arrangement appear to us all too palpable.[83]

According to the court, the surrogacy agreement set custody of a child regardless of the best interests of the child and destroyed the birth mother's right as a mother.[84] Furthermore, the court found the birth mother's consent to surrender the child was problematic, and her right could not be sold for money.[85] Therefore, the surrogacy agreement was unenforceable.[86] As in *Marvin*, this exception to the surrogate mother's freedom of contract is not gender neutral. As only women serve as surrogate mothers, and there are no comparable surrogate fathers, this has a disparate impact on women. Furthermore, surrogacy perpetuates gender roles and the patriarchal family because although surrogacy relates to parents in general, it mainly relates to motherhood. Two comments on this case are due. First, today, surrogacy agreements are enforceable contracts.[87] Second, there are good reasons for enforcing such contracts, as well for not enforcing them. In fact, there is a feminist debate regarding surrogacy.[88] Some feminists have maintained that women selling their reproductive services is empowering and economically beneficial to women.[89] While reproductive labor is usually performed for free, surrogate mothers are paid while helping childless couples. Other feminists have argued that surrogacy is abusive because poor women are coerced into surrogacy due to financial constraints, because surrogates are subject to predatory one-sided contracts that do not protect their interests, and because they are poorly paid and are abused by surrogacy agencies.[90]

My focus here is not on the case result—that is, whether the agreement is enforced or not—but on the analysis of the balancing between freedom of contract and public policy. It is important to note that both the pro-surrogacy

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[83] Matter of Baby M, 537 A.2d 1227, 1250 (N.J. 1988).

[84] *Id.* at 1252–53.

[85] *Id.* at 1251–52.

[86] *Id.* at 1257.

[87] Antognini & Appleton, *supra* note 80, at 1829.

[88] Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 717–18 (2003); Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1077 (2014); Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 392 (2012).

[89] Munyon, *supra* note 88, at 725.

[90] London, *supra* note 88.

and anti-surrogacy camps assume the need to balance between competing interests. That is, they assume that contractual autonomy conflicts with other important interests. Regardless of whether public policy outweighs liberty of contract, I point to the mere notion that these are countervailing values that need to be balanced against one another. Even if surrogacy agreements are enforced, the public policy exception may work to women's detriment. More generally, even if in some cases public policy protects women, justifying the unenforceability of the contract, it comes at a price of disadvantaging women's autonomy. Since it is structured as freedom versus other considerations, assigning more weight to public policy may appear to favor women, but in fact curtails their freedom.[91] Because it is structured around balancing conflicting values, protecting women under public policy will inevitably mean limiting their freedom and preventing their contracts from being enforced. Even if they win on the public policy front, their autonomy is diminished.[92]

A similar example is the case of non-disclosure agreements (NDAs) shielding sexual harassment. These NDAs are usually enforced, unless they offend public policy. For example, a settlement agreement with an employee prohibiting her from aiding the Equal Employment Opportunity Commission in investigating sexual harassment charges is void as against public policy.[93] The Speak Out Act makes pre-dispute NDAs unenforceable in sexual harassment and sexual assault cases.[94] As in the previous example of surrogacy agreements, the issue of sexual harassment is inherently gendered. Furthermore, failing to enforce the contract protects women's interests. However, since contract law is structured in binary terms—freedom of contract versus public policy—it is paternalistic protection that curtails women's freedom of contract. Though advancing the eradication of sexual harassment, it comes at a price of signaling women as needing special protection of the law, unlike men who sign an NDA. NDAs may have some advantages for women, such as saving time and money for litigation and maintaining their privacy, but persistent disadvantages.[95] Therefore, both enforcing and not enforcing the contract negates a nuanced contextual approach.

The same holds true for the Ending Forced Arbitration of Sexual Assault

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[91] *See, e.g.*, Thorne v. Kennedy [2017] HCA 49 (Austl.) (refusing to enforce a prenuptial agreement because of unconscionable conduct and undue influence); Royal Bank of Scotland v. Etridge [2001] UKHL 44, [53]–[61], (appeal taken from Scot.) (refusing to enforce a surety agreement with the bank because of undue influence).

[92] *See generally* Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111 (2010) (discussing the problematic balance between women's autonomy and the state's interests).

[93] E.E.O.C. v. Astra U.S.A. Inc., 94 F.3d 738, 747 (1st Cir. 1996).

[94] Speak Out Act, S. 4524, 117th Cong. § 4(a) (2022).

[95] Orit Gan, *Contract Law, Equality and the State*, 72 CLEV. ST. L. REV. 889, 900–02 (2024).

and Sexual Harassment Act.[96] This statute voids pre-dispute arbitration agreements regarding sexual harassment or sexual assault disputes.[97] Again, not enforcing such arbitration agreements protects women's rights. However, this protection comes at a price. As in the *Marvin* example, the argument here is against binary thinking and gendered line-drawing and calls for a more complex notion of autonomy and its relation to other values. Autonomy is gradual and relative, evolving and changing, and therefore a binary of either an individual with full autonomy or a powerless victim is ill-suited to describe its complexity.

The freedom not to contract—that is, refusing to enter into a contract—is also gendered, since women (and also minorities) are denied service because of their identity.[98] Recent Supreme Court decisions dealt with businesses denying services to same-sex couples.[99] Though the Supreme Court did not frame it as such, the result is that the business's right to refrain from contracting trumped the consumer's right not to be discriminated against. Examined through the eyes of binary thinking, the Supreme Court's decisions favor the freedom of the business over other values—like equality. The last Part of this Article suggests a more complex balance among several values, such as property rights, religious freedom, and artistic freedom, rather than balancing only between freedom of contract and equality.

III. ABORTION LAW

After telling the story of women's autonomy through the lens of contract law, I now turn to the parallel story of women's reproductive freedom. This Part examines how women's autonomy is limited under abortion law, using the same rationales used to limit their freedom of contract as explored in the previous Part. Though women's right to abortion was recognized, this was based on an individualistic notion of autonomy and was placed at odds with the state's interests.

A. Women's Autonomy

As in the contract context, scholars emphasize that women's control over their reproduction is important for their equality.[100] Women's right to

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[96] 9 U.S.C. § 402 (2022).

[97] *Id.*

[98] *See generally* Hila Keren, *Beyond Discrimination: Market Humiliation and Private Law*, 95 U. COLO L. REV. 87 (2024) (discussing market humiliation); Hila Keren, *Market Humiliation*, 56 LOY. L.A. L. REV. 565 (2023) (discussing market humiliation and proposing market citizenship as a solution).

[99] *See generally* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018) (addressing a refusal to sell a wedding cake for a gay couple); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (addressing a refusal to create websites for same-sex weddings).

[100] *See generally* Rosemary Nossiff, *Gendered Citizenship: Women, Equality, and Abortion Policy*, 29

have an abortion is crucial for their equal civil, political, economic, and labor participation. In fact, even the early suffragettes demanded that women have reproductive control.[101] The following are examples (rather than an exhaustive survey) of court decisions that viewed women's reproductive rights as important for their autonomy.

In *Roe v. Wade* the Court recognized that a woman's personal liberty to decide whether to abort her child is protected by the Constitution.[102]

> 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 broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[103]

Though it was framed as a right to privacy rather than equality, it protected women's right to make their own reproductive decisions.[104] However, this right is not absolute. "[T]he right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[105] As Justice Ginsburg explained in her dissenting opinion in *Gonzales*, women's reproductive freedom is important for women's equality.[106]

> Women, it is now acknowledged, have the talent, capacity, and right 'to participate equally in the economic and social life of the Nation.' Their ability to realize their full potential . . . is intimately connected to 'their ability to control their reproductive lives.' Thus, legal challenges to undue

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NEW POL. SCI. 61 (2007) (analyzing abortion policy and showing that a politics of motherhood conflicts with women's rights to full citizenship); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160 (2012) (discussing abortion right as an equality right); Mary Ziegler, *Contesting the Legacy of the Nineteenth Amendment: Abortion and Equality from Roe to the Present*, 92 U. COLO. L. REV. 751 (2021) (discussing the equality arguments made by both abortion proponents and opponents); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (analyzing abortion-restrictive regulation in an equal protection framework).

[101] Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 8–19, 27–30 (2012).

[102] Roe v. Wade, 410 U.S. 113, 129 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[103] *Id.* at 159.

[104] *Id.* at 153.

[105] *Id.* at 154; *see also*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 360 (2022) (Breyer, J., dissenting) ("[T]he Court struck a balance, as it often does when values and goals compete.").

[106] *See* Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting).

> 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.[107]

The Court later affirmed *Roe* in *Casey*.[108] The Court again stated that women's right to have an abortion is protected by the Constitution.[109] "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."[110] Nevertheless, as stated in *Roe*, this right is not absolute but rather limited to protect the state's interests. "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[111]

Though *Roe* was criticized for basing the constitutional protection of the right to have an abortion on privacy rather than on equality,[112] *Roe* still provided American women with procreative freedom for five decades. However, this precedent did not provide an absolute guarantee for all women, and some had difficulty obtaining an accessible and affordable abortion.[113] Nonetheless, it was a significant achievement for women's autonomy and freedom. Most importantly, the court established both the constitutional right to have an abortion and its limitations. The right to abortion is not absolute, and the state has compelling interests as the pregnancy progresses. As in the context of the right to contract, *Roe* supported the right to reproductive freedom and, at the same time, restrained it.

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[107] *Id.* (citations omitted) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022)); *see also*, *Dobbs*, 597 U.S. at 404 (Breyer, J., dissenting) ("*Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. . . . [W]omen must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions."); Carole J. Petersen, *Women's Right to Equality and Reproductive Autonomy: The Impact of* Dobbs v. Jackson Women's Health Organization, 45 U. HAW. L. REV. 305 (2023) (arguing that *Dobbs* undermines reproductive autonomy and gender equality by reviving restrictive constitutional tests and dismissing equal protection concerns).

[108] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 853 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022).

[109] *See id.*

[110] *Casey*, 505 U.S. at 846. "It is a constitutional liberty of the woman to have some freedom to terminate her pregnancy." *Id.* at 869.

[111] *Id.* at 879.

[112] *See, e.g.*, Ruth Bader Ginsburg*, Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) (discussing the evolution of classification by gender under an equal protection framework).

[113] Kelly Keglovits, *A Way Forward After* Dobbs*: Human Rights Advocacy and Self-Managed Abortion in the United States*, 18 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 73, 78 (2022).

The Court recently held in *Dobbs* that the Constitution does not protect women's right to terminate their pregnancy.[114] However, this right, now protected by the legislatures or constitutions of several states, is still grounded in women's autonomy.[115] That is, *Roe* was reversed, and some states now restrict women's right to have an abortion.[116] Yet, with regard to states' regulation of abortion, the right to abortion is still based on women's autonomy balanced against states' interests. The *Dobbs* dissent criticized the majority for relegating women to second-class citizens,[117] stripping women of their agency, and taking away their liberty.[118] This dissenting opinion echoed that "*Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. . . . [W]omen must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions."[119] Yet even under *Roe*, *Casey*, and the dissent in *Dobbs*, women's autonomy is not absolute but balanced against the state's interests. As in the contract context discussed in the previous Part, the court acknowledged women's autonomy while simultaneously planting the seeds for its limitation, as will be discussed in the following Subsections.

B. Individual and Gendered Autonomy

As in the contract law cases, autonomy in abortion cases also means individual autonomy, isolated from social context and relations. *Roe* protects "personal liberty and restrictions upon state action."[120] That is, it espouses an individualistic notion of autonomy, which views a person as an isolated individual free from state intervention. Furthermore, in the language of *Roe*, "a physician and his pregnant patient might decide that she should have an abortion . . . ."[121] Thus, it is not solely the woman's decision, but a decision

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[114] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 216 (2022). For abortion cases following *Dobbs*, see examples, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) and Moyle v. United States, 603 U. S. 324 (2024).

[115] *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state [perma.cc/5W2D-BSHR].

[116] *Id.*

[117] *Dobbs*, 597 U.S. at 373 (Breyer, J., dissenting). For a critical analysis of *Dobbs*'s limiting women's equality, see generally Marc Spindelman, *Dobbs' Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117 (2023) (discussing further equality issues that may arise following the *Dobbs* decision).

[118] *Dobbs*, 597 U.S. at 387 (Breyer, J., dissenting). For a critical analysis of *Dobbs*'s limiting women's freedom, see generally April L. Cherry, "*I Wish I Knew How It Would Feel To Be Free*": *A Lamentation on* Dobbs v. Jackson*'s Pernicious Impact on the Lives and Liberty of Women*, 72 CLEV. ST. L. REV. 301 (2024) (discussing "how the *Dobbs* Court failed to consider the lived experiences of women").

[119] *Dobbs*, 597 U.S. at 404 (Breyer, J., dissenting).

