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Introduction: The Constitutional Law and Politics of Reproductive Rights

In the fall of 2008, Yale Law School sponsored a conference on the future of sexual and reproductive rights. Panels on law, politics, history, sociology, social science, and the media addressed conflicts over sexual and reproductive rights in the last several decades.¹ The Essays *The Yale Law Journal* has chosen to publish from this conference concern the constitutional law and politics of reproductive rights.

In *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*,² Neal Devins examines what conflicts over *Roe v. Wade*³ reveal about the relation of constitutional law and public opinion. Devins sees majority convictions as exerting orienting force in the law. By the time of *Roe*, Devins emphasizes, the public disapproved of the criminalization of abortion, at least in cases of fetal impairment. *Roe* triggered backlash, in part, he argues, because the Court protected abortion later in pregnancy than the public thought reasonable and, in part, because of *Roe*'s association with a growing women's

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1. Panels during the three-day conference were entitled: Uncomfortable Conversation: The Constitutional Law and Politics of Sexual and Reproductive Rights; Sexual and Reproductive Rights: Dignity, Liberty, and Equality; Covering the Courts; Remembering Catherine Roraback and Connecticut's Role in Sexual and Reproductive Rights; *Roe*'s History; Family Values; The Facts of the Matter: Science, Public Health, and Counseling; Movement/Countermovement; Crossing Borders: Transnational Perspectives on Sexual and Reproductive Rights; and The Future of Sexual and Reproductive Rights.
2. Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 *YALE L.J.* 1318 (2009).
3. 410 U.S. 113 (1973).

rights movement.⁴ Ensuing efforts to overrule *Roe* through judicial appointments also prompted backlash because these efforts were out of line with public opinion.⁵ In *Planned Parenthood v. Casey*,⁶ the Court was able to stabilize this conflict by adopting a “compromise” allowing incremental regulation of abortion from the onset of pregnancy that “mirrored public opinion in 1992 and . . . mirrors public opinion today.”⁷ Devins tells a big-picture story focused on national majorities, rather than regional or religious minorities, that tends to conflate public opinion concerning the timeframe, justifications, and regulatory oversight of abortion. The moral of his story is that law does not shape public opinion; instead, public opinion shapes law. Advocates who want to alter access to abortion need to address the public’s beliefs, and they will not do so successfully through law.

Devins’s story focuses on national polling data concerning abortion—not the lived experience or social meaning of the act. In *TRAPing Roe in Indiana and the Common-Ground Alternative*,⁸ Dawn Johnsen shows how law shapes the circumstances of women who are making decisions about whether to continue a pregnancy. Johnsen agrees with Devins that conservatives have not undermined *Roe* in its broadest outlines, but she warns that the devil is in the details. She offers a case study of the regulation of clinics in Indiana, and finds harm in the very forms of incremental regulation that Devins suggests satisfy the public’s desire for compromise. Examining in detail legislation enacted in Indiana, Johnsen shows how incremental restrictions, which are designed to send messages of collective ambivalence or disapproval, can translate into functional barriers to access that disproportionately burden poor and young women.⁹ As she illustrates, incremental restrictions that appear to strike a reasonable compromise may inflict unequal injuries in practice. Invoking the example of voting rights, Johnsen urges that “[a]t times analyzing the contours of a right requires delving deeply into the practicalities of the exercise and oversight of that right.”¹⁰ Johnsen differentiates between compromise and common ground, and insists it is the latter that we must find. “A common-

4. Devins, *supra* note 2, at 1325 (“The backlash against *Roe*, in part, was a backlash against feminism, for the decision came to embody the core aims of the women’s liberation movement.” (internal quotation marks omitted)).

5. *Id.* at 1331.

6. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

7. Devins, *supra* note 2, at 1338.

8. Dawn Johnsen, “TRAP”ing *Roe* in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356 (2009).

9. *See id.* at 1380-81.

10. *Id.* at 1387.

ground approach should situate abortion where it logically belongs as a matter of public policy and constitutional values: within a broader agenda that empowers individuals both to prevent unintended pregnancy and to choose wanted childbearing through a range of government-supported programs for women and families.”¹¹

Like Johnsen, Robin West believes that reproductive rights law is harming women but suggests that the women’s movement is at least partly to blame. In *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*,¹² West objects to the dearth of “pro-choice criticism of *Roe*,”¹³ offering a critique of reproductive rights scholarship in the tradition of “various critiques of negative rights, of the Left’s reliance on courts to create and protect them, and of the liberal-legal political commitments that underlie them, that were pioneered by the critical legal scholarship of the 1970s and 1980s.”¹⁴ She argues that legal protections for choice legitimate injustice in the social conditions within which choice is exercised, that reliance on courts exacerbates “anti-democratic features of U.S. constitutionalism, to women’s detriment,”¹⁵ and that arguments for court-enforced rights lead the women’s movement to ask for less social change than it did in the 1970s. West subjects abortion rights to a progressive critique that applies to all judicially enforced constitutional rights, yet she also advances specific descriptive and causal claims. West asserts that the women’s movement’s commitment to *Roe* inhibited it from criticizing *Roe*,¹⁶ and led it to focus on courts in ways that exacted political, rhetorical, and moral “opportunity costs.”¹⁷ West holds these failures of feminist critique and politics significantly responsible for the state of the law today¹⁸: a “shift in focus away from courts and to more democratic fora, might open the door to moral and political opportunities to which we have been blinded by the light of the promises of a living Constitution.”¹⁹ Strikingly, West does not survey feminist scholarship, nor does she discuss feminist legislative efforts to provide sexual education and access to contraception, to combat violence against

11. *Id.* at 1389.

