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# The Production and Reproduction of Constitutional Norms

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# THE PRODUCTION AND REPRODUCTION OF CONSTITUTIONAL NORMS

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## I.
## FROM *ROE* TO *CARHART*

Since 1973, *Roe v. Wade* has served as shorthand in the United States for the proposition that women have a constitutionally protected right to abortion.[1] *Roe* has also been used as a rallying cry for opponents of abortion rights who, in the words of Professors Reva Siegel and Robert Post, sparked "*Roe* rage" to mobilize a diverse set of interests into a social movement committed to the reversal of the decision.[2]

In 2007, constitutional lawyers in the United States got a new shorthand—*Carhart*—the first decision since the 1973 ruling in *Roe v.*

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

2. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007). The history of abortion litigation leading up to *Roe* is provided in BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (Linda Greenhouse & Reva B. Siegel eds., 2010) [hereinafter BEFORE *ROE V. WADE*].

*Wade* to uphold the facial validity of a statute that limits access to abortion without providing an express exception for risks to a woman's health, as contrasted to abortions "necessary to save the life of a mother."[3] That statute, provocatively named by Congress the "Partial-Birth Abortion Ban Act of 2003," subjects doctors who "knowingly" perform a particular kind of abortion (designed to reduce the risk of infection to women) to criminal sanctions including prison terms of up to two years.[4]

One might be tempted to assign *Carhart* to a particularly contentious corner of law and morality in the United States and, absent an interest in reproductive rights, turn away. But *Carhart* offers a myriad of lessons about the role of courts in democracy, the evocative power of constitutional claims, the relevance of texts and precedents to constitutional judgments, the effects of national and transnational movements, and the autonomy of women, of health professionals, of Congress, and of judges—including those sitting on the Supreme Court. Further, in contrast to an oft-invoked presumption that judicial review displaces or silences democratic processes, the decisions in *Roe* and in *Carhart* demonstrate the dependency of democracies on dialogic interaction among the many groups within and across social orders. As this brief essay sketches, legal generativity from actors arrayed about the political spectrum is an artifact of adjudication in democratic polities.

## II.
## THE INSTABILITY OF *CARHART*

To appreciate how *Carhart* engendered, rather than quieted, constitutional debate, elaboration of the arguments and conflicts within the decision is needed. At first glance, *Carhart* might be viewed as a minor ruling that does not mark a major retreat from *Roe v. Wade*. On its face, both the Act in question and the decision rendered have a limited reach. The procedure at issue is atypical: eighty-five to ninety percent of the 1.3 million abortions recorded annually in the United States take place during the first three months of a pregnancy.[5] Further, the Partial-Birth Abortion Act does not preclude abortions, even when late-term and after viability.

Rather, as Justice Kennedy's opinion for the Court explained, the Act bans "only" one method by which abortions take place: the deliberate and knowing delivery of a "living fetus" killed after the "fetal trunk past the navel is outside the body of the mother" or "in the case of a head-first presentation, the entire fetal head is outside the body of the mother."[6] The

3. Gonzales v. Carhart, 550 U.S. 124 (2007); 18 U.S.C. § 1531 (2006).

4. 18 U.S.C. § 1531.

5. *Carhart*, 550 U.S. at 134 (citing Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 960 n.4 (N.D. Cal. 2004)).

6. *Id.* at 147–48 (quoting 18 U.S.C. § 1531(b)(1)(A)).

doctor's crime thus has "anatomical landmarks" related to the mother's body.[7] As a consequence, the opinion held, the Act's definition of the crime was not unconstitutionally vague.[8] Moreover, the majority explained, were doctors to get past that critical point by "accident or inadvertence,"[9] they ought not be prosecuted.[10] The decision thereby provided doctors with both a defense to prosecution and an option of seeking a court's declaration in advance that a specific abortion was necessary, given "a particular condition" related to a woman's health.[11] If doctors were willing to risk criminal sanctions by repeatedly testing the boundaries of the ruling, their claims could narrow its import. On the other hand, given the rarity of the procedure, few opportunities for litigating its import would be likely to arise.

But the dissent, the concurrence, and the bulk of the Kennedy opinion tell another story, making plain the distance *Carhart* stands from *Roe* and from the judgments in between. Justice Ruth Bader Ginsburg, moved to read excerpts of the dissent from the bench when *Carhart* was rendered in April of 2007, called it "alarming."[12] The brief concurrence by Justice Thomas (joined by Justice Scalia) spoke directly to the larger stakes.[13] In the wake of the death of Chief Justice William Rehnquist and the departure of Justice Sandra Day O'Connor, some opponents of abortion had hoped that a new majority of five would adopt what the Thomas concurrence in *Carhart* proposed: that "the Court's abortion jurisprudence . . . has no basis in the Constitution."[14] In the years since *Carhart* was decided, efforts to make that proposition law through limiting access to abortion have intensified, as state legislatures have enacted additional impediments to the procedure.[15]

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7. *Id.* at 148 (quoting Brief for Petitioner at 46, *Carhart*, 550 U.S. 124 (No. 05-380/1382)); *id.* at 153.

8. *Id.* at 149.

9. *Id.* at 148.

10 *Id.* at 150.

11. *Id.* at 167.

12. *Id.* at 170 (Ginsburg, J., dissenting). *See also* Linda Greenhouse, *In Reversal of Course, Justices, 5–4, Back Ban on Abortion Method*, N.Y. TIMES, Apr. 19, 2007, at A1.

13 *Carhart,* 550 U.S. at 168 (Thomas, J., concurring).

14. *Id.* at 169.