[120] Roe v. Wade, 410 U.S. 113, 153 (1973).

[121] *Id.* at 156.

made by both the woman and her doctor. It is interesting to note that the doctor is listed before the woman and assumed to be a "he." Even though abortion is a medical decision (in addition to a moral and religious decision), and surely involves medical considerations and requires medical consultation, the way *Roe* is worded—referring to the doctor and the woman—weakens the former statement according to which it is a woman's right to make decisions regarding the pregnancy. Another statement that downplays women's autonomy is that, "for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[122] Thus, it is the doctor's decision, in consultation with the woman, and not the other way around. *Roe*'s notion of autonomy is twofold: it is individualistic and personal, with the decision made by an atomistic, unconnected woman in isolation from her surroundings, and it is free from state intervention.

The same limited notion of liberty is found in *Casey*. According to the opinion of the Court, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[123] Here again, the Court addressed women's right to terminate a pregnancy as an "intimate and personal choice[]," [124] a "personal decision[]," [125] "free from unwarranted governmental intrusion," [126] respecting the "private realm of family life which the state cannot enter." [127] The Court then protected women's "personal liberty" [128] and "individual liberty," [129] "reproductive choice" [130] and "woman's right to choose abortion," [131] "free from state coercion." [132]

The same limited notion of liberty is also found in *Dobbs*. The dissenting

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[122] *Id.* at 163; *see also id.* at 164 ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.").

[123] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022).

[124] *Id.* at 851.

[125] *Id.*

[126] *Id.* (quoting Eisenstadt v. Baird 405 U.S. 438, 453 (1972)).

[127] *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

[128] *Id.* at 853.

[129] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 853 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022).

[130] *Id.* at 923.

[131] *Id.* at 927*; see also* Mary Ziegler, *The Framing of a Right to Choose:* Roe *and* Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281 (2009) (showing the decline of population control arguments and the shift to rights-based arguments in the abortion debate).

[132] *Casey*, 505 U.S. at 930 (citation omitted).

opinion in *Dobbs* noted that:

> Roe held, and Casey reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. Roe held, and Casey reaffirmed, that in the first stages of pregnancy the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.[133]

The *Dobbs* dissent stressed that *Roe* and *Casey* protected the "woman's right to choose."[134] Liberty means freedom of an individual to make her own choices and freedom from the state's intervention in these decisions.

> Roe and Casey were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. . . . Even in the face of public opposition, we uphold the right of individuals—-yes, including women—to make their own choices and chart their own futures.[135]

Abortion cases are also riddled with gender stereotypes. In *Gonzales*, Justice Kennedy, delivering the opinion of the Court, held that:

> [r]espect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[136]

Justice Kennedy did not base the above assertion on any study, as he admitted and as Justice Ginsburg remarked in her dissent.[137] His assertion was based not only on anti-abortion sentiments, as Justice Ginsburg commented,[138] but also on gender stereotypes of women who are too fragile

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[133] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 359 (2022) (Breyer, J., dissenting).

[134] *Id.* at 367.

[135] *Id.* at 365.

[136] Gonzales v. Carhart, 550 U.S. 124, 159 (2007) (citations omitted).

[137] *Id.* at 183 (Ginsburg, J., dissenting).

[138] *Id.* (Ginsburg, J., dissenting).

to make difficult decisions that affect their own lives as well as those of others. According to Justice Kennedy, some doctors might withhold information from women since they are perceived as too emotional to make abortion decisions.[139] This gendered way of thinking about pregnant women limits their autonomy, even if unintentionally. Autonomy means respecting one's choices, but here there are doubts about whether women will regret their decision after the fact. Rather than chivalrously and paternalistically protecting women from their own choice, autonomy demands providing women with the information and a set of options to choose from.

Dobbs is also riddled with gender stereotypes and animus.[140] By refusing to frame abortion as a matter of sex-discrimination, and its reliance on ancient cases from the 19th century and early 20th century, it perpetuates outdated gender roles and ancient notions of women's status in society. It neglects to consider the social context of these old cases, how women's social position has changed since then, how abortion is a matter of women's equality in society, and how abortion bans would impact women's lives.

As in the contract cases, the notion of freedom in these abortion cases is narrow, even before viability. The Court emphasized that the right to abortion means choosing abortion without state intervention.[141] That is, liberty is limited to making up one's own mind regarding the pregnancy without moral judgment. It only requires respecting women's decisions. It disregards social context and how women's relations with others impact their decisions. As Laura Portuondo argued, liberty is gendered.[142] That is, Supreme Court decisions protect traditional gender norms, based on freedom of religion—and at the same time do not protect nontraditional gender norms, for example, abortion.[143] In other words, the values protected under the theory of liberty are not gender-neutral. Robin West warned that the individualistic and negative right to abortion has political and moral costs.[144] The last Part provides a relational notion of autonomy as an alternative to the simplistic, individualistic notion.

C. Liberty v. State's Interests

Balancing between autonomy and other important values is present not

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[139] *Id.* at 159.

[140] J. Shoshanna Ehrlich, *Why the* Dobbs *Court Got It Wrong: Connecting the Dots Between Opposition to Abortion and Gender Animus*, 22 SEATTLE J. SOC. JUST. 461, 463 (2024).

[141] *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 927 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[142] Laura Portuondo, *Gendered Liberty*, 113 GEO L.J. 707, 711 (2025).

[143] *Id.*

[144] Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1396 (2009).

only in contract law cases, but also in abortion law cases. In *Roe*, the Court recognized that women had the right to abortion protected by the Constitution.[145] However, this right is not absolute and must be weighed against the state's interests: "[T]he right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the State interests as to protection of health, medical standards, and prenatal life, become dominant."[146] To put the balancing test into practice, the Court provided three principles:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[147]

Therefore, women have the right to terminate their pregnancy. However, this right is limited as the pregnancy progresses. In other words, the state's interests and other values are balanced against women's autonomy, and the former gradually holds greater weight as the pregnancy advances.

The Court affirmed *Roe* in *Casey*. The Court stated that

> [t]he woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.[148]

In other words,

> The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. . . . On

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[145] Roe v. Wade, 410 U.S. 113, 153 (1973).

[146] *Id.* at 155.

[147] *Id.* at 114.

[148] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 869 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022).

> the other side of the equation is the interest of the State in the protection of potential life. . . . *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.'[149]

Rejecting *Roe*'s trimester framework, the Court stated instead that

> [t]o protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis. . . . An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.[150]

To sum up, "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[151] Thus, the Court affirmed *Roe*'s holding of subsequent viability.[152]

The Court recently reminded us once again that women's reproductive liberty is not unlimited. "Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed 'potential life.'"[153] As the dissenting opinion stated, "[t]he constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them."[154] Although it overruled *Roe* and *Casey*, the Court still maintained the notion of limited reproductive freedom balanced against the state's interest, which is now protected by some states rather than by the Constitution.[155] In other words, even the dissent in *Dobbs* still adhered to the liberty-state's interests dichotomy.

As Noya Rimalt observed, this balancing is gendered.[156] Abortion is framed as a unique issue, not analogous to other issues, and therefore

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[149] *Id.* at 871 (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

[150] *Id.* at 878. For the undue burden test see also, Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 607–24 (2016), Stenberg v. Carhart, 530 U.S. 914, 938 (2000), and Gonzales v. Carhart, 550 U.S. 124, 144 (2007).

[151] *Casey*, 505 U.S. at 876.

[152] *Id.* at 879.

[153] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 225 (2022).

[154] *Id.* at 256 (quoting Roe v. Wade, 410 U.S. 113, 150 (1973)).

[155] *After Roe Fell: Abortion Laws by State*, *supra* note 115.

[156] Noya Rimalt, *The Legal Contestation of Abortion Rights: Why Abortion Should be Theorized as a Gender-Based Comparative Right*, *in* GLOBAL CONTESTATIONS OF GENDER RIGHTS 217, 217 (Alexandra Scheele, Julia Roth, & Heidemarie Winkel eds., 2022); Noya Rimalt, *Against Roe*

deserving of a distinct legal standard. Rather than comparing abortion to other similar constitutional frameworks, the court carved out a context-specific abortion law, and since abortion is inherently a gendered topic, so too is abortion law. Furthermore, it portrays the right to life of the fetus as inevitably superior to the pregnant woman's right. That is, the fetus's right trumps the woman's right, thus opening the door to the continuous challenging of women's abortion rights. In the same manner, Meghan Boone and Benjamin McMichael argued that pitting fetal personhood against women's rights undermines women's personhood, categorizing them as non-person objects.[157]

In *Dobbs*, the Court limited women's reproductive autonomy based on an interpretation of the Constitution—mainly holding the Fourteenth Amendment did not protect women's right to abortion—historical analysis, and stare decisis (overruling *Roe*). Much has been written about these aspects of the *Dobbs* holding.[158] However, this Article focuses on the notion of autonomy, balanced against the state's interests, as a limitation on women's autonomy. As such, the concern of this Article is the notion of autonomy held by the majority opinion and the dissenting opinion alike. As in the contract context, the balancing test is gendered. Protecting potential life pits the woman against her fetus.[159] Though the unborn fetus is inside its mother's womb and dependent on her, the Court sets them as rivals.[160] As in the contract context, reproductive autonomy is set against other values, and striking the balance between them is gendered. For example, women's autonomy is balanced against the state's interest in women's health. Although women's health is also the interest of women, not only that of the state, the issue is nonetheless set in binary terms. That is, the court employs a binary of freedom versus other interests and draws the line between the competing interests in a gendered manner. The last Part offers a more comprehensive notion of autonomy that entails delicately balancing the varied interests, rather than a binary in which freedom is at odds with other values.

Exceptionalism: Degendering Abortion, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 264, 265 (Robin West & Cynthia Bowman eds., 2019).

[157] Meghan M. Boone & Benjamin J. McMichael, *Reproductive Objectification*, 108 MINN. L. REV. 2493, 2500–01 (2024).

[158] *See generally* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee C. Bollinger & Geoffrey R. Stone eds., 2024) (compiling diverse works relating to the *Dobbs* decision and implications).

[159] Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 900–01 (1989); Donna Greschner, *Abortion and Democracy for Women: A Critique of* Tremblay v. Daigle, 35 MCGILL L. J. 633, 652–53 (1990).

[160] *See, e.g.*, Loeb v. Vergara, 326 F. Supp. 3d 295, 304 (E.D. La. 2018) (discussing embryos named Emma and Isabella, suing their mother).

IV. RETHINKING AUTONOMY

As described above, the overarching problem is not the gendered application of legal principles. Rather, the problem is a simplistic, individualistic notion of autonomy that is ill-suited to provide true autonomy for women generally. This Part suggests an alternative, more complex, and well-rounded notion of autonomy that will enhance women's autonomy in both the contract and the abortion contexts. To this end, it advocates for adopting a comprehensive and relational, rather than an individualistic notion of autonomy. Relational autonomy acknowledges that relations—rather than isolation—constitute autonomy.[161] Accordingly, rather than ignoring social inequalities, it highlights the role of the state in facilitating relations that nurture autonomy.[162] Therefore, state intervention, veiled under the current individualistic perception of autonomy, is unveiled by relational autonomy. Relational autonomy highlights social oppression that hinders autonomy and suggests restructuring social relations to foster autonomy.[163] After discussing possible difficulties in applying relational autonomy, this Part concludes by revisiting the contract and abortion cases discussed in the previous parts and applying relational autonomy to them. Finally, this Part uses a contract law test case and an abortion law test case to demonstrate how relational autonomy would work in practice and the difference it would make.

A. Relational Autonomy

As demonstrated above, the courts—majority and dissenting opinions alike—endorsed an individualistic, limited notion of autonomy throughout cases involving both freedom of contract and reproductive freedom.[164] This is not only a misapplication of contract and abortion law. In fact, the entire notion of autonomy needs to be revised, and an alternative conception of autonomy is warranted. This Article does not give up on autonomy altogether because it is a problematic concept ill-suited to properly protect women's autonomy, but rather suggests adopting the notion of relational autonomy in place of the individual autonomy currently used by the courts.

There is no single theory of relational autonomy, and distinct scholars have developed different versions of this notion of autonomy, which has led to disagreements even among them. Relational autonomy includes procedural, normative, dialogue-based, and emotion-based conceptions, to

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[161] *See* discussion *infra* Section IV.A.

[162] *See* discussion *infra* Section IV.B.

[163] *See* discussion *infra* Section IV.A.