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

13. *Id.* at 1397.

14. *Id.* at 1405.

15. *Id.* at 1406.

16. *Id.* at 1399-1401.

17. *Id.* at 1426.

18. *See id.* at 1427-30.

19. *Id.* at 1431.

women, and to protect women's decisions about motherhood through the Freedom of Choice Act, welfare reform, publicly supported child care, and a family-friendly workplace. Nor does West discuss the role that conservatives played in blunting these efforts. Rather, she writes in a tradition of scholarship dominant in the academy in the 1970s and 1980s premised on the faith that Left-Left critique makes progressivism stronger.

Since entering teaching, I have sought to defend the abortion right by re-theorizing it on sex-equality grounds, addressing readers from Left to Center.²⁰ But decades of conservative mobilization led me to focus, in abortion rights and many other contexts, on how social movement conflict of the Left-Right kind shapes the articulation of constitutional norms in courts and politics.²¹ This is the approach of my *Yale Law Journal* essay published on the

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20. I have written a number of articles in this register, as have many defenders of the abortion right. For an overview, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007). The equality argument can, and often does, begin with far-reaching critique of *Roe*. See, e.g., Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 274 (1992) ("Because *Roe* and its progeny treat pregnancy as a physiological problem, they obscure the extent to which the community that would regulate a woman's reproductive choices is in fact implicated in them, responsible for defining motherhood in ways that impose material deprivations and dignity injuries on those who perform its work. . . . *Roe's* account of the abortion decision invites criticism of the abortion right as an instrument of feminine expedience . . . because it presents the burdens of motherhood as woman's destiny and dilemma—a condition for which no other social actor bears responsibility."); *id.* at 272-80, 380-81; see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) ("Overall, the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) ("The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied. . . . The rhetoric of privacy also reinforces a public/private dichotomy that is at the heart of the structures that perpetuate the powerlessness of women."); Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 52-53 (J.L. Garfield & Patricia Hennessey eds., 1984) (criticizing *Roe's* basis in privacy instead of equality, and claiming that this choice resulted in *Harris v. McRae's* holding that public funding for abortions is not constitutionally required).
21. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) (discussing the Equal Rights Amendment); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (discussing gun rights); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (discussing race equality); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (discussing abortion rights).

eve of the symposium, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*,²² which surveys efforts of the antiabortion movement to eviscerate *Roe*²³ and offers a normative rejoinder that can be asserted in constitutional politics. The “dignity” framework I offer for the regulation of abortion contemplates ongoing struggle over this widely shared normative commitment, much as we see conflict over other core concepts in the abortion debate such as “health” and “freedom.” The framework in fact derives from the Court’s cases, which reflect this agonistic logic. In *Planned Parenthood v. Casey*,²⁴ the Supreme Court reasoned that protecting a woman’s decision whether to bear a child protected a woman’s dignity,²⁵ whereas in *Gonzales v. Carhart*,²⁶ the Court allowed the government to restrict abortion to express respect for the dignity of unborn life.²⁷ In due process and equal protection cases, “constitutional protections for dignity vindicate, often concurrently, the value of life, the value of liberty, and the value of equality.”²⁸ Attending to these shifts in usage, I read *Casey* and *Carhart* as allowing government to regulate abortion in ways that demonstrate respect for the dignity of human life so long as such regulation also demonstrates respect for the dignity of women.²⁹ This normative framework offers reasons, which can be asserted in adjudicative, legislative, or popular arenas, to constrain woman-protective and fetal-protective regulation of abortion, whether the proposed restrictions are incremental (for example, counseling) or categorical (for example, criminal sanctions).³⁰

The Essays *The Yale Law Journal* is publishing from the conference offer very different views on the role of courts in defending reproductive rights. None imagines that adjudication is the only, or even the primary, arena in which this society will define and defend reproductive justice. Some believe we would be stronger if we abandoned hope of adjudication and recognized judicial review as merely a reflection of modal public opinion or a distraction

22. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart* 117 YALE L.J. 1694 (2008).

23. *Id.* at 1706-34 (surveying intramovement debates about the reach and rationale of restrictions most likely to bring an end to the practice of abortion).

24. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

25. *See id.* at 851.

26. 550 U.S. 124 (2007).

27. *Id.* at 158.

28. Siegel, *supra* note 22, at 1736; *see id.* at 1735-45.

29. *Id.* at 1751-52.

30. *See id.* at 1753-1800.

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from politics. Others view judicial review's connection to and distance from politics as its strength, enabling courts to provide an arena in which we can reflect on how to live with the deepest conflicts that shape our collective lives.