15. For example, in 2009, North Dakota enacted a statute requiring that abortion providers inform women that they may receive an ultrasound and hear a fetal heartbeat before obtaining an abortion (the latter option is called "auscultation"). That state's only abortion provider, the Red River Women's Clinic in Fargo, filed suit and obtained a state court judgment clarifying that abortion providers were not required to provide auscultation services but were to inform women that such services might be available. *See North Dakota Court Provides Clarity on Vague and Confusing Abortion Restriction*, CTR. FOR REPROD. RIGHTS (Aug. 12, 2009), http://reproductiverights.org/en/press-room/north-dakota-court-provides-clarity-on-vague-and-confusing-abortion-restriction. Several states require women to make two separate trips to health care providers before being able to obtain an abortion. *See* CTR. FOR REPROD. RIGHTS, 2010 LEGISLATIVE WRAP UP 5,

## III.
## THE "FACTS": MEDICAL AND CONGRESSIONAL

*Carhart* prompted both applause and distress because it is the first decision since *Roe* that "blesse[d]" a prohibition of abortion that does not include provisions "safeguarding a woman's health."[16] Moreover, the Court did so by ratifying what Congress had styled "factual findings," such as the claim that a consensus in medicine viewed this method of abortion as "inhumane" and "never medically necessary."[17] The Court chose the congressional view of medical "fact" over the judgment of the American College of Obstetricians and Gynecologists, which had provided evidence that, on occasion, such procedures were needed both to protect a woman's health and her future procreative possibilities.[18] That professional view prompted one of the appellate courts (later overturned by the Supreme Court) to insist that the "Constitution requires legislatures to err on the side of protecting women's health by including a health exception."[19]

The Supreme Court's deference to Congress on questions of "medical necessity" was particularly perplexing given that the record created in Congress before the Act's passage was filled with other "findings" devoid (as the majority acknowledged) of accuracy.[20] For example, Congress had "found" that no medical school in the United States taught doctors how to perform the procedure.[21] But, in fact, several major teaching institutions

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http://reproductiverights.org/sites/crr.civicactions.net/files/documents/state_wrapup_2010.pdf (last visited May 18, 2011); GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION, (Mar. 1, 2011), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf; *A Year in Review: 2009 Legislative Wrap Up*, CTR. FOR REPROD. RIGHTS, http://reproductiverights.org/en/feature/a-year-in-review-2009-legislative-wrap-up (last visited May 18, 2011). Plaintiffs obtained an injunction against portions of the Arizona legislation, but the two-trip requirement remained in effect. *See* Tucson Women's Center v. Arizona Medical Board, CTR. FOR REPROD. RIGHTS (Sept. 29, 2009), http://reproductiverights.org/en/case/tucson-womens-center-v-arizona-medical-board. *See also infra* note 44 (discussing recent restrictive legislation in Nebraska and Oklahoma).

16. *Carhart*, 550 U.S. at 171 (Ginsburg, J., dissenting).

17. *Id.* at 141 (majority opinion) (quoting the Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105 § 2(7), 117 Stat. 1201, 1201 (2003) (codified at notes following 18 U.S.C. § 1531 (2006))).

18. *See id.* at 170–71 (Ginsburg, J., dissenting) ("[The Court's opinion] tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists."); Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents at 10, *Carhart*, 550 U.S. 124 (Nos. 05-380/1382).

19. Carhart v. Gonzales, 413 F.3d 791, 796 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007).

20. *Carhart*, 550 U.S. at 165 ("Whether or not accurate at the time, some of the important findings have been superseded.").

21. *Id.* at 175 (Ginsburg, J., dissenting) (citing the Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105, § 2(14)(B), 117 Stat. at 1204).

did.[22] Moreover, in other cases, members of the Court who were also in the *Carhart* majority had been energetic in overseeing congressional fact-finding and concluded that what they viewed as impoverished congressional records demonstrated that certain issues were beyond congressional authority or that legislative remedies failed to be "proportionate" and "congruent" to the harms the record before Congress had identified.[23]

In contrast to the one-sided investigation by Congress (a "polemic," as the dissent noted[24]), the trial courts spent weeks hearing from medical experts.[25] Those evidentiary explorations were the predicates to lower court conclusions that, as a matter of fact, the intact dilation and evacuation procedure (referred to by the politically freighted but medically meaningless congressional term "partial-birth abortion") provided a safer means of abortion for women who suffered from various medical conditions (such as certain forms of heart disease) than did alternative procedures.[26] Adding its own political freight, the Kennedy decision repeatedly chose to label surgeons, whose specialty is gynecology and obstetrics, "abortion doctors"[27] over the dissent's objection that such nomenclature was pejorative.[28]

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22. *Id.* at 175–76. The list included "Columbia, Cornell, Yale, New York University, Northwestern, University of Pittsburgh, University of Pennsylvania, University of Rochester, and University of Chicago." *Id.* (quoting Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, *supra* note 18, at 18).

23. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 614, 625–26 (2000) (holding that Congress lacked authority under the Commerce Clause and the Fourteenth Amendment to enact a federal civil remedy provision in the Violence Against Women Act of 1994); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000) (holding that Congress lacked the authority to impose liability on states under the Age Discrimination Act of 1967); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999) (overturning the Patent and Plant Variety Protection Remedy Clarification Act); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (holding that Congress lacked the power to enact the Religious Freedom Restoration Act of 1993).

24. *Carhart*, 550 U.S. at 175 (Ginsburg, J., dissenting) ("[T]he oral testimony before Congress was not only unbalanced, but intentionally polemic." (quoting Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004))).

25. *See id.* at 177 ("[T]he District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of 'much more extensive medical and scientific evidence . . . concerning the safety and necessity of intact D&Es.'" (quoting *Planned Parenthood*, 320 F. Supp. 2d at 1014)); *id.* ("[The] District Court 'heard more evidence during its trial than Congress heard over the span of eight years.'" (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 482 (S.D.N.Y. 2004))).

26. *See id.* at 177–79 (noting the significant amount of expert testimony introduced during trial that contradicted Congress' claims that intact D&E was never medically necessary).

27. *Id.* at 138, 144, 154, 155, 161, 163 (majority opinion).

28. *Id.* at 186–87 (Ginsburg, J., dissenting).

## IV.
## "PROMOTING FETAL LIFE" BY "PROTECTING" WOMEN FROM MAKING DECISIONS

Justice Ginsburg's dissent took on the Court's opinion in another respect: its analysis of the government's "legitimate and substantial interest in preserving and promoting fetal life."[29] As the dissent explained, the Act does not preserve fetal life *per se* but instead precludes the ending of fetal life by a particular procedure.[30] What appeared to be animating Justice Kennedy's approach can be found in two facets of the majority's remarkable narration: its sense of abortion as unmitigated violence and its characterization of women as mothers in need of protection.