[164] For the difference between freedom and autonomy see JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 3 (2011); Bernard P. Dauenhauer, *Relational Freedom*, 36 REV. METAPHYSICS 77, 77 (1982), and DAGAN & HELLER, *supra* note 19, at 1.

name just a few.[165] Procedural conceptions emphasize the process of reflecting on one's preferences and revising them accordingly;[166] normative conceptions take into account the values of preference rather than a content neutral approach;[167] conceptions based on dialogue address the dialogue between self-perception and how one is perceived by others;[168] conceptions based on emotions stress that autonomy does not only mean rational decisions but that emotions are also involved in the reasoning process.[169] For example, self-trust and self-worth are essential for autonomy.[170] In this Section, the concept of "relational autonomy" is used broadly, focusing on the principles common to much of the rich scholarship on this subject. This Section espouses the core elements relevant to many conceptions of relational autonomy to show the difference its application will make in both contract and abortion court decisions. While acknowledging these different approaches, this Article does not endorse any one approach but rather applies relational autonomy generally.

Relational autonomy criticizes the notion of an individualistic, atomistic self that is independent and unconnected.[171] The individualistic version of the self is a self-sufficient agent abstracted from social relations and context.[172] In contrast, the relational self is connected to and dependent on others.[173] That is, the relational self is embedded in relationships, not isolated

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[165] For literature on relational autonomy, see generally NEDELSKY, *supra* note 164; MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS 60 (2003); RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SELF (Catriona Mackenzie & Natalie Stoljar eds., 2000) (providing a collection of essays which explore "the social and relational dimensions of individual autonomy"); Catriona Mackenzie, *Feminist Innovation in Philosophy: Relational Autonomy and Social Justice*, 72 WOMEN'S STUD. INT'L F. 144 (2019) (discussing how society has operated to diminish the field of feminist philosophy); Andrea C. Westlund, *Rethinking Relational Autonomy*, 24 HYPATIA 26 (2009) (arguing that relational autonomy may simultaneously be constitutive without being inherently perfectionist); John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD.: INT'L J. FOR PHIL. ANALYTIC TRADITION 143 (2003) (discussing relational autonomy's efficacy in a normative context); ANDREA VELTMAN, AUTONOMY, OPPRESSION, AND GENDER (Andrea Veltman & Mark Piper eds., 2014) (discussing the intersection of philosophy, feminism, and autonomy); *Feminist Perspectives on Autonomy*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (2024), https://plato.stanford.edu/entries/feminism-autonomy (on file with the author) (discussing the reconceptualization of autonomy from a feminist perspective).

[166] RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SELF, *supra* note 165.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] Jody Lynee Madeira, *Woman Scorned?: Resurrecting Infertile Women's Decision-Making Autonomy*, 71 MD. L. REV. 339, 345 (2012).

[171] NEDELSKY, *supra* note 164, at 3–11.

[172] *Id.*

[173] *Id.*

from others, and also influenced by social factors such as gender, class, race, and their intersection. Rather than the boundaries between the self and others, the focus is on the embedded self. Not only children, but all individuals are connected to and codependent on others.[174] These relations are important and even constitute one's autonomy, in that they can foster or hinder it.

Furthermore, social conditions also shape autonomy. Thus, some forms of social oppression constrain autonomy,[175] while an egalitarian social context enables it to thrive. For example, living in poverty tends to reduce a woman's choices, requiring the individual to choose among a few and bad options. As women face discrimination and social inequality, this also hinders their autonomy. Decisions are also not made in a vacuum without any regard for the social surroundings, and relationships play a role in decision making.[176] Thus, for example, being in a committed relationship (e.g., with a partner, child, community, or workplace) is a consideration when making decisions. Therefore, there is a need to examine the social conditions and social relations that hinder or foster autonomy and autonomous decision-making.[177]

If autonomy is relational rather than isolated from others, then one's choices, preferences, and decisions are made after considering how they will affect others. Moreover, others also influence one's preferences, choices, and decisions. People are not solitary individuals, islands unto themselves, unrelated to and isolated from others and their surroundings. People are embedded in relationships. Their decisions will affect others, and they consider others when making decisions. Autonomous agents making decisions are not removed from others, and their decisions are shaped and set in a social context. Autonomy is contextual—that is, it is embedded in social settings, familial dynamics, community, and cultural surroundings. Gender, class, race, ability, and their intersection should be considered as factors shaping one's autonomy, alongside family, friends, neighbors, and colleagues. Autonomy is also dynamic and interactive. Indeed, relational autonomy goes against the individual-collective or private-public binary.

Rather than all or nothing, autonomy is a matter of degree. It is not black or white but rather takes on different shades. It should be measured on a spectrum, rather than as a binary concept. In other words, relational

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[174] For further discussion of the freedom to contract and dependency, see Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J.L. & HUMAN. 37, 39 (2009).

[175] Examples of social oppression that limit autonomy include the caste system and racial segregation. Mattison Mines, *Conceptualizing the Person: Hierarchical Society and Individual Autonomy in India*, 90 AM. ANTHROPOLOGIST 568, 570 (1988).

[176] In Virginia Woolf's words, "a woman must have money and a room of her own if she is to write." VIRGINA WOOLF, A ROOM OF ONE'S OWN 4 (1957). That is, one needs social preconditions in order to be able to write one's own life story.

[177] NEDELSKY, *supra* note 164, at 118.

autonomy breaks the free agent-victim binary. Social conditions shape our available options and our ability to choose and may enhance or limit our freedom. Sometimes these conditions empower the agent, enabling them to pursue their preferences; other times, oppressive conditions offer very limited, poor options; yet other times, inequality curtails but still leaves some options open. There are also in-between situations, between full autonomy and no autonomy at all. A person is neither a completely free agent nor an absolute victim, as the human condition is more complex and nuanced. Autonomy is variable, changing, and developing, so a more nuanced model would offer a more sophisticated and varied notion of the concept. As Jennifer Nedelsky argued, autonomy is a process.[178] It is not fixed but varies. It is fluid and dynamic, not static.[179] It is temporal, not spatial.[180] Rather than a simplistic notion of an autonomous person, relational autonomy presents a more complex, context-dependent view of the autonomous self. Persons are multi-dimensional rather than rational agents. As for the state, relational autonomy emphasizes the state's responsibility to provide the social conditions that will enhance autonomy and to eradicate conditions that impede it—that is, the state must strive to enable people to gain more (rather than less) autonomy.

Instead of a conflict between freedom and other values or interests, a more accurate description is based on two premises. First, other values are already part of the agent's decision-making process. That is, the decision is not detached from social values, and these are not only incorporated into the interests of the state or society at large but are also considered by the agent. They are not extrinsic; they are part of the autonomous decision-making process. As autonomy is not value-neutral but is a values-laden concept, autonomous decision-making takes these values into consideration. For example, in a capitalist economy, social norms will influence the decision-making process of both parties in consumer, commercial, or employment agreements. Parties to these contracts are embedded in capitalist relationships, and their contracts reflect these relationships. Similarly, if abortion is unacceptable in a conservative community, a woman considering abortion will consider the social attitudes and the resulting social consequences. If abortion is acceptable, this will also be a factor in the pregnant woman's decision-making. Thus, these decisions already encompass these values. The second premise is that the decision is not only between freedom and state interests, but a more complex balancing among numerous and different interests, preferences, and considerations. It is not only a conflict between two values but a more complex process of arriving at a decision by weighing multiple factors. It is not a binary—freedom versus public policy—but a multi-faceted decision. As the above examples show,

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[178] *Id.* at 135–36, 199.

[179] *Id.*

[180] *Id.*

contracts involve many—sometimes conflicting—social, economic, individual, personal, and cultural aspects, factors, and concerns that need to be balanced. Similarly, abortion involves medical, ethical, moral, religious, and social considerations as well as personal and economic factors.

Relational autonomy may seem to lead to inconsistency, in that it would give judges discretion to consider many factors, which they would apply differently. However, as shown in Part III, employing a simplistic binary individualistic notion of autonomy can also lead to inconsistency[181]—for example, in *Dobbs* overturning *Roe* and in the majority and dissent in other abortion cases.[182] It shows that the judges' personal beliefs influenced their application of the notion of individualistic autonomy. Thus, applying individual autonomy is neither more predictable nor more reliable, but rather provides a false sense of consistency. Moreover, relational autonomy will not necessarily increase the confusion and inconsistency of current jurisprudence. The courts should engage in a more comprehensive and nuanced analysis by using relational autonomy, as ignoring these complexities does not enhance the consistency of their decisions. What's more, looking at and taking into consideration only part of the intricate and multifaceted notion of autonomy provides an inaccurate and incomplete picture. Individual autonomy is a fiction that limits rather than enhances autonomy, because it ignores the social relations that comprise it. Relational autonomy not only points to social oppression that hinders autonomy but also suggests ways to restructure social relations to empower and enhance autonomy.

Indeed, applying relational autonomy is not an easy task. However, it paints a more socially accurate picture and would result in enhanced autonomy. Relational autonomy is complex and nuanced. Yet, ignoring the relational elements of autonomy results in curtailed autonomy as demonstrated in the contexts of contracts and abortion. Furthermore, applying relational autonomy is neither impractical nor unachievable. As Lucy-Ann Buckley demonstrated, Canadian courts apply the principle of relational autonomy to spousal support and property agreements.[183] She detected some movement—though still not a trend—from individual autonomy to relational autonomy in the courts' jurisprudence and advocated continuing this movement since applying relational autonomy would, in some cases, make a significant—though not always practical—difference.[184] Other scholars have provided practical guidelines for applying relational autonomy in other contexts, among them end-of-life decisions,[185]

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[181] *See supra* Part III.

[182] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007) (eliciting a 5-4 split decision despite the individualistic autonomy jurisprudence).

[183] Buckley, *supra* note 16, at 298–301; *see also* Leckey, *supra* note 6, at 3–6.

[184] Buckley, *supra* note 16, at 295–96.

[185] Megan S. Wright, *End of Life and Autonomy: The Case for Relational Nudges in End-of-Life*

surrogacy,[186] inheritance law,[187] health law,[188] and immigration law.[189] Jennifer Nedelsky applied relational autonomy in the context of violence against women.[190] Relational autonomy is a workable principle, and the courts are up to the task.

The next Sections revisit the contract law and abortion law decisions discussed in the previous parts and apply relational autonomy to these cases. In addition, the last Section demonstrates the application of relational autonomy to two test cases (one concerning an arbitration contract and the other a federal act regulating abortion procedures). This will demonstrate how relational autonomy can be applied and the difference it will make in practice.

B. State Intervention

Both the contract and abortion cases stressed that autonomy means being free from state intervention.[191] This is negative freedom, meaning the state may not intervene, leaving the decision to the agent. It may seem as if the state is neutral, while in fact it supports the status quo as it takes social structures as a given. In a world of social inequalities, women and minorities need the state's actions to preserve and protect their rights. As relational autonomy highlights, one cannot be autonomous under oppressive social conditions, and social conditions may either nurture and support autonomy or inhibit and restrain it. The social structure of power limits women's autonomy in both the contract[192] and abortion[193] contexts. As law constitutes social relations, it is therefore an important factor at play in autonomy.[194]

Though not the only factor, the state has a role in setting social relations.

Decision-Making Law and Policy, 77 MD. L. REV. 1062, 1101–03 (2018); Mann, *supra* note 15, at 1300–11.

[186] Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1251–55 (2013).

[187] Shelly Kreiczer-Levy, *Property's Immortality*, 23 CARDOZO J.L. & GENDER 107, 136–45 (2016).

[188] Roy Gilbar & Charles Foster, *It's Arrived! Relational Autonomy Comes to Court:* ABC v ST George's Healthcare NHS Trust [2017] EWCA 336, 26 MED. L. REV. 125, 132 (2018); Colin Mitchell et al., *Exploring the Potential Duty of Care in Clinical Genomics Under UK Law*, 17 MED. L. INT'L. 158, 165–66 (2017).

[189] Tally Kritzman-Amir, *The Methodology of Immigration Law*, 60 VA. J. INT'L L. 651, 686–88 (2019).

[190] *See generally* NEDELSKY, *supra* note 164 (exploring the application of relational autonomy in relation to violence against women).

[191] *See supra* Sections II.A, III.A.

[192] Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 171 (2013).

[193] Ashley E. Vaughan McWilliam, *Critical Abortion Theory*, 24 J.L. SOC'Y 57, 57–58 (2024).

[194] NEDELSKY, *supra* note 164, at 66–69.

It does so, among other things, through legal institutions, legislation, regulation, and court decisions, which are all background factors underpinning autonomy. In its actions, the state constructs social relations and thus can either promote or limit autonomy.[195] Therefore, to enhance women's autonomy, the state must eradicate social inequalities, stereotypes, and gender roles that limit women's options and choices based on their gender. As noted, the state may seem neutral, while in fact its involvement in social relations may simply not be visible. Jennifer Nedelsky highlighted the state's active role, and therefore its responsibility, in shaping social context.[196] Some scholars have advocated for state intervention to ensure the social conditions for autonomy.[197] This Section specifically focuses on the state's important role in combating discrimination and social oppression in order to guarantee women's autonomy.