The opinion begins by positioning all types of abortion as terrible acts of aggression.[31] The narrative structure is reminiscent of the detailed descriptions of crimes that open many of the Court's rulings upholding convictions of criminal defendants. Much of the decision's specific and gruesome discussion of "dismemberment" is legally superfluous; some procedures detailed ("vacuum aspiration," the medicine RU–486, and others)[32] were not before the Court. Indeed, the majority's decision to uphold a ban on the extraction of an intact fetus intact left the method of abortion that it described as "dismemberment" legal.[33]

But perhaps not for long. The decision acknowledged that the "standard" dilation and evacuation (D & E) procedure could be considered "in some respects as brutal, if not more," than the intact D & E method banned by the Act[34]—thereby inviting legislators who were anti-abortion to address these other "brutal" procedures as they assert their interest in protection of fetal life. Not mentioned in the majority opinion are the reasons (risk of infection, preservation of future childbearing capacity) why women and their physicians chose the intact D & E when facing the disaster of a pregnancy gone wrong because a fetus was terribly injured or deformed.[35]

The second remarkable feature of the opinion is its characterization of pregnant women as mothers who, given "the bond of love the mother has

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29. *Id.* at 181 (quoting *Carhart*, 550 U.S. at 145).

30. *Id.* at 181 ("The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion.") (emphasis in the original).

31 *See id.* at 134–40 (majority opinion).

32. *Id.* at 134.

33. *Id.* at 156 (distinguishing the abortions prohibited by the Partial Birth Abortion Ban Act from abortions in which doctors "intend dismemberment before delivery"); *id.* at 182 (Ginsburg, J., dissenting) ("Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant.").

34. *Id.* at 160 (majority opinion).

35. *See id.* at 177 (Ginsburg, J., dissenting).

for her child," are inevitably in need of protection.[36] The opinion relied on an amicus filing that argued that women suffer something called "post-abortion syndrome," said to entail regret, shame, and loss of self-esteem.[37] Although acknowledging that "no reliable data to measure the phenomenon" existed,[38] Justice Kennedy proffered a view of a pregnant woman that has become a signature of the decision.

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child . . . . In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used . . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[39]

## V.
## PRISONERS OF THEIR SEX

Missing in the majority's discussion is a comparable claim, made on behalf of fathers, that they too would feel anguish and loss when prospective parenthood is precluded. The focus, instead, was on women whom the majority described as "mothers," even when they had had abortions. This conflation of women with mothers prompted the dissenters to object that the majority did not recognize women as full and equal citizens, able to function as economic and social actors equal to men.[40] As Justice Ginsburg's opinion detailed, the prior abortion jurisprudence had been founded on recognition of a woman's "personhood," "autonomy," and individual "dignity," which required that the decision to bear children was hers to make.[41] While "ancient notions" of women had placed them

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36. *See id.* at 159–60 (majority opinion).

37. Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 22–24, *Carhart*, 550 U.S. 124 (Nos. 05-380/1382), 2006 WL 1436684, *cited in Carhart*, 550 U.S. at 159.

38. *Carhart*, 550 U.S. at 159.

39. *Id.* at 159–60. One commentator has argued that the imagery of trauma invoked by Justice Kennedy is shared by some feminist writings asserting bodily rights of freedom from coercion. *See* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

40. *Id.* at 183–86 (Ginsburg, J., dissenting) (noting the Court's invocation of the "bond of love the mother has for her child" to justify its holding).

41. *Id.* at 170–71 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851–52 (1992)).

inevitably as mothers who had to be protected by men,[42] contemporary laws and constitutional commitments saw women as actors owning their own "destiny."[43]

Given the majority's view that doctors might be reluctant to provide all relevant information and that women would not press for details, one would have expected a different denouement—rejecting the ban on "partial-birth abortions" but inviting regulations that required the disclosure of risks and benefits as a predicate to legally sufficient consent. That template can be found in various legislative provisions directing health care providers to give pregnant women certain specific information. Doctors have objected that those directions violate their medical ethics and freedom of speech as well as women's privacy and liberty, and some courts have agreed.[44] But rather than promote regulation of decision-making, *Carhart* upheld a ban precluding women, men, and doctors of either sex from coming to their own judgments about how to proceed.

*Carhart* is thus momentous in that it marks the emergence in constitutional doctrine of what Reva Siegel has called a "woman-

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42. *Id.* at 171.

43. *Id.* at 185.

44. *See, e.g.*, Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025 (D. Neb. 2010). In that decision, the federal court restrained Nebraska state defendants from enforcing a law, enacted on April 13, 2010, that would have required medical providers to inform women of any risk factors "including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with one or more complications associated with abortion such that there is less than a five percent probability ($P < .05$) that such statistical association is due to chance." *Id.* at 1032. The court concluded that the plaintiffs, Planned Parenthood of the Heartland and an obstetrician, were likely to succeed on the merits of their claims that the statute violated their liberty and privacy interests under the Due Process Clause of the Fourteenth Amendment and their First Amendment rights. *Id.* at 1046, 1048. On August 18, 2010, the Nebraska Attorney General agreed to a settlement with Planned Parenthood and the American Civil Liberties Union that stipulated to a permanent injunction. Order and Final Judgment, *Heineman,* 724 F. Supp. 2d 1025 (D. Neb. 2010) (No. 4:10-CV-03122), ECF No. 64.

In the spring of 2010, Oklahoma enacted a provision, H.B. 2780, that requires medical providers to display to women live ultrasound images, to provide a "simultaneous explanation of what the ultrasound is depicting," and to "[p]rovide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable." Petition, Nova Health Sys. v. Edmondson, No. CV-2010-533 (Okla. D. Ct., Apr. 27, 2010), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/ documents/Petition.pdf. On July 19, 2010, a state court issued a temporary injunction of the law. *See* Barbara Hoberock, *Judge Extends Order Blocking Oklahoma Abortion Law*, TULSA WORLD, July 19, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=17&articleid=20100719_17_0_OKLAHO486872. *See also* GUTTMACHER INST. STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND 1 (Mar. 1, 2011), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (summarizing various states' ultrasound requirements); Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 970 (2010) (noting that "Oklahoma's mandatory ultrasound law is one of the most severe").

protective" rationale.[45] This approach has been promoted—as documented in a volume by Reva Siegel and Linda Greenhouse—by a significant and sustained social movement that pushed the debate about abortion to the forefront.[46] Those efforts changed the agenda of the Republican Party, which once had neither focused on abortion nor made anti-abortion efforts a part of its platform.[47] In the last decades in which women's rights have come to be accepted, abortion objectors have adopted the language of women's rights to frame arguments that anti-abortion statutes are themselves pro-women by protecting women from what would otherwise be ill-informed judgments to abort rather than enjoying the fulfillment of motherhood.[48]

Yet, as the excerpt from Justice Kennedy's majority opinion suggests, another way to describe the decision in *Carhart* is that it treats women as prisoners of their sex by confining women to a maternal role presumed to render them incompetent decision-makers. Prisoners are another category of adults treated, because of a different form of confinement, as unable to give consent for certain medical procedures. Law limits their agency on the theory that their condition, incarceration, renders them subject to misjudgments.[49] The rationale proffered by the Kennedy opinion is that women are also a category of persons to be told by law that they can have

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45. *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 993 (2007) [hereinafter Siegel, *The New Politics of Abortion*]. *See also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008) [hereinafter Siegel, *Dignity and the Politics of Protection*].

46. *See* BEFORE *ROE V. WADE*, *supra* note 2.

47. *Id.* at 113, 157, 215–16.

48. *See generally* Siegel, *The New Politics of Abortion*, *supra* note 45; Siegel, *Dignity and the Politics of Protection*, *supra* note 45.

49. *See, e.g.*, 28 C.F.R. §§ 512.10–21 (2009) (U.S. Bureau of Prisons regulations setting forth "additional requirements . . . to obtain approval to conduct research within the Bureau of Prisons . . . and responsibilities of Bureau staff in processing proposals and monitoring research projects," beyond the "[g]eneral provisions for the protection of human subjects"); 45 C.F.R. §§ 46.201–.207, 46.301–.306, 46.401–.408 (2009) (U.S. Department of Health and Human Services regulations establishing additional requirements governing federally-administered research involving pregnant women, fetuses, neonates, prisoners, and children). *See also* Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1150 (1997) (discussing the Department of Health and Human Services regulations, as well as debates among participants of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research over "whether prisoners can give truly voluntary consent to participate in research"). As Maya Manian has detailed, other areas in which the state, rather than individuals and doctors, makes decisions about individuals' health include bans on controlled substances and regulation of experimental drugs, as well as mandatory vaccination programs and prohibitions on physician-assisted suicide. *See* Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009). She distinguished those procedures as not precluding "medical treatment proven to be physically safer based on the government's unproven view" of the psychological harms imposed. *Id.* at 264–65. *See also id.* at 265–89.

no volition because their condition, pregnancy, makes them incompetent to act on their own behalf. The majority opinion goes further—in the face of maternal grief, it insists, doctors too will be unnerved: "In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the means that will be used . . . ."[50] Law thus divests both doctors and women of their autonomy.

In this respect, *Carhart* is a judicial foray into psychology coupled with religious overtones about the meaning of life. The majority opinion is an amalgam of presumptions about the emotions and motivations of mothers and of doctors (fathers remain missing in action), interspersed with moral or religious views about when life begins and what a pregnancy means for a woman.[51] Pervading the majority opinion is its own sense of what is self-evident and uncontestable about human nature and life; that approach, in turn, opens up yet other questions. If women are at risk of making the wrong decisions and if the government has a legitimate interest in fetal life, can the state prevent women from eating certain foods or from drinking alcohol while pregnant? What about affirmative (as well as negative) obligations, such as requiring that women submit to fetal monitoring, ultrasounds, or Caesarian sections under certain circumstances? Could legislation oblige women to consume foods and vitamins that promote fetal growth?[52]

Such questions may sound dramatic or fanciful, but they have real-world analogues. Women have been criminally prosecuted in some jurisdictions for failure to protect a fetus.[53] In 2003, the South Carolina Supreme Court upheld the conviction and the twenty-year sentence of a mentally limited, cocaine-addicted woman who had been charged with murder when her child was stillborn.[54] In other states, women accused of substance abuse have been subject to civil confinement,[55] and guardians

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50. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

51. *See generally* Bridges, *supra* note 44.

52. *See* Margo Kaplan, *"A Special Class of Persons": Pregnant Women's Right to Refuse Medical Treatment After* Gonzales v. Carhart, 13 U. PA. J. CONST. L. 145 (2010).

53. *See generally* Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (And Other Countries Don't)*, 18 COLUM. J. GENDER & L. 647 (2009); Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537 (2006) [hereinafter Fentiman, *The New "Fetal Protection"*].

54. State v. McKnight, 576 S.E.2d 168, 171, 179 (S.C. 2003). After McKnight had been imprisoned for seven years, the South Carolina Supreme Court overturned her conviction on grounds of ineffective assistance of counsel. McKnight v. State, 661 S.E.2d 354, 357–59, 366 (2008).

55. April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 164–72 (2007) (citing state statutes authorizing civil confinement and examples of prosecutions); Fentiman, *The New "Fetal Protection,"* *supra* note 53, at 545–46, 566–68 (citing state statutes authorizing civil confinement and examples of prosecutions).

have been appointed for fetuses.[56]

Further, the idea of the fetus as an independent person in-being has been nurtured under some state laws as well as by provisions of federal law. Since 2002, federal regulations promulgated by the Department of Health and Human Services have defined "children" eligible for jointly funded state and federal health insurance plans to include individuals "under the age of 19 including the period from conception to birth."[57] The "Unborn Victims of Violence Act of 2004" makes it a federal crime to injure or cause death to a fetus if committing another federal offense; the Act defines "unborn child" as "a member of the species *homo sapiens*, at any stage of development, who is carried in the womb."[58] While current proposals do not aim to prevent men from endangering their sperm, voters in Colorado have been asked repeatedly to enact a constitutional amendment to provide that "inalienable rights, equality of justice and due process of law" apply to "every human being from the beginning of the biological development of that human being." Thus far, these proposals have not been enacted,[59] even as similar ballot provisions are in the offing in other jurisdictions.[60]

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56. Cherry, *supra* note 55, at 161, 168 n.92 (citing cases); Fentiman, *The New "Fetal Protection," supra* note 53, at 570–72 (citing cases).