Women and minorities need state intervention to protect their autonomy and state action to protect and safeguard their freedom.[198] State non-intervention for these groups means social constraints that impede their freedom.[199] That is, it maintains the privileged's freedom by perpetuating the status quo. To realize their freedom, the underprivileged need the state's hand—for example, mandatory rules to protect employee and consumer autonomy. What is needed is positive freedom, with the state actively promoting autonomy.[200] Limited negative freedom is insufficient to promote contractual justice[201] or reproductive justice,[202] and the state has an important role in promoting women's equality in both contexts.

People are never truly free from state intervention. Whether the state actively regulates or refrains from regulating, whether the state supports or curtails autonomy, whether the state advances women's equality or perpetuates a patriarchal society—in all these cases, the state de facto

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[195] *Id.* at 337, 354.

[196] For example, through property law, administrative law, and violence against women. *Id.* at chs. 3, 5.

[197] Yael Braudo-Bahat, *Towards a Relational Conceptualization of the Right to Personal Autonomy*, 25 AM. U. J. GENDER SOC. POL'Y & L. 111, 149 (2017); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1424 (2012).

[198] *See generally* MENACHEM MAUTNER, HUMAN FLOURISHING, LIBERAL THEORY, AND THE ARTS: A LIBERALISM OF FLOURISHING (2018) (arguing that a liberal tradition requires the state to create the background conditions for human flourishing).

[199] Of course, sometimes state intervention might be harmful for women, as state laws restricting abortion may demonstrate. Therefore, the state needs to intervene in a way that advances—rather than hinders—women's autonomy.

[200] H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 836 (1979); JOSEPH RAZ, THE MORALITY OF FREEDOM 372, 398 (1986).

[201] Gan, *supra* note 95 (advocating state intervention to promote social equalities through contract law).

[202] West, *supra* note 144, at 1405.

intervenes and influences our decisions.[203] It is not a matter of being free from state intervention, but how the state intervenes and shapes our autonomy. To what degree does the state provide the social background needed for autonomous decisions? To what extent do the state's regulations limit people's options? The state's actions or inactions can enhance autonomy, empower women, or curtail autonomy and disempower women. The state can support women's decisions by ensuring they have available options and by protecting these options. Alternatively, the state can passively do nothing to safeguard women's freedom and maintain social inequalities and oppression that limit autonomy. Relational autonomy critiques the opacity of the state's intervention and exposes the many ways in which the state shapes the social conditions, structures, and relations underlying autonomy.[204] Jennifer Nedelsky argued that relational autonomy does not mean more state intervention, but rather different intervention.[205] In fact, state courts may be the most suitable means for protecting state constitutional rights.[206]

The State is not neutral. The state already intervenes in contracts by either enforcing or not enforcing them, as well as through regulations and legislation—for example, in family law, labor law, or consumer law. The court decides whether the contract should be enforced or set aside, thereby favoring one party over the other, maintaining the status quo, or remedying social inequality, ignoring social context and perpetuating social imbalance, or considering social background and pursuing distributive justice. Furthermore, legislation and regulation, as state actions, also apply to contracts. Both *Lochner* and *Muller* are examples of state intervention. Thus, it is not a matter of whether, but of how, legislation is applied. The state is also not neutral regarding gender, and even when it does not explicitly address gender, its actions are gendered. Therefore, it is not a matter of whether to consider gender—as it impacts and is impacted even if not actively considered—but how to do so in a just and egalitarian manner. Since state actions are not gender neutral, they should be free of stereotypes and promote gender equality.

The state regulates abortion and therefore intervenes in abortions. Especially after *Dobbs*, which leaves the matter of abortion up to the states,[207] it is more urgent than ever to make sure the states empower women and protect their autonomy with regard to their equality, dignity, and privacy.

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[203] Frances E. Olsen*, The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 836 (1985).

[204] NEDELSKY, *supra* note 164, at ch.3.

[205] *Id.* at 337, 342, 359–61. As Nedelsky points out, there is indeed some risk in law and state intervention; however, this risk is both necessary and mitigatable. *Id.* at 364–66.

[206] Jonathan L. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 SMU L. REV. 519, 522–24 (2023).

[207] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300–02 (2022).

Now that the federal Constitution no longer protects women's right to have an abortion, it is in the hands of the states.[208] Therefore, it is not a matter of giving the state power over women, but rather of how the states will use that power. *Roe* and both the *Dobbs* majority—which advocates for leaving abortion regulation to each state—and the dissent—which supports guaranteeing women's right to abortion under the federal Constitution—involve state intervention, and in neither is this intervention neutral.

Relational autonomy acknowledges social oppression while also offering ways to overcome it. That is, it points to the power imbalances in our social institutions and offers ways to reshape them to ensure more egalitarian relations. Relational autonomy points to both the sources of the problem, such as social structure and relations of dominance, and to its solution, striving for a relationship between equals without subordination. The goal is to structure relations in a way that fosters autonomy and that eliminates social impediments to autonomy. In other words, relational autonomy not only acknowledges that autonomy is relationally constructed but also suggests ways to enhance autonomy through supporting, empowering, and nurturing relations. It maintains that individual autonomy is non-existent, and that relational autonomy will improve rather than impede autonomy. Relational autonomy is a complex concept that requires delicate and nuanced application. However, it reflects social reality and relations more accurately than individual autonomy, and it will enhance autonomy while reducing its curtailment, as described in the previous Parts. In other words, ignoring both the role of social relations and the role of the state in constituting autonomy leaves women with limited autonomy. Therefore, relational autonomy would improve women's autonomy by both highlighting the ways social oppression impedes autonomy and offering ways to address these impediments.

State intervention takes place not only through court decisions but also through legislation and regulations. These, too, should be structured to enhance autonomy. For example, consumer protection laws and regulations are meant to enhance consumer autonomy, and labor laws and regulations are meant to enhance employee autonomy. Mandatory rules protect vulnerable parties, and anti-discrimination laws prohibiting businesses from discriminating against women and other groups also enhance women's autonomy. The same holds true for abortion laws. Laws and regulations requiring doctors to provide medical information to pregnant women are meant to enhance autonomy.[209] At the same time, laws and regulations requiring pregnant women to receive the consent of the father in cases of violent relations or requiring pregnant minors to obtain the consent of their

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[208] Kaitlin Ainsworth Caruso, *Abortion Localism and Preemption in a Post-*Roe *Era*, 27 LEWIS & CLARK L. REV. 585, 587–90 (2023).

[209] *Law and Policy Guide: Informed Consent*, CTR. FOR REPROD. RTS , https://reproductiverights.org/maps/worlds-abortion-laws/law-and-policy-guide-informed-consent [https://perma.cc/8YV8-GGMA].

parents in certain circumstances may impede their autonomy. The state also regulates clinics to ensure patient health and the quality of medical treatment they provide. These examples show that by considering background social rules, the state can shape social relations and therefore foster women's autonomy.

Equality is vital and a prerequisite for the enjoyment of true autonomy, and for women to make autonomous decisions, they must enjoy social equality. As social oppression limits women's options, for women to truly be self-determined, the state must ensure an egalitarian society. Therefore, contrary to conventional wisdom, freedom and equality are not in conflict, but rather go hand in hand, as the dissent in *Dobbs* argued.[210] In a similar vein, Robin West criticized the conventional wisdom that the right to contract conflicts with civil rights.[211] Rather than a limited Lochnerian notion of the right to contract, she argued that the right to contract is itself a civil right. Therefore, it is consistent with civil rights law and is at the basis of civil society.[212] Hila Keren also criticized the supposed tension between freedom of contract and equality and developed the notion of "freedom TO contract," which bridges these two values.[213] Hanoch Dagan suggested that, if properly understood, freedom of contract includes its limitations.[214] For Dagan, rather than intervening in freedom of contract, setting a contract's boundaries is necessary for a contract's integrity and legitimacy.[215] That is, freedom of contract's commitment to relational justice and autonomy sets its boundaries, rather than by external intervention.

As Melissa Murray argues, *Dobbs* altered the public-private binary and viewed the state as an ally in regulating—that is, restricting or prohibiting—abortion.[216] Despite the rhetoric about the freedom to make a choice without state coercion, the Court welcomed the state's restriction of abortions. As in *Muller*, for the Roberts Court, men's freedom is protected, while women's bodies warrant state regulation. Thus, the state is encouraged to maintain a gender hierarchy; women's bodies are controlled by the state and freedom is a facade. In contract law, public policy is the meeting point of private law and public values. The understanding that contract law is not entirely private, that

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[210] *Dobbs*, 597 U.S. at 381 (Breyer, J., dissenting).

[211] Robin West, *The Right to Contract as a Civil Right*, 26 ST. THOMAS L. REV. 551, 552 (2014).

[212] *Id.* at 554.

[213] Hila Keren, "*We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 172–77 (2005).

[214] Hanoch Dagan Lecture, *Freedom of Contract, Properly Understood*, MAASTRICHT U. PRIV. L. LECTURE, 8 (May 24, 2024).

[215] *Id.* at 3.

[216] Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 837–43 (2023).

social interests play a role, and that it has public policy aspects is not new.[217] In the same vein, it is also not new that reproductive freedom has public aspects, as it is crucial for women's participation in the public sphere across areas such as the market economy, employment, civil society, and politics.[218]

The following Sections revisit the contract and abortion cases analyzed in the previous Parts but apply the concept of relational autonomy. While this Article does not develop a relational autonomy theory for contracts and abortions, it does highlight the different analyses of these cases through this prism. It also demonstrates how applying relational autonomy would work in practice, and as noted, it does not always come to a different conclusion. A contract law test case and an abortion law test case are thus used as examples to demonstrate the application of relational autonomy.

C. Contract Law

Dagan and Dorfman developed a distinctly "liberal conception of private law, founded on the commitments to individual self-determination and substantive equality."[219] They maintain that private law governs individuals' "interpersonal relationships as free and equal persons,"[220]—that is, that private law is relational and has normative value. The relational aspect means, for example, that contract law concerns interpersonal interactions between the parties and is committed to substantive equality. Dagan and Heller also developed a choice theory of contract that is based on autonomy, which also holds a liberal conception of contract based on relational justice.[221] While Dagan and others have advocated for the concept of a relational—rather than an isolated—person, and addressed the problem of the unequal social surroundings of the self,[222] they did not consider feminist concerns of women's oppression in society, which is at the heart of this Article. Thus, while they addressed relationality and substantive equality in general, they did not discuss the gendered aspect of relations. In the same vein, Ian MacNeil established a relational theory of contract, which suggested that parties are

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[217] *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997, 1000 (1985); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 587 (1933).

[218] Roat, *supra* note 1.

[219] Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397 (2016) [hereinafter Dagan & Dorfman, *Just Relationships*]; Hanoch Dagan, *Autonomy, Relational Justice, and the Law of Restitution*, *in* RSCH. HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION 219 (Elise Bant et al. eds., 2020); Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURIS. 1, 9 (2022); Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89, 94 (2022).

[220] Dagan & Dorfman, *Just Relationships*, *supra* note 219, at 1397.

[221] DAGAN & HELLER, *supra* note 19, at 1.

[222] Hanoch Dagan & Avihay Dorfman, *Private Law and the Embedded Person*, *in* THE FUTURE OF THE PERSON 9 (Hans-Wolfgang Micklitz & Giuseppe Vettori eds., 2025).

relational and that their relations are at the basis of contract law.[223] However, he too did not notice that these relations are gendered. Sharon Thompson developed a feminist relational contract theory based on relational autonomy and relational contract theory, which takes gender, women's oppression, and social inequality into account.[224] Gillian Hadfield alluded to the dilemma of choice: "the conflict between promoting women's autonomy and freedom of choice on the one hand, and protecting women from the harmful consequences of choices made under conditions of inequality on the other."[225] To solve this dilemma, she advocated for an alternative, expressive theory of rational choice, rather than the economic, value-neutral notion of choice.[226] Kathryn Abrams proposed an understanding of autonomy that considers social oppression.[227] Hadfield did not address autonomy directly, while Abrams did not address contract law. However, they both revisited autonomy along the lines advocated in this Article. This Article was inspired by and builds upon the above scholarship.

The following applies the alternative notion of relational autonomy, discussed in the previous Sections, to analyze the contract law cases mentioned in Section II. It should be noted that the aim is to suggest an alternative analysis, not necessarily to reach a different result. Offering a detailed application of relational autonomy is beyond the scope of this Article, and a thorough practical guide to relational autonomy in contract law will have to wait for a follow-up article, although this Section does conclude with a test case demonstrating such an application. The test case analyzes a case in which the majority applied an individual autonomy approach, while the dissenting opinion applied a relational autonomy approach.[228] This will serve as an example of the practical implications of relational autonomy and how it may yield different results.