57. 42 C.F.R. § 457.10 (2009).

58. 18 U.S.C. § 1841(d) (2006).

59. Lynn Bartels, *"Personhood" Proposal's 2010 Ballot Title Approved*, DENVER POST, Aug. 6, 2009, at B3; Joseph Boven, *Personhood's Jones Says Amendment's Effects Exaggerated But Real*, COLO. INDEP., July 15, 2010, http://coloradoindependent.com/57321/personhoods-jones-says-amendments-effects-exaggerated-but-real. In November 2010, Colorado voters rejected the amendment by a 3–1 margin. Electa Draper, *The Colorado Vote: Amendment 62: "Personhood" Initiative Sinks by 3–1 Margin*, DENVER POST, Nov. 3, 2010, at B2. In November 2008, Colorado voters rejected a similar amendment, which would have redefined "person" to include "any human being from the moment of fertilization," with 72.8% of ballots cast against the measure. Tim Hoover, *Voter Rematch on Personhood*, DENVER POST, July 3, 2009, at B1.

60. For example, in November, 2011, Mississippi voters may be asked to vote on a similar constitutional amendment that would define person to include "every human being from the moment of fertilization, cloning or the functional equivalent thereof." Laura Bauer, *Anti-Abortion Activists Seek To Redefine "Person,"* CHATTANOOGA TIMES FREE PRESS, Apr. 7, 2010, at A12. On July 6, 2010, plaintiffs filed suit in Mississippi state court to block the amendment from appearing on the ballot; they argued that the initiative process cannot be used to change the state Bill of Rights. *Suit Seeks To Block Miss. "Personhood" Initiative*, PICAYUNE ITEM, July 14, 2010, http://picayuneitem.com/statenews/x961152867/Suit-seeks-to-block-Miss-personhood-initiative. A Hinds County judge ruled that the initiative could appear on the ballot, a ruling that is expected to be appealed to the state supreme court. Elizabeth Crisp, *Judge OKs Mississippi Anti-Abortion Initiative for '11 Ballots*, CLARION-LEDGER (Jackson, Miss.), Oct. 27, 2010. On January 8, 2010, a Nevada state court ruled that a "personhood" petition contained language so vague that it could not be circulated among voters; the proposed petition also violated a state law limiting ballot questions to one subject. Ed Vogel, *Petition Ruled Too Vague for '10 Ballot*, LAS VEGAS REV.-J., Jan. 9, 2010, at B1. Other states considering such initiatives include Missouri and Alaska. *See* Bauer, *supra*.

## VI.
## CONSTITUTIONAL PREDICATES

The proposition that a fetus is a human being with constitutional rights points to another aspect of *Carhart* to be analyzed before I turn to its future in light of social movements, both domestic and international. What was the constitutional basis that gave Congress the power to ban an abortion method? Congress cited its power over interstate commerce and defined the scope of the statute as addressing physicians "in or affecting interstate or foreign commerce."[61] The parties did not challenge that claim.[62]

The Commerce Clause has been used before as a basis for regulating morality. One example is the Mann Act, a turn-of-the-twentieth century statute (named for its sponsor) that prohibited the interstate transport of women for sexual purposes.[63] Nonetheless, in relatively recent decisions, the Court has read the scope of the Commerce Clause more narrowly. For example, a 2000 decision by then Chief Justice Rehnquist, writing for a five-person majority, held that Congress lacked the power under both the Commerce Clause and the Fourteenth Amendment to authorize victims of violence "motivated by gender bias" to bring civil damage actions in federal court under the Violence Against Women Act (VAWA).[64] In a 1995 case, the Court held that Congress could not rely on the Commerce Clause to prohibit guns within a thousand feet of schools.[65] On the other hand, the Court has relied on the Commerce Clause to uphold congressional regulation of marijuana used for medical purposes,[66] and the debate about the constitutionality of federal health care legislation also turns on the scope of the Commerce Clause and its relevance to social welfare and community wellbeing.[67]

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61. 18 U.S.C. § 1531(a) (2006).

62. Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring).

63. Pub. L. No. 61-277, 36 Stat. 825 (1910) (current version codified at 18 U.S.C. §§ 2421–2424 (2006)).

64. United States v. Morrison, 529 U.S. 598, 626 (2000). *See generally* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

65. United States v. Lopez, 514 U.S. 549 (1995).

66. Gonzales v. Raich, 545 U.S. 1 (2005).

67. As of this writing, four federal district courts have issued decisions on the merits of constitutional challenges to the Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119 (2010). Two of those courts had upheld the statute as within Congress' power under the Commerce Clause. Liberty Univ., Inc. v. Geithner, No. 6:10-cv-00015-nkm, 2010 WL 4860299, at *11 (W.D. Va. Nov. 30, 2010), *appeal docketed*, No. 10-2347 (4th Cir. Dec. 1, 2010); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 891–95 (E.D. Mich. 2010), *appeal docketed*, No. 10-2388 (6th Cir. Oct. 25, 2010). Two other courts held that the statute exceeded the bounds of the Commerce Clause. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *20–29 (N.D. Fla. Jan. 31, 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 775–82 (E.D. Va. 2010), *appeal docketed*, No. 11-1057 (4th Cir. Jan. 20, 2011).