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[223] *See* sources cited, *supra* note 17 and accompanying text.

[224] *See* sources cited, *supra* note 18 and accompanying text.

[225] Gillian K. Hadfield, *Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1238 (1998) [hereinafter Hadfield, *Expressive Theory of Contract*]; *see also* Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract*, 33 OSGOODE HALL L. J. 337, 338 (1995) (discussing the difficulties feminists face between the subjugation faced when not included in the market and that engaging in the market tends to degrade women).

[226] Hadfield, *Expressive Theory of Contract*, *supra* note 225, at 1237–38.

[227] Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 805 (1999) (describing the role of agency as "resistance to oppression"); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306 (1995) (detailing how to "formulate feminist theories that highlight both women's oppression and the possibilities of women's agency").

[228] As this Article critiques binary thinking, it is important to note that rather than the individual-relational binary, the majority opinion is more individualistic and the dissenting opinion more relational.

1. Autonomy, Relations, and Emotions

Relational autonomy emphasizes that a party is relational and is embedded in relations. Therefore, it does not view the other party as a rival. As the relational theory of contract suggests, parties cooperate and collaborate; they reciprocate and are codependent. Deborah Post explained that Ms. Williams' Walker-Thomas contract should be analyzed with regard to her relationship and interactions with the sales agent.[229] She signed the contract not only because she was poor and could not buy items from other establishments, but also because of her ongoing relations with the company's representatives.[230] That is, her autonomy was embedded in relations and had social and economic underpinnings. The court ignored this relational aspect and only considered the fairness of the contract.[231] The sole question in the case was whether to enforce the contract, and not how to facilitate the relations between the parties and their autonomy.[232]

As Threedy showed, the plaintiffs in the *Arthur Murray* cases developed relations with the studio's dance instructors.[233] It was not only about buying dance lessons but also about the women having a good time at the studio and their self-perception.[234] These dancers were not too emotional to contract, as emotions are part of autonomy. Autonomous decisions are not only about choosing rationally between options; they may also involve an emotional component.[235] That is, they are based on self-perception and may involve emotions such as regret. These women were not incapable of making good decisions but made the decisions they did because the studio made them feel good about themselves. The fact that these women regretted their purchase does not mean they did not make autonomous decisions. The court does not need to protect them from their supposed bad, unreasonable decisions, but rather to police the predatory practices of the dance studio and prohibit its manipulative behavior. The court does not need to provide paternalistic protection to supposedly foolish old women, but rather provide ethical guidelines that will limit the marketing and selling practices of businesses and enterprises. Because the transactions also involved relational aspects with the instructors and sales agents, invalidation of the contracts in both cases results from their abuse of these relationships. Relations and emotions were part of

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[229] Deborah Post, *The Square Deal Furniture Company, in* CONTRACTING LAW 1, 464 (Carolina Academic Press ed., 5th ed. 2015).

[230] *Id.* at 464–65.

[231] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).

[232] *Id.* at 448.

[233] Threedy, *supra* note 57, at 767.

[234] *Id.*

[235] *See generally* Emma Jones, *You Don't Pay £ 100,000 to a Lawyer Unless You Care About Something: The Role of Emotion in Contract Law, in* RESEARCH HANDBOOK ON LAW AND EMOTION 248 (Susan A. Bandes et al. eds., 2021) (discussing emotions in contract law).

these women's autonomous decisions and did not impede their autonomy.

Nonmarital agreements also have relational and emotional aspects. Currently, the labor of love that is housework and care work does not qualify as consideration.[236] However, because of the emotional and relational aspects of nonmarital agreements, courts should revise their view of consideration to recognize consideration in these cases. This means that more contracts between intimate partners would be enforced that benefit women. In the same manner, intimate relations entail emotional ties and should not be reduced to sexual relations. The relationship between intimate partners and their children is all part of what comprises making an autonomous decision. This means that nonmarital agreements would not be invalidated because they involve "illicit" sexual relations.

Surrogacy agreements also involve relationships between the surrogate mother and the couple, the surrogate's family (her partner and children), the doctors at the clinic, and the agency. It is both a commercial transaction and a familial relationship; it is both economic and emotional. As demonstrated in the *Baby M* case, a surrogate mother may be driven by emotions and may regret entering into the surrogacy agreement.[237] However, this does not negate her autonomy. The issue here is not only whether to enforce the surrogacy agreement, but also how to foster the relationship between the parties and promote their autonomy.

NDAs addressing sexual harassment or sexual assault cases likewise involve both economic and emotional issues. A sexual assault or harassment victim may suffer economic loss (such as leaving her job) as well as emotional turmoil. However, this does not negate her agency. Though signing an NDA may not be a cold-hearted decision, it is still a contract that provides benefits and disadvantages to both parties. One cannot understand the NDA without understanding the relations between the parties in the background of the agreement. In other words, sexual harassment is an abuse of the relationship by one party, and this abuse is the reason for the NDA. Rather than a bargain to enhance the welfare of the parties to the contract, relational autonomy shines the spotlight on the relations between the parties in the background of the contract.

2. Autonomy as a Matter of Degree

As contract law adopted an individualistic notion of autonomy when applying defenses, the court diminished the aggrieved party's autonomy. That is, as Threedy showed, the women in the *Arthur Murray* cases were portrayed

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[236] Antognini, *Nonmarital Contracts*, *supra* note 51, at 102.

[237] Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143, 144 (2015).

by the courts as helpless victims in need of the court's redemption.[238] They were described as feeble-minded, old ladies incapable of an autonomous decision and therefore, deserving of the court's protection.[239] However, if one understands autonomy as a spectrum, these women did not lack autonomy entirely.[240] Rather than two options, either an autonomous party, which would lead to enforcing the contract, or a non-autonomous party, which would lead to voiding the contract, this Article advocates applying a more complex notion of relational autonomy. According to this view, these women did not lack autonomy altogether. Yet, nonetheless, their contract should have been set aside. In other words, under a nonbinary notion of autonomy, invalidating the contract does not mean a lack of autonomy. This also holds true for Ms. Williams. She was autonomous but still entered into a draconian agreement.[241] She managed her finances and budget autonomously, notwithstanding the predatory contract with *Walker-Thomas*. Applying relational autonomy to that case, not enforcing the contract does not hold her to be non-autonomous but rather is based on social inequality and distributive justice.

From a relational autonomy perspective, invalidation of the contracts does not mean the women lacked autonomy, but rather reflects the balancing of the different and varied interests of both parties. In the *Arthur Murray* cases, the plaintiffs' (and the studio's) freedom of contract is but one consideration. Autonomy sometimes means enforcing women's contracts; other times it means protecting them from succumbing to pressures. The same holds true for surrogacy agreements and NDAs; sometimes autonomy means invalidating women's decisions since they were made under the pressures of a patriarchal society. Relational autonomy means that, in some cases, in which social conditions undermine women's autonomy, their contracts should be invalidated—in other words, not enforcing the contracts out of respect for their autonomy. Setting Ms. Williams's contract aside as unconscionable means empowering her as an autonomous person deserving to live in an egalitarian society. Rather than an autonomous party-helpless victim binary, relational autonomy demands eradicating social inequalities to give disadvantaged parties more (rather than less) autonomy.

3. Autonomy and Other Values

The courts need to balance varied interests. It is not a simple freedom-public policy dichotomy, but rather a complex weighing of multiple values. For example, in cases of nonmarital agreements, the court needs to consider

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[238] Threedy, *supra* note 57, at 762.

[239] *Id.*

[240] *See* Alison Diduck, *Autonomy and Family Justice*, 28 CHILD FAM. L. Q. 133, 148 (2016) (criticizing the autonomy-vulnerability binary in family law).

[241] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965).

not only the right of the parties to contract and the views on prostitution, but also equality, economic distributive justice, the best interests of the couple's children, and the concept of family and familial responsibilities. Nonmarital agreements raise economic welfare issues as well as social and emotional issues. These agreements highlight the importance of intimate relationships, of social attitudes, and of the state's responsibility. That is, it is not just an agreement between two individuals but a contract that has both personal and social components and implications. These agreements concern both intra-family relations and broader social relations, which holds true for marital agreements as well.

Surrogacy agreements involve many considerations beyond the parties' freedom of contract, among them the surrogate mother's health and dignity, the child's best interests, and, more broadly, social equality, commodification, parenthood, and family. Surrogacy agreements raise issues regarding the relations between the parties—intended parents, surrogate mother, and the agency—as well as social relations—parent-child, family, and customer-agency. These interests are incorporated into rather than going against freedom of contract. Weighing all these different interests is much more complicated than balancing two conflicting interests. It involves both commerce and intimacy, economics and emotions.[242]

NDAs also involve many social values, among them privacy, promoting equality, eradicating sexual violence, and workplace relations and regulations. NDAs have both advantages and disadvantages for each party and for society at large. However, a simple balancing between freedom of contract and public policy overlooks this more complicated reality. The argument is not that public policy is unimportant; society has valid concerns resting on important values. Rather, it is the setting of freedom of contract against social values that is criticized. Therefore, the courts need to strike a more sophisticated balance rather than a simplistic one between two competing interests.

As demonstrated, it is not a matter of balancing freedom of contract against public considerations. This is a narrow understanding of the issue that excludes other considerations and disregards the fact that social considerations are not outside the parties' contract but woven into it. That is, public policy is part of the contract and not an external value competing with it. Furthermore, public policy is not neutral, and the court needs to consider its disparate impact. The court also needs to take distributive justice and equality considerations into account.[243] Finally, the line between enforceable

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[242] Laufer-Ukeles, *supra* note 186, at 1238–43.

[243] For distributive justice in contract law, see Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472 (1980) (discussing a defense of contract law as tools to implement distributive justice goals); Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L. J. 105 (2008) (defending a view that contractual doctrine can be useful in promoting justice); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law,*

contracts and non-enforceable agreements should not be affected by gender stereotypes. A contract may still not be enforced under the relational autonomy approach. However, this would occur as the result of a more nuanced multi-factor weighing of considerations rather than a balance between two values. Whether or not the application of the relational approach would have the same result, the process leading to the outcome will be more complex and consider more aspects. Autonomy is a values-laden concept, therefore warranting a delicate balance between varied—sometimes conflicting—values, concerns, and interests, rather than a balance between only two competing values.

4. Autonomy, Stereotypes, and Social Context

Commercial agreements also encompass social as well as personal issues, among them distributive justice interests and commercial market inequalities. In these cases, freedom of contract and public policy are integrated, and the latter is not a factor external to the contract. Therefore, not enforcing a predatory contract after careful consideration of these many factors does not mean curtailment of consumer autonomy. Rather, it protects consumer autonomy. Consumers are not isolated individuals but participants in consumer relations,[244] and the state has the responsibility to regulate the consumer market to enable consumers (women and men alike) to make autonomous decisions. The same holds true for the labor market, as the state shapes employer-employee relations.

The degree of autonomy varies and depends on the market, meaning the state must actively promote market conditions that are prerequisites for consumer autonomy. For example, protective legislation and mandatory rules in consumer law and labor law are a valuable foundation for guaranteeing women's autonomy. Although Ms. Williams and the women in the *Arthur Murray* cases did not enjoy full autonomy, this was not because they lacked personal autonomy. Relational autonomy showed that social oppression undermines autonomy, as autonomy can only thrive in an egalitarian society. As this is a precondition for autonomy, when reviewing consumer contracts, the market conditions are factored into freedom of contract, not only public

with Special References to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563 (1982) (discussing the place of distributive justice within private agreements); Hugh Collins, *Distributive Justice Through Contracts*, 45 CURRENT LEGAL PROBS. 49 (1992) (discussing the distributive justice consequences of contract law); Marco Jimenez, *Distributive Justice and Contract Law: A Hohfeldian Analysis*, 43 FLA. ST. U. L. REV. 1265 (2016) (discussing how the regulation of private agreements necessarily affects distributive justice); John Choi, *Distributive Justice as a Function of Contract Law*, 7 CAMBRIDGE L. REV. 155 (2022) (arguing that to accomplish distributive justice goals law should ensure that contracts promote a fair distribution of wealth); Ugo Mattei, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653 (2004) (arguing that the existing law has failed to promote desirable social goals such as distributive justice).

[244] Shelly Kreiczer-Levy, *The Data Crowd as a Legal Stakeholder*, 44 OXFORD J.L. STUD. 645 (2024) (discussing the interdependence of consumers in the data economy).

policy, which is balanced against it. This is also true for nonmarital and surrogacy agreements, where requiring independent legal advice and the duty to disclose information will ensure informed consent. NDAs in cases of sexual harassment and sexual assault are also set in the context of violence against women in a patriarchal society. Legislation protecting from sexual violence is vital as background for NDAs. State policing and regulation of nonmarriage, surrogacy, and sexual harassment to protect vulnerable parties will also enhance their autonomy. Generally, anti-discrimination laws will enhance women's freedom of contract.

The state's awareness of social power imbalances, and the protective legislation to eradicate it, would empower women and enhance—rather than limit—their autonomy. Social context includes factors such as gender, race, class, age, disability, and their intersection,[245] and contracts should be viewed in light of this social background. At the same time, the court needs to avoid gender (or other) stereotypes. For example, considering women's social subordination should not be reduced to stereotypical thinking, and acknowledging a patriarchal society should mean actively working to eliminate social impediments to enhancing women's autonomy. Background legislation and regulations empowering women would enhance their contractual autonomy. Under the relational autonomy approach, supportive social relations enhance autonomy and lead to contract enforcement, while social oppression limits autonomy and results in contracts being set aside. Therefore, the state has the responsibility to eradicate social inequalities in order to promote the former rather than the latter.

5. Summary

Contractual autonomy should not be reduced to contract enforceability. Also, drawing the line between enforceable and unenforceable promises should be sensitive to gender implications rather than to gender stereotypes. Furthermore, true freedom of contract requires the state to foster the market conditions and the social background that will facilitate the relationship between the parties and enhance their autonomy.[246] Being an autonomous party does not mean only making rational decisions; it may also involve emotions. Freedom of contract is but one factor among many that courts should consider in contract decisions. Therefore, not enforcing the contract would not necessarily mean a lack of autonomy.

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[245] For intersectionality in contract law, see generally Lyn K. L. Tjon Soei Len, *Progress Towards What? On the Need for an Intersectional Paradigm Shift in European Private Law*, 1 EUR. L. OPEN 363 (2022) (discussing intersectional approaches to social justice reform). For intersectional autonomy in international human rights law, see generally Rose Celorio, *The New Gender Perspective: The Dawn of Intersectional Autonomy in Women's Rights*, 25 CHI. J. INT'L L. 67 (2024) (discussing the need for an intersectional approach by states to give full autonomy to women).

[246] *See* Aditi Bagchi, *Contract as Exchange*, 133 CAL. L. REV. 1661 (2025) (developing a theory of contract of exchange claiming that regulating the market is needed to advance the parties' autonomy).

The state needs to regulate markets (e.g., the market economy, labor market, consumer market) to foster equitable relations between contracting parties. In doing so, the state should be sensitive to power imbalances between the parties—for example, between consumers and businesses, and between employees and employers—and strive to mitigate them and support relationships that increase autonomy, especially for disadvantaged parties. Anti-discrimination laws serve a similar purpose: shaping egalitarian relations and eradicating social inequalities, a precondition for autonomous contractual decisions. When courts enforce or invalidate contracts, they should take gender into account. However, this does not mean basing the decision on gender stereotypes, but rather on acknowledging gender inequality, how a patriarchal society hinders women's autonomy, and how to correct social power imbalances to enhance women's autonomy. It is not a question of whether to enforce the contract, but of how to do so with gender inequalities in mind, and with awareness of social oppression and of eradicating inequality.

In addition to contract enforceability, mandatory laws, legislation, and regulations protect vulnerable parties and provide an important background for the parties' negotiations and decision-making. It is not only about balancing freedom of contract against public policy but also considering the many—sometimes conflicting—aspects, impacts, values, and interests at issue. It is neither a complete victim needing the paternalistic protection of the court to invalidate the contract due to vitiating factors (under defenses such as duress, undue influence, and unconscionability), nor an autonomous agent deserving of honoring her choice and enforcing her contract. Rather, it is a complex decision involving varied considerations, both social and inter-party, and their implications. Contracts are relationships between parties set in a social context, and therefore, the enforcement or invalidation of a contract affects both the relationship between the parties and society at large. Applying relational autonomy involves a different analysis of contract enforcement or invalidation than the current analysis under individual autonomy and will sometimes yield different results. In addition, it underscores the importance of legislation and regulations—for example, mandatory rules—as part of the contract's background. As discussed, contract law is not only a matter of the enforcement of contracts, but also a matter of regulating the market.

As noted, applying relational autonomy will not necessarily yield different results. For example, a relational autonomy analysis may have led to the invalidation of the contracts in *Walker-Thomas*, *Arthur Murray*, or *Baby M*. However, even if that were the case, according to relational autonomy, the aggrieved party would not be viewed as a helpless, non-autonomous victim but rather as having limited autonomy due to market and social constraints. Thus, non-enforcement and state intervention can promote—rather than curtail—autonomy. Furthermore, by applying the relational autonomy approach, the courts are not paternalistically protecting weak parties but

rather weighing multiple values and preserving meaningful relations. In addition, rather than public policy that trumps freedom of contract, it is a delicate balancing of various—sometimes conflicting—values. Under a relational autonomy analysis, autonomy is not only a matter for the courts but also for legislative and regulatory frameworks governing the markets, shaping the social background, and fostering relations that will enable autonomy to thrive. Thus, due to the legislation and regulations, consumers will enjoy fair rather than predatory contracts. In other words, relational autonomy may yield the same results, but it will aim to regulate the market to ensure fair commerce. The following case will demonstrate the application of relational autonomy to an employment contract.[247]

6. Test Case

Martinez-Gonzalez, a Mexican man, worked on a farm in California.[248] The issue was whether his employment contract, which included an arbitration agreement, was voidable due to economic duress and undue influence.[249] The majority opinion rejected the duress claim since the employer did not commit a wrongful act and because the employee had reasonable alternatives.[250] While admitting that the circumstances surrounding the signing of the employment agreement were not ideal—Martinez-Gonzalez signed the employment agreement after he traveled from Mexico to California, in a parking lot with no chairs, after a long work day when he was tired and hungry, with the employer's representatives rushing all the employees to sign the agreements quickly with no time to read them or consult an attorney before signing them,—Circuit Judge Bumatay nonetheless concluded that the court's invalidation of the contract would impede freedom of contract and would constitute unnecessary intervention in the way the employer conducted its business.[251] Furthermore, he concluded that there was no wrongful threat, since arbitration agreements are

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[247] A detailed application of relational autonomy to different doctrines is beyond the scope of this section. However, the following scholarship offers revisions of contract law doctrines that, though not explicitly relying on relational autonomy, are based on social power dynamics, inequality, gender stereotypes, context, and relationality: Gan, *supra* note 192 (discussing duress); Orit Gan, *Spousal Agreements and Patriarchal Bargains: A Wife's Guarantee of Her Husband's Business Debts*, 18 EUR. REV. CONT. L. 175 (2022) (discussing undue influence); Orit Gan, *Nonmarital Contract Law*, 76 RUTGERS U. L. REV. 663 (2024) (discussing consideration).

[248] Martinez-Gonzalez v. Elkhorn Packing Co. LLC, 25 F.4th 613, 619 (9th Cir. 2021). Although the plaintiff was a man, as discussed in the introduction, individual autonomy is ill-suited to describe the human condition of both women and men. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 86 (2010) (arguing that Ginsburg decided to sue on behalf of male plaintiffs because of the rich and powerful perception of anti-discrimination law).

[249] *Martinez-Gonzalez*, 25 F.4th at 620.

[250] *Id.* at 621.

[251] *Id.* at 622.

common and the employee did not suffer any loss by signing one.[252] Moreover, according to Judge Bumatay, Martinez-Gonzalez did not demonstrate a lack of reasonable alternatives.[253] The arbitration agreement did not state it was mandatory, and he was not told by the employer's representatives that he had to sign the arbitration agreement to keep his job.[254] In Judge Bumatay's view, the employee signed the agreement because he was tired and hungry, and was told to hurry, not out of fear of losing his job.[255] Additionally, he concluded that Martinez-Gonzalez should not have assumed that the agreement was mandatory and instead should have asked whether he could decline signing it.[256] Further, the arbitration agreement expressly allowed employees to revoke the contract within ten days, providing Martinez-Gonzalez with another reasonable alternative.[257]

The court also rejected Martinez-Gonzalez's undue influence claim. According to Judge Bumatay, Martinez-Gonzalez was not especially vulnerable to pressure—he had a secondary-school education so he could read the agreement written in Spanish, he had been an agricultural worker since he was six-years old, and he was the breadwinner of his family. His quitting his job also negated his claim of vulnerability. Again, although the conditions for signing the agreement were not ideal, they did not amount to excessive pressure.

The court relied on an individualistic notion of autonomy. The court paid little attention to the social background and circumstances surrounding the signing of the agreement. They placed little weight on the employee's visa status, his dependency on his employer, and his socio-economic status, all of which impeded his autonomy. Any sign of agency—such as his education and being able to read Spanish—was interpreted by the court as a sign of autonomy.[258] Rather than understanding the spectrum of autonomy, the court maintained the autonomous party-helpless victim dichotomy, reserving economic duress and undue influence for extreme cases. This dichotomy disregarded how social oppression might limit autonomy, and the court's analysis was limited to personal traits, capabilities, and circumstances shaping the employee's autonomy. According to the majority opinion, the employee's personal traits negated his vulnerability and as such, he was an autonomous party to an enforceable contract. Stressing Martinez-Gonzalez's role as the family provider was also gendered, alluding to a conservative view of the division of labor in the family. The court also disregarded the employee's

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[252] *Id.*

[253] *Id.* at 623.

[254] *Id.*

[255] Martinez-Gonzalez v. Elkhorn Packing Co. LLC, 25 F.4th 613, 624 (9th Cir. 2021).

[256] *Id.*

[257] *Id.*

[258] *Id.* at 626.

power relations with his employer, his relations with his dependent family, and his relations with his coworkers standing with him in line in the parking lot to sign the agreements. Thus, the majority treated Martinez-Gonzalez as an individual isolated from these relationships.

Furthermore, the court applied freedom of contract in a narrow sense—that is, enforcing the contract as is, adhering to business practices, and holding a non-interventionist approach. The court practically ignored other values and public policy, focusing almost exclusively on freedom of contract. Rather than delicately balancing various values, the court relied heavily on freedom of contract. This case demonstrates the need for regulating the employment market to enhance employee autonomy. Besides contract law, employment law (including work visa laws), and arbitration law, these laws also set the background conditions for employee autonomy. The majority's analysis only preserved the employer's freedom of contract and perpetuated the imbalance of power between the parties. It maintained labor market inequalities, serving only the employer's liberty.

The dissenting judge accepted Martinez-Gonzalez's duress and undue influence claims (which would have affirmed the district court's ruling).[259] Circuit Judge Rawlinson stressed the following facts: (1) the employment agreement was presented to the employee after a twelve hour bus ride from Mexico to the United States; (2) Martinez-Gonzalez was living in housing provided by the employer; (3) Martinez-Gonzalez was not provided with information regarding the agreement he signed; and (4) Martinez-Gonzalez was transported to the United States under a work visa.[260] She concluded that there was economic duress because Martinez-Gonzalez faced challenging economic circumstances, he was dependent on the employer for housing and transportation, he reasonably believed that he could only work for this employer with the visa he was issued, he was directed to sign the arbitration agreement without being allowed to read it and with no explanation of it, he was never provided with a copy of the agreement, he earned five times more than he earned in Mexico, and he supported his family financially.[261] According to Judge Rawlinson, the employer created an oppressive and coercive atmosphere during the signing of the employment agreement.[262] This atmosphere precluded and discouraged the ability to review documents, ask questions, and consult advisors.[263]

The dissenting opinion applied a relational autonomy approach. Judge Rawlinson emphasized Martinez-Gonzalez's dire circumstances, the reality

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[259] *Id.* at 629 (Rawlinson, J., dissenting).

[260] *Id.* at 631–32 (Rawlinson, J., dissenting).

[261] Martinez-Gonzalez v. Elkhorn Packing Co. LLC, 25 F.4th 613, 631 (9th Cir. 2021) (Rawlinson, J., dissenting).

[262] *Id.* at 637 (Rawlinson, J., dissenting).