While the ban at issue in *Carhart* was keyed to doctors working in interstate commerce, the justification invoked to uphold it—namely, the government's interest in protecting fetal life[68]—is less obviously related to interstate commerce. That point was implicitly raised by Justice Thomas's concurrence, which noted the failure of either party to brief or raise the question of the Act's constitutionality as an exercise of Congress' Commerce Clause powers; on that ground, he declined to address the question.[69] Thomas, a persistent advocate of a narrow reading of the Commerce Clause, has argued that it provides only the basis for Congress to regulate the purchase and sale of goods and services.[70] Under his approach, congressional authority for abortion bans could be based on the service prong (if provisions of abortions are understood to entail interstate activities) but may also prompt a search for other constitutional predicates.

What would be the source of authority for congressional action if not or if in addition to the Commerce Clause? If one takes the position that the national legislature has no general welfare powers and only limited Commerce Clause authority, where can one look for congressional power to promote or protect fetal development? Would one have to argue that a fetus is a "person" or other form of life protected by the Fifth and Fourteenth Amendments prohibitions against governmental deprivation of "life, liberty, or property without due process of law"?[71] Would the argument be that, in addition to ensuring procedural fairness, the Due Process Clauses of the Fifth and Fourteenth Amendments should be enlisted to impose substantive limits on state power?[72] Can those

68. Gonzales v. Carhart, 550 U.S. 124, 145 (2007).

69. *See id.* at 169 (Thomas, J., concurring). In contrast, a recent analysis of the Commerce Clause detailed the Clause's concern with exchange across state lines, as it analyzed why "commerce-as-intercourse" is broader than "economics narrowly conceived" and supports federal regulatory interventions affecting labor, discrimination, and health. *See generally* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

70. *See, e.g.*, *Raich*, 545 U.S. at 58 (Thomas, J., dissenting) ("[T]he Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines."); *Lopez*, 514 U.S. at 586–89 (Thomas, J., concurring) (contrasting "commerce" with "manufacturing" and "agriculture"). *See also* Balkin, *supra* note 69, at 18–23 (discussing the "trade theory" view of Justice Thomas and others that under the Commerce Clause, "commerce" is limited to the "trade or exchange of commodities"). The argument that harms to health burdened interstate commerce was also put forth by proponents of the constitutionality of the civil rights remedy in VAWA and rejected by the five-person majority in *United States v. Morrison*, 529 U.S. 598 (2000). *See supra* note 64 and accompanying text.

71. U.S. CONST. amends. V, XIV, § 1.

72. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 565 (2003) ("*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the

prohibitions on government become a springboard for positive obligations to protect fetal life? Such are the questions of the sources, nature, and proper exercises of government power over fertile or pregnant women—and men—that now hang in *Carhart*'s wake.

## VII.
## JUDICIAL REVIEW SUBJECT TO REVISION

*Carhart* is part of a series of efforts to undermine *Roe*'s meaning and import. What the span from *Roe* to *Carhart* makes plain is that even decisions couched in terms of constitutional absolutes are part of an iterative process in democracies. If significant constituencies disagree about the underlying premises and if they are able to marshal the resources and use media and politics persistently, their actions can result in the revision of constitutional pillars.

Whether a fan of *Roe*, of *Carhart*, or of neither, reading the two opinions together undermines a central claim made by critics of judicial review. These critics posit that when ruling on the constitutionality of legislation, judges undercut the role of elected leaders in a democracy by ending debate and aborting majoritarian decision-making.[73] But judicial proclamations of constitutional parameters do not necessarily last, nor do they inevitably put an end to the debate. *Roe* remains the law, but its import and parameters have changed, and both *Roe* and *Carhart* are now subject to contestation and reevaluation.

This phenomenon can be found in many areas of constitutional jurisprudence. Another illustration comes from three centuries of conflict over slavery and its residue. One can chart a path from the 1856 Supreme Court ruling in *Dred Scott v. Sandford* that a slave who had escaped to a free state had to be returned as a fugitive,[74] to its rejection through the Civil War. The consequences of that struggle included amendments to the

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fairness of the procedures used to implement them.'" (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990))); Moore v. East Cleveland, 431 U.S. 494, 502 (1977) ("'[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.'" (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting))); Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) ("In my view the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'" (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

73 *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

74. 60 U.S. 393 (1857).

U.S. Constitution to end involuntary servitude[75] and to create rights of due process and of equal protection.[76]

Another tragic decision, the 1896 ruling in *Plessy v. Ferguson*, upheld segregated seating for passengers on railroad cars.[77] That judgment prompted decades of efforts by groups dedicated to equality. Successes came in various venues, including the 1948 executive order by President Harry Truman that ended segregation in the military.[78] By the end of the 1940s, the United States had joined the United Nations and signed onto the Universal Declaration of Human Rights, and a state court had read the obligations of the U.N. Charter to prohibit race-based limits on property ownership.[79]

The Supreme Court's 1954 judgment in *Brown v. Board of Education*[80] did not rely on transnational rights but instead reinterpreted the federal Constitution to prohibit certain forms of discrimination. In the 1960s, Congress, working with the Executive, passed critical civil rights legislation,[81] and lower courts implemented the mandate of *Brown*.[82] These

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75. U.S. CONST. amend. XIII.

76. U.S. CONST. amend. XIV.

77. 163 U.S. 537 (1896).

78. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

79. *See* Oyama v. California, 332 U.S. 633, 649–50 (1948) ("[W]e have recently pledged ourselves to cooperate with the United Nations to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?") (Black, J., concurring); Namba v. McCourt, 204 P.2d 569, 577 (Or. 1949) ("Moreover this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified by the United States is but one more reason why the statute must be condemned." (quoting *Oyama*, 332 U.S. at 673 (Murphy, J., concurring))). *See also* Sei Fujii v. State, 242 P.2d 617 (Cal. 1952) (concluding that the U.N. Charter was "entitled to respectful consideration" as a "moral commitment of foremost importance" by courts and legislators, but holding that those Charter provisions were not self-executing and so did not supersede state law, and affirming the lower appellate court's invalidation of California's Alien Land Law on the alternate ground that the statute violated the Fourteenth Amendment). *See generally* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946–1955*, 69 IOWA L. REV. 901, 923 (1984) (noting that *Namba* "used the Charter human rights provisions to inform the meaning of the equal protection clause," but "was lost in the wake of the *Sei Fujii* cases").

80. 347 U.S. 483 (1954).

81. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 42 U.S.C. § 3601); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000).

82. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967) (en banc); Price v. Denison Indep. Sch. Dist. Bd. of Educ., 348 F.2d 1010 (5th Cir. 1965).

developments demonstrate that the Fourteenth Amendment, once read to tolerate segregation, could be reread to mean that the government could not mandate either de jure or de facto separation by race and had obligations to alleviate the harms of its past policies. Yet even the pillar of *Brown* proved vulnerable as opposition mounted to its implementation through school busing and affirmative action.[83] In response to long histories of segregation, local school boards in Louisville, Kentucky and Seattle, Washington each crafted voluntary efforts to promote racial diversity in their schools. But in 2007, the same five justices who came together in *Carhart* ruled in *Parents Involved in Community Schools v. Seattle School District No. 1* that these local efforts impermissibly took race into account.[84]

In short, although decisions serve as precedent and have the authority as stare decisis, no absolute barrier exists to reconsideration, especially (but not only) over decades. To the extent critics of judicial review object on the grounds that a constitutional judgment is preclusive of politics,[85] these examples demonstrate that revisions can and do occur. Although the United States, unlike Canada,[86] has no formal provision in its Constitution for a "legislative override" that authorizes a legislature to enact statutes altering certain constitutional rulings, limits on judicial review exist in practice.

In fact, *Roe/Carhart, Plessy/Brown,* and *Brown/Seattle School District* teach that constitutional rulings may inspire, rather than derail, political engagement. While some constitutional rulings rest easy, seeming both inevitable and inviolate, others serve as rallying cries, used by social movements both domestic and transnational. Given the high visibility of decisions made by the Supreme Court, they can readily become shorthand for committed activists to use. Within the legal academy, Professors Reva Siegel and Robert Post have named this pattern "democratic constitutionalism" to capture their point that "the authority of the Constitution depends on its democratic legitimacy," and that legitimacy in

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83. *See generally* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 645–56 (2004) (book review); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003).

84. 551 U.S. 701 (2007).

85. *See supra* note 73.

86. The Canadian legislative override provision, or "notwithstanding clause," allows both the Federal Parliament and provincial legislatures to declare that certain laws "shall operate notwithstanding a provision included in" key sections of the Canadian Charter of Rights and Freedoms. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, § 33 (U.K.). *See also* Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFF. 250, 254–55 (2005).

turn is evidenced by popular engagement, making claims on behalf of or contesting the meaning of particular provisions.[87]

## VIII.
## NATIONAL AND TRANSNATIONAL SOCIAL MOVEMENTS

The conflict over abortion and its relationship to women's autonomy, citizenship, and to courts in democratic orders is by no means limited to the United States. As legislatures, courts, and transnational institutions debate these issues around the world, the outcomes are varied, with lines drawn and distinctions made on the basis of the timing or reason for abortions, the nature of the sanction imposed on doctors or women, and the availability of services for abortion. For example, while a series of decisions by the German Constitutional Court have upheld the criminalization of abortion, they have also detailed a process by which women, after counseling, have access to abortion as part of the state's affirmative obligations under its constitution to protect life.[88]

In contrast, in 1988, the Supreme Court of Canada held illegal a criminal prohibition on abortion that had permitted the procedure in cases where the woman's health or life was at risk when approved by a medical panel of hospital doctors.[89] That Court held that the statute violated Section 7 of Canada's Charter of Rights and Freedoms, which protects the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[90] A majority found the statute unconstitutional, for various reasons.[91] Four of the majority's five focused on the principle that "security of the person" included access to medical care for life or health "without fear of criminal sanction."[92] Two emphasized the burdens of delays by

87. Post & Siegel, *supra* note 2, at 374. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

88. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (Ger.) and Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (Ger.), *as reprinted in* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 110–29 (2d ed. 2006). *See also* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 210–22 (2010); Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, *in* CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93 (Susan H. Williams ed., 2009); Gerald L. Neuman, Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995).

89. *See* R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.).

90. *Id.* at 45 (Dickson, C.J.).

91. *See, e.g.*, Jane Bailey, *Towards an Equality-Enhancing Conception of Privacy*, 31 DALHOUSIE L.J. 267, 285 n.46 (2008).

92. *Morgentaler*, [1988] 1 S.C.R. at 81 (Beetz, J., joined by Estey, J.). *See also id.* at 56

doctors and hospitals in responding to requests; the process infringed on fundamental rights by impermissibly imposing physical and psychological trauma on women seeking abortions.[93] The opinion of the Chief Justice, joined by another, insisted that law could not force "women to carry a foetus to term contrary to their own priorities and aspirations."[94] Another justice in the majority read the provision as unduly impinging on women's autonomy to make their own life choices and their freedom of religion.[95]

Within the last few years, several other countries have addressed the question of abortion. In 2006, the Constitutional Court of Colombia held that an abortion could not be a criminal act if a woman's life or physical or mental health was at stake, if fetal malformations made unviable life, or if the pregnancy resulted from rape or incest.[96] Underlying the judgment were commitments to women's health, welfare, equality, dignity, liberty, and reproductive autonomy. In contrast, during the same year, the legislature in Nicaragua voted fifty-two to zero to criminalize all abortions, thereby superseding a law that had permitted abortions for rape, incest, or risks to a woman's life or health.[97]

One relevant transnational instrument, now supported by more than 185 nations, is the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[98] While committing states parties to the equal treatment of women and men in health, employment, politics, and other facets of public and private life,[99] CEDAW's silence on abortion rights reflects the contentiousness of the issue. Yet CEDAW's guarantee in Article 12 of women's right to health and wellbeing specifies rights of access to medical services including family planning.[100] The

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(Dickson, C.J., joined by Lamer, J.).

93. *Id.* at 81 (Beetz, J., joined by Estey, J.).

94. *Id.* at 63 (Dickson, C.J., joined by Lamer, J.).

95. *Id.* at 170–73, 179–80 (Wilson, J.).

96. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.). *See* Verónica Undurraga & Rebecca J. Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006*, *in* CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 215 (Susan H. Williams ed., 2009). *See also* Rebecca Cook & Bernard M. Dickens, *From Reproductive Choice to Reproductive Justice*, 106 INT'L J. GYNECOLOGY & OBSTETRICS 106 (2009).