[263] *Id.* (Rawlinson, J., dissenting).

of migrant workers, and considered his social background and circumstances as a non-American migrant with poor economic means, dependent on the employer.[264] The dissent noted the imbalance of power between the employee and the employer, as well as the social inequalities.[265] The dissent did not rely solely on the employee's education and personal capabilities but also looked beyond them to social factors that diminished his autonomy. The dissent acknowledged the employee's agency while at the same time noting the conditions that limit his autonomy. In addition, due to the employer-employee relationship, in which the latter was away from his country and dependent on the former for accommodation, transportation, and his visa, the employer's behavior was wrongful.[266] The dissenting opinion also acknowledged Martinez-Gonzalez's relations with his family and his commitment to supporting them financially as part of its consideration in taking the job.[267]

Contrary to the majority, which adhered to the freedom of contract, the dissent acknowledged that state intervention was needed to protect the employee's autonomy. Therefore, the agreement was invalid. The dissent also delicately balanced multiple considerations: freedom of contract, encouraging arbitration, employment relations, and migrant status. All these values and issues were treated in a contextual and non-binary manner. As a result, the dissent, along with the district judge, accepted the employee's claims to invalidate the employment contract. That result would have enhanced employee autonomy. Rather than perpetuating social inequality, the dissenting opinion used contract law to protect employee autonomy. In this case, the individualistic notion of autonomy held by the majority led to the rejection of the employee's economic duress and undue influence claims and to the enforcement of the employment agreement, whereas the dissenting opinion's relational autonomy approach resulted in accepting these claims and invalidating the arbitration agreement.

D. Abortion Law

As the rich scholarship on women's right to an abortion has shown, this right is based on and fosters women's right to make reproductive decisions and women's control over their bodies and their lives. It also protects and promotes women's equality in society and family, as well as their ability to participate in the public sphere of politics, the workforce, and the market

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[264] *Id.* at 632 (Rawlinson, J., dissenting).

[265] For a discussion of the imbalance of personal power and social inequalities, see Orit Gan, *Duress Law and Power*, *in* CONTRACT AND POWER: IDEOLOGIES, INEQUALITIES, AND MARGINALISATOIN IN EUROPEAN CONTRACT LAW 41 (Lucinda Miller, Pietro Sirena eds., 2026).

[266] *Martinez-Gonzalez*, 25 F.4th at 633 (Rawlinson, J., dissenting).

[267] *Id.*

economy.[268]

This Section applies the alternative notion of relational autonomy presented in the previous Sections to analyze the abortion law cases discussed in Part III. As in the contract context, it should be noted that the aim is to present an alternative analysis, not necessarily reach a different result. Offering a detailed application of relational autonomy is beyond the scope of this Article, and a thorough practical guide to relational autonomy in abortion law will have to wait for a follow-up article. Still, this Section concludes with a test case demonstrating such an application, similar to the previous analysis of contract law. The test case analyzes a case in which the majority applied an individual autonomy approach, while the dissenting opinion applied a relational autonomy approach.[269] This will serve as an example of the practical implications of relational autonomy, and as in the contract context, how it can yield different results.

1. Autonomy, Relations, and Emotions

The dissenting opinion in *Dobbs* stressed that the choice to have an abortion "must belong to a woman, in consultation with her family and doctor."[270] A decision is not made in a vacuum. It is a woman's decision; however, it is made in relation to others around her who will be affected by her decision, such as the father of the child, her children, the parents in the case of a pregnant minor, and her doctor. That is, a pregnant woman contemplating an abortion considers her relations with the father of the fetus,[271] or how it will affect her family, including her relations with her partner and other children she might have. This does not mean that the father or the parents of a pregnant minor have veto power. In cases of rape[272] or battery, or in the case of a minor,[273] a bypass is needed to allow women to

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[268] *See* Reva B. Siegel et al., *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 79 (2022) (discussing the effect of equality-based arguments on women's autonomy generally and not just in the case of abortion); *see also* Petersen, *supra* note 107, at 305 (discussing the impact the arguments in *Dobbs* have on women's right to equality).

[269] *But see* comment *supra* note 228.

[270] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 365 (2022) (Breyer, J., dissenting).

[271] Most women consult their husbands. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 892 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022) (holding that a Pennsylvania statute requiring married women seeking an abortion must consult their husbands before doing so was not an undue burden on the decision to have an abortion).

[272] Lori N. Ross, *Childbearing Under Unbearable Circumstances: The Importance of Abortion Ban Exceptions for Victims of Sexual Violence and the Current Bias Against Sex Trafficking Victims*, 52 U. BALT. L. REV. 251, 319 (2023); Mary Ziegler, *Abortion and the Law of Innocence*, 2021 U. ILL. L. REV. 865, 870 (2021).

[273] Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights After* Dobbs, 132 YALE L.J. 1908, 1941 (2023).

obtain an abortion without the consent of the father, or the parents in the case of a minor. She may also consult her doctor regarding the medical aspects and implications of abortion. The woman's and the fetus's health are important considerations. Especially after *Dobbs*, it is important for doctors and other health personnel to observe ethical and privacy codes of conduct. Furthermore, as abortion is a moral decision, the woman may consider her ethical and religious beliefs[274] and consult a minister or rabbi for spiritual support. She may consider her financial means for raising a child and the impact of her pregnancy on her job and educational plans. The woman is not isolated from social relations, but a connected person who considers multiple relations and the influence of her decision on others. As Jody Lyneé Madeira argued, regret does not suggest a wrong decision and does not negate an autonomous decision.[275] Therefore, women should not be denied their right to abortion because they may regret it in hindsight—and even if they do regret it, it is still their decision. Abortion is an issue between a woman and her doctor;[276] a woman and her spouse, partner, or boyfriend; a woman and her employer; and a woman and her minister or rabbi. Numerous social and other factors may influence a woman's decision about an abortion, such as whether her religion allows abortions under certain circumstances,[277] or whether her employer's healthcare plan covers abortions.[278] Especially after *Dobbs*, employers may offer their employees abortion related benefits, such as health insurance plans that cover abortions or travel benefits.[279]

It should be clear that it is the woman's decision—and only her decision—whether to receive an abortion. Relational autonomy does not mean that others make the decision for her. It means she takes others with whom she has relations into consideration in making her decision. Social and other circumstances may also undoubtedly impact and even limit her options. For example, lack of financial means, her health, lack of available clinics in her area, adoption options, demonstrations at the entrance to the clinic, and

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[274] *See* Josh Blackman et al., *Abortion and Religious Liberty*, 27 TEX. REV. L. & POL. 441 (2023) (discussing the role of religious considerations in light of *Dobbs*).

[275] Jody Lyneé Madeira, *Aborted Emotions: Regret, Relationality, and Regulation*, 21 MICH. J. GENDER & L. 1, 25–27 (2014); *see also* Kate Greasley, *Abortion and Regret*, 38 J. MED. ETHICS 705, 706 (2012); Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 324 (2011).

[276] Sonia M. Suter, *Alito is Wrong: We* Can *Assess the Impact of* Dobbs*, and It Is Bad for Women's Health*, 53 SETON HALL L. REV. 1477, 1479 (2023); Natasha Rappazzo, Comment, *Emergency Room to the Courtroom: Providing Abortion Care Under EMTALA and State Abortion Bans*, 128 DICK. L. REV. 325, 344 (2023).

[277] *See, e.g.*, Michael A. Helfand, *Using Jewish Law: Jewish Religious Liberty Advocacy for the Right to Abortion*, 70 WAYNE L. REV. 51, 53 (2024).

[278] Jennifer S. Fan, *Corporations and Abortion Rights in a Post-*Dobbs *World*, 57 U.C. DAVIS L. REV. 819, 835–36 (2023).

[279] Virginia Bethune, *What Employers Must Consider When Paying for Abortion Travel in the Wake of* Dobbs, 17 OHIO ST. BUS. L.J. 265, 273–74 (2023).

lack of information may influence her decision. Ultimately, it is the woman's—and only the woman's—choice. These relational and emotional aspects of women's autonomy do not negate her autonomy. Rather, making an autonomous decision may be an emotional process that also considers the impact of the decision on others. It is usually not a cold, rational decision, but a decision laden with relational and emotional components, considerations, and consequences.[280] Deciding whether to have an abortion is a relational decision that is influenced by relational considerations.

2. Autonomy as a Matter of Degree

Autonomy is not dichotomous; rather, autonomy sits on a spectrum. Women who live in a state without any clinics to go to or in a state with restrictive abortion laws need to travel to another state to have an abortion; women who cannot afford the cost of an abortion need to raise the money to pay for it; women who are denied medical information cannot make an informed decision; women who are pressured to keep the pregnancy (for example, for religious reasons) may feel compelled to do so. These women do not lack autonomy; rather, they have less autonomy than women who do not face these difficulties. These women are autonomous to a degree. However, they have to overcome these challenges in making their decision, and they are disempowered in the process. For example, though demonstrations in front of clinics or anti-abortion campaigns may make the pregnant women's decision more difficult, this does not mean that they did not make an autonomous decision. Women may need to travel to another state or take a loan to pay for an abortion, making their decision more difficult, but they may be able to overcome these difficulties and still act on their decision. However, severe impediments to abortion could negate women's autonomy and may even lead women to have unsafe abortions that harm their health. The state should promote policies that enhance women's autonomy by eradicating the difficulties women face when making their decision whether to abort. Autonomy is a matter of degree, and some women may face difficulties—some minor and some harsher—in obtaining an abortion in a patriarchal society.

3. Autonomy and Other Values

Abortion is a complicated and heartbreaking decision. In making their decision, women take into account various factors, including religion, moral and ethical considerations, physical and health issues, and economic stability.[281] They may also consider other options, such as having the child and then giving it up for adoption. The fetus's interests are not in opposition

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[280] CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 82–85 (1982).

[281] *Id.*

to the woman's interests. As her body carries and nurtures the fetus, they are connected. Considerations regarding the fetus are part of and not external to women's considerations.

Pamela Laufer-Ukeles suggested an alternative framework of informed consent in reproductive decisions.[282] This framework is relational and acknowledges the woman's interconnectedness to the fetus, the conflict between the woman's interests, the doctor's interests, and the state's interests, as well as the woman's identity.[283] It is not the woman against the fetus, as they form a relationship even if the woman chooses to abort. [284]

Abortion does not only involve a balance between women's autonomy on the one hand and the state's interests on the other. For example, concern for the fetus is not only the state's consideration but also that of the woman. The fetus and the woman are connected, and pregnant women do not take the decision to terminate a pregnancy lightly, as they are aware of the heavy implications of their decision on the fetus. Likewise, women's health is the interest of both women and the state. Therefore, rather than viewing the woman and the state as having competing interests, pitted one against the other, it is a matter of a complex weighing and balancing of varied values, interests, and considerations. All three cases, *Roe*, *Casey*, and *Dobbs,* assumed a test of balancing between women's freedom and the state's interests. This oversimplifies what, in reality, is a grave and distressing decision involving complex—and sometimes conflicting—factors and considerations. It is not a simple act of placing two factors on the scale, but rather a tragic multi-factor dilemma.

Indeed, relational autonomy is nuanced, contextual, and complex. However, this does not mean it is unworkable or impossible to apply. It requires a delicate consideration of varied interests and values, but it is not beyond the reach of judges. Balancing between only two values, rather than several varied ones, does not necessarily simplify the task. In fact, the undue burden test, which balances women's freedom and state interests, was criticized for failing to provide useful guidelines, implying that such guidelines are needed.[285] Abortion entails the consideration of multiple values, interests, and considerations, and abortion law presents very hard cases entailing difficult and heartbreaking decisions for both women and the

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[282] *See generally* Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567 (2011) (suggesting that informed consent in such contexts should involve dialogue and broad interactive consultations where both doctor and patient learn about the risks, priorities, competing interests, and social pressures surrounding the decision).

[283] *Id.*

[284] *See* Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753 (Can.).

[285] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 990 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 219–20 (2022).

court. Autonomy is also a values-laden concept, and relational autonomy adds a needed multifaceted view of abortion and abortion law.

4. Autonomy, Stereotypes, and Social Context

Social conditions may hinder women's autonomy, and the state has an important role to play to ensure that women have the options and conditions to make autonomous decisions. For example, poor women may have a hard time paying for an abortion, and therefore, affordable healthcare is needed. Ensuring abortion clinics provide adequate healthcare is also monitored by state authorities. Making sure there are available abortion clinics and there is no need to travel to another state to have an abortion will also enhance women's options. Regulating adoption agencies for women who prefer this option over abortion is also needed.[286] Informed consent is also crucial for women's autonomy. Doctors need to provide women with full and adequate information.[287] Rushing women into having an abortion or withholding an abortion impedes women's autonomy. Parent-child relations are also regulated by the state. Therefore, not requiring minors to receive their parent's consent in certain circumstances would facilitate their autonomy. The state also regulates the prescribing and the mailing of medications.[288] These regulations should provide women with easy access to affordable abortion pills. The privacy of app users' data is also regulated by the state. These regulations should protect the privacy of women using menstruation and fertility apps.[289] The state also regulates affordable daycare centers, which will be a factor that poor women consider when deciding whether to keep the pregnancy rather than abort. Employment relations are also regulated by the state. Providing protections for pregnant employees will enhance their autonomy.[290] Hence, abortion decisions are never free from state intervention, as argued by the dissent in *Dobbs*.