97. Ley No. 603, 26 October 2006, Ley de Derogación al Artículo 165 del Código Penal Vigente [Act Waiving Article 165 of the Penal Code In Force] LA GACETA, DIARIO OFICIAL [L.G.], 17 November 2006 (Nicar.).

98. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) (entered into force Sept. 3, 1981) [hereinafter CEDAW]. A list of countries that support the CEDAW is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

99. *See* CEDAW, *supra* note 98, at arts. 7–16.

100. CEDAW, *supra* note 98, at art. 12(1) ("States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to

Committee that oversees CEDAW's implementation explained in its General Recommendation 24 ("Women and Health") that, to fulfill their obligations under Article 12, states parties must provide for women's safety and protect against the risk of stigma from unwanted pregnancies.[101]

In terms of transnational rulings, in 2007 the European Court of Human Rights held that the requirement under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms that individual privacy rights not be subjected to unnecessary "interference by a public authority"[102] was violated when Poland failed to provide an abortion for a woman who had severe myopia, had two children, and was told that her eyesight was put at risk from a pregnancy.[103] In November 2007, in *Llantoy Huamán v. Peru*, the U.N. Human Rights Committee concluded that denying access to abortion for a seventeen-year-old carrying a fetus with severe brain anencephaly violated her basic human rights under the International Covenant on Civil and Political Rights.[104] There, the Committee focused on requirements that persons be free "from cruel, inhuman and degrading treatment," as well as protection for privacy and the need to pay special attention to minors' rights.[105] And, in a 1998 report that relied on CEDAW, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights recognized the need for health services to ensure that women's lives are not threatened through unsafe abortions.[106]

Questions of access to abortion are thus being posed worldwide. Given that both proponents and opponents are part of transnational networks

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ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.").

101. *See* Rep. of the Comm. on the Elimination of Discrimination Against Women, 20th Sess., Jan. 19–Feb. 5, 1999, ¶¶ 8, 12(b), 31(c), U.N. Doc. A/54/38 (Part I) (May 4, 1999).

102. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Apr. 11, 1950, E.T.S. No. 005.

103. Tysiac v. Poland, App. No. 5410/03, 45 Eur. Ct. H.R. 42 (2007), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number). More recently, however, the European Court of Human Rights accorded a "broad margin of appreciation" to Ireland's anti-abortion legislation, while concluding that, as to one applicant, the failure to provide "effective and accessible procedures" to establish her right to an abortion, given her special health needs, constituted a violation of Article 8. *See* A, B, & C v. Ireland, App No. 25579/05 ¶¶ 233, 264 (2010), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number).

104. Llantoy Huamán v. Peru, Comm. No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

105. *Id.*

106. *See* Rep. of the Inter-American Comm'n on Human Rights on the Status of Women in the Americas, Inter-Am. C.H.R., OEA/ser.L/V/II.100, doc. 17 (1998) (endorsing General Recommendation 19 of the Committee on the Elimination of Discrimination Against Women).

ranging from religious orders to nongovernmental organizations, their efforts do not stop at a particular nation's border. Legal principles migrate, and judiciaries are one of the many mechanisms for the import and export of law.[107] By considering the analytic bases of the judgments from these various jurisdictions, one can see the discussion around abortion move beyond the frameworks of privacy, liberty, and equality, which are the frequently proffered premises for supporting women's abortion rights in the United States. The issue of reproduction is located in broad sets of questions related to women's health and work, as the problem is addressed in terms of "human rights" to health and safety; to nondiscrimination on the basis of race, age, and gender; to economic opportunity; to freedom of speech, conscience, and religion; to autonomy and dignity.[108]

## IX.
## COURTS AS CONSTITUTIVE ELEMENTS OF DEMOCRACIES

In sum, the adjudication of rights to reproductive health is part of a worldwide debate about the nature of citizenship, the obligations of parenthood, and the role of government in structuring individuals' lives. A central lesson, for those interested in the relationship between courts and democracies, from this overview is that rather than presuming courts to be a *problem* for democracy, courts are *resources* in that they facilitate democratic practices.

Long before the creation of modern democracies, rulers relied on adjudication to enforce their laws and maintain security. In those pre-democratic eras can be found proto-democratic practices inside courts. Even when working for monarchs, judges were required to "hear the other side" so as not to impose arbitrary decisions. Further, judges worked in public, demonstrating that the rulers had the power to enforce legal obligations.[109] Commitments to democracy have transformed the "rites" of adjudication by turning them into "rights" of access to open and public courts in which disputants are supposed to be treated with equal respect.[110] As women gained juridical voice, courts have had to consider how to

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107. *See* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

108. *See generally* REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010); Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1 (2003).

109. *See generally* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011); Judith Resnik, *Managerial Judges, Jeremy Bentham and the Privatization of Adjudication*, 49 SUP. CT. L. REV. 205 (2010).

110. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 102, at art. 6(1) (requiring that in determination of a person's civil rights, she is entitled to a "public hearing" and that judgments are generally "pronounced publicly").

recognize and honor their citizenship, autonomy, and liberty.[111] Because of these commitments to participatory parity and transparency, courts are regular contributors to the public sphere, and they serve as one of several venues for debating and developing norms.[112]

The paradox of constitutional democracy is that it is obliged to have pre-commitments but the parameters of those commitments are constantly under scrutiny, to be reaffirmed or modified in light of social, political, and technological changes. The distinctive methods of courts, required to hear both sides, to develop records in public, and to offer reasons for their judgments, make them particularly useful contributors to these deliberative processes. Adjudication in democracies is thus in an ongoing conversation with majoritarianism.

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111. *See* Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15 (1997); Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (1996); Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237 (1989).

112. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., 1989); Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109, 110–11 (Craig Calhoun ed., 1992) ("[Habermas's public sphere is] a theater in modern societies in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs, and hence an institutionalized arena of discursive interaction. This arena is conceptually distinct from the state; it is a site for the production and circulation of discourses that can in principle be critical of the state.").