This social context of abortion means that the state has an important role in setting the social conditions for empowering women, and in providing

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[286] Malinda L. Seymore, *Social Costs of* Dobbs *' Pro-Adoption Agenda*, 57 U.C. DAVIS L. REV. 503, 503–04 (2023).

[287] Calvin Lee, *Say It Ain't* Roe*:* Dobbs *and Reason Bans Are Trojan Horses for the Down Syndrome Community*, 107 MINN. L. REV. 817, 817–18 (2022); *see also*, Sonia M. Suter, *The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making*, 39 AM. J. L. MED. 7, 17–19 (2013) (discussing the importance of informed decision-making in the reproductive and end-of-life contexts).

[288] Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L. J. 1068, 1071–72 (2025).

[289] Anya E.R. Prince, *Abortion Surveillance*, 28 J. GENDER, RACE & JUST. 605 (2025) (exploring the abortion-related digital privacy and legal issues in a post-*Dobbs* world).

[290] Prashasti Bhatnagar, *The Pregnant Workers Fairness Act Leaves Agricultural Workers Behind*, 52 J. L. MED. ETHICS 13, 13 (2024); Samantha J. Prince, *Deducting* Dobbs*: The Tax Treatment of Abortion-Related Travel Benefits*, 98 TUL. L. REV. 1, 1–2 (2023).

them with varied, affordable options to choose from. As the dissent in *Dobbs* observed, freedom and equality go hand in hand. That is, anti-discrimination would enhance rather than impede women's freedom. The state is not neutral, and women are not free from state intervention. Whether the Constitution allows abortions or not, whether state laws prohibit abortions or not, the state intervenes. In the same manner, both *Roe*, holding women have a constitutional right to abortion, and *Dobbs*, holding the opposite, means state intervention. Importantly, abortion is not only a gender equality issue, but also involves other factors such as race,[291] age,[292] disability,[293] and class.[294] Therefore, promoting equality for these social groups would enhance their autonomy. Women are never free from state intervention. To the contrary, the state has an important role in regulating social relations to eradicate inequalities and foster autonomy.

5. Summary

Reproductive freedom does not mean being free from state intervention. Rather, the state plays an important role in nurturing and enhancing women's reproductive autonomy. Deciding whether to have an abortion is a complex decision, involving many considerations, and is set in a relational and social context. It has economic and emotional aspects and involves medical and moral considerations. To make their own decisions, women need supportive relationships and social equality.

State regulation of abortion (and related matters such as regulating clinics) should therefore support and nurture relations that enhance women's reproductive autonomy—for example, parent-child relations, patient-doctor relations, employee-employer relations, and relations between spouses.

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[291] Makiya Turntine, *Constitutional Law*—Dobbs v. Jackson Women's Health Organization *Will Likely Have a Negative, Disproportionate Impact on Women of Color and Reassert Inferiority*, 46 U. ARK. LITTLE ROCK L. REV. 237, 237–38 (2023); Kira Eidson, Note, *Addressing the Black Mortality Crisis in the Wake of* Dobbs*: A Reproductive Justice Policy Framework*, 24 GEO. J. GENDER & L. 929, 931–32 (2023); Halley Townsend, *Second Middle Passage: How Anti-Abortion Laws Perpetuate Structures of Slavery and the Case for Reproductive Justice*, 25 U. PA. J. CONST. L. 187, 189–90 (2023); Mary Ziegler, Roe*'s Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1, 1 (2013); Suzanne A. Kim, *Bringing Visibility to AAPI Reproductive Care After* Dobbs, 71 UCLA L. REV. DISCOURSE 318, 320 (2024).

[292] *See generally* J. Shoshanna Ehrlich, *The Abortion Rights of Teens in the Post-*Dobbs *Era*, 30 CARDOZO J. EQUAL RTS. & SOC. JUST. 1 (2023) (focusing on teen abortions); Michele Goodwin, *She's So Exceptional: Rape and Incest Exceptions Post-*Dobbs, 91 U. CHI. L. REV. 593 (2024) (focusing on minor abortions).

[293] *See generally* Robyn M. Powell, *Including Disabled People in the Battle to Protect Abortion Rights: A Call-to-Action*, 70 UCLA L. REV. 774 (2023) (focusing on individuals who are disabled receiving abortions).

[294] *See generally* Elizabeth Tobin-Tyler, *Putting Your Money Where Your Mouth Is: Maternal Health Policy After* Dobbs, 53 SETON HALL L. REV. 1577 (2023) (focusing on abortion of people living in poverty); Noy Naaman, *Reproductive Time in Law*, 48 HARV. J. L. & GENDER 49, 82 (2025) (arguing that legal practices impose certain restraints on family planning timelines).

Fostering relations that improve women's autonomy is also the court's guideline in reviewing these regulations. Furthermore, the state should use its power to advance equality, through anti-discrimination laws, for example, for women, thereby also increasing women's autonomy. Therefore, the focus is not on undue burden for the pregnant woman, but on nurturing relations; the focus is not on the individual woman's choice-making, but on social context that provides women a menu of options to choose from; it is not a matter of balancing between reproductive choice and state interests, but a delicate and complex balance between varied considerations and values; it is not a woman against the fetus, since they are connected physically and emotionally; it is not either an autonomous agent or a non-autonomous victim, but a matter of degree with the aim of increasing rather than impeding autonomy.

Relational autonomy applies a different approach to analyzing abortion regulations than the current analysis under individual autonomy. As noted, this will not necessarily produce different results. For example, the proper regulation of abortion is warranted under relational autonomy. However, the purpose of such regulation is to enhance women's autonomy, providing more and better options to choose from and removing the social constraints that impede their autonomy. Assuming proper state intervention, when women decide to have an abortion, acting on their decision and obtaining an abortion will be easier. For example, the abortion may be funded and accessible at a nearby clinic. Again, assuming proper state intervention, when women decide not to have an abortion, here too, pursuing their wishes to have the child will be easier. For example, they will have available adoption options or childcare options. Therefore, under relational autonomy, women would either make the same decision they would have made under current individual autonomy (though it will be easier to act upon their decision) or make a different decision (as abortion will be available in places where it is currently practically unavailable). As in the contract context, abortion based on the relational autonomy approach is not only a matter for the courts but also a matter of a social background that fosters autonomy through legislation and regulation. The following case will demonstrate the application of relational autonomy to abortion regulation.

6. Test Case

Is the Partial-Birth Abortion Ban Act of 2003 ("Act") constitutional? The Supreme Court addressed the procedures regulated by the Act and answered in the affirmative.[295] Justice Kennedy, writing the opinion of the Court, rejected three arguments that would have rendered the Act unconstitutional: (1) the Act posed an undue burden on a woman's ability to choose a second-trimester abortion; (2) the Act was unconstitutionally vague; and (3) the Act

[295] Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007).

lacked a women's health exception.[296] Justice Kennedy briefly acknowledged the right of a woman to choose to have an abortion before viability and to obtain it without undue intervention from the state.[297] However, he emphasized that the state has legitimate interests in protecting the health of the woman and the life of the fetus.[298]

Justice Kennedy endorsed an individualistic notion of autonomy. This limited notion of autonomy means women's right to choose with no state intervention. This is a limited notion of autonomy that fails to consider social factors and disregards those that affect women's autonomy. He also failed to acknowledge that women are never free from state intervention. Furthermore, Justice Kennedy mentioned that some doctors decided not to disclose the details of the procedure to women before the abortion and concluded that the state has a legitimate interest in prohibiting this procedure.[299] However, Justice Kennedy did not consider that the lack of full information limits women's autonomy and that full disclosure is needed for women to make an informed and autonomous decision.

Furthermore, Justice Kennedy also followed *Roe* and *Casey*'s demand for a balance between women's autonomy and the State's interests.[300] He also discussed whether the Act protected the mother's health when considering the state's interests.[301] That is, in the analysis, the health of the mother is one of the state's interests rather than a consideration women make when considering abortion. Women's health is placed at odds with women's autonomy and then balanced against it. Concern for women's health is not viewed as part of women's decision-making autonomy; it is considered external rather than an integral part of it.

The dissenting opinion argued that the Act was unconstitutional. Justice Ginsburg affirmed women's right to choose an abortion.[302] She stressed that the right to choose is part of women's dignity, personhood, equality, participation in social life, and the realization of their full potential.[303] That is, she held a broader notion of autonomy, not limited to making a choice without state intervention. Framing abortion as part of women's equality endorses a notion of autonomy that is not limited to non-intervention but also considers social impediments to women's autonomy.

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[296] *Id.* at 144 (stressing that the Act at issue is different than the Nebraska statute that was invalidated in Stenberg v. Carhart, 530 U.S. 914 (2000)).

[297] *Id.* at 157–58.

[298] *Id.* at 158.

[299] *Id.* at 159–60.

[300] *Id.* at 145–46.

[301] Gonzales v. Carhart, 550 U.S. 124, 161 (2007).

[302] *Id.* at 170 (Ginsburg, J., dissenting).

[303] *Id.* at 170–71 (Ginsburg, J., dissenting).

Justice Ginsburg also balanced women's health, women's autonomy, women's equality, and the life of the fetus.[304] Rather than choosing one value over the other, she delicately balanced the varied conflicting values. She also took notice of social conditions that make seeking abortion difficult for adolescents, minors, poor women, and indigent women.[305] She acknowledged that some women face difficulties accessing abortion, warning that "[e]liminating or reducing women's reproductive choices is manifestly not a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies."[306] Justice Ginsburg cautioned against the consequences of barriers to safe abortion for women's health. She also refuted Justice Kennedy's contention that women are too fragile to receive full medical information regarding the medical procedure and that they might regret having an abortion. She supported giving women full information so they would be able to choose. According to Justice Ginsburg, Justice Kennedy's assertions reflected "ancient notions about women's place in the family and under the Constitution,"[307] and would deprive women of the option of having a safe abortion. These old notions about women's destiny as mothers might endanger their health since they may be denied a safe abortion. That is, women's health is not only the state's interest, but also part of women's considerations. It is not external to their autonomy but crucial for their autonomous decision-making.

The dissenting opinion held a notion of relational autonomy. It was sensitive to the way social conditions affect women's autonomy. Pregnant women are also embedded in social relations that impact their options and shape their choices. Justice Ginsburg was aware of intersectionality and of how some women may face more difficult and/or different hurdles than others. Rather than stereotypically assuming motherhood as women's destiny and aspiration, she more realistically pointed out that some women become pregnant through rape, and that some women cannot afford or do not have access to safe abortion.

The dissenting opinion also recognized that emotions are part of the decision-making process. Rather than negating autonomy, emotions are part of autonomous decision-making. Rather than stereotypically portraying women as too emotional and fragile to make decisions and too weak to handle medical information, she aimed to normalize emotions and give women full medical information. She also balanced among varied, conflicting values. Thus, autonomy is not at odds with women's health and the fetus's right to life, but instead, these are all considerations to be considered. Justice

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[304] *Id.* at 172–74 (Ginsburg, J., dissenting).

[305] *Id.* at 170, n. 3 (Ginsburg, J., dissenting).

[306] *Id.* at 184, n. 9 (Ginsburg, J., dissenting).

[307] Gonzales v. Carhart, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

Ginsburg delicately and contextually weighed all these concerns when analyzing the Act. In this case, while the majority opinion took an individual autonomy approach and upheld the Act, the dissenting opinion adopted a relational view of autonomy and would have declared the Act unconstitutional.[308]

V. CONCLUSION

Women's autonomy is limited. One reason is that the courts have endorsed a simplistic individualistic notion of autonomy, which is balanced against other values. The narrow notion of autonomy, the dividing line between autonomy and other values, and the reconciliation of the two are all gendered. Freedom of contract means the enforceability of contracts and limited policing of contracts. Reproductive freedom means the right to decide to have an abortion without state intervention. In both contexts, the law ignores the relations and social conditions that shape women's autonomy. In both contexts, the law veils the state's involvement in setting the social conditions for autonomy. In both contexts, autonomy is set at odds with public policy and the state's interests. And in both contexts, the line between these two competing values is gendered.

To enhance women's autonomy, the law needs to adopt a relational, more well-rounded, and comprehensive notion of autonomy. This alternative notion of autonomy would consider social oppression that hinders women's autonomy and would encourage social equality and supportive relationships that would nurture autonomy. It would endorse a nuanced, context-sensitive balance among varied—and sometimes conflicting—interests, concerns, and values, yielding a better balance among the different considerations. It would unveil the state's intervention in contract and abortion and would therefore require the state to act to promote equality and social justice. The result would be greater autonomy and more autonomous decision-making for women.

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[308] For analysis of the difference of opinions between the majority and the dissenting opinion, see Orit Gan, *I Dissent: Justice Ginsburg's Profound Dissents*, 74 RUTGERS UNI. L. REV. 1037, 1076–83 (2